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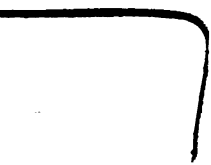
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AN
ANALYTICAL DIGEST

OF THE CASES PUBLISHED IN THE
NEW SERIES OF THE
LAW JOURNAL REPORTS

AND
Other Reports

IN THE
COURTS OF COMMON LAW AND EQUITY,
AND APPEAL IN BANKRUPTCY,
IN THE HOUSE OF LORDS, THE PRIVY COUNCIL,
IN THE COURT OF PROBATE,
THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES,
AND IN THE HIGH COURT OF ADMIRALTY,
FROM MICHAELMAS TERM 1855 TO TRINITY TERM 1860
INCLUSIVE.

By FRANCIS TOWERS STREETEN, Esq.

AND
GEORGE STEVENS ALLNUTT, Esq.
BARRISTERS-AT-LAW.

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LIST OF THE ABBREVIATIONS

IN THIS DIGEST.

<i>Abbreviations.</i>	<i>Reports.</i>	<i>Courts.</i>
Beav.	Beavan's Reports	Chancery.
Bell's C.C.	Bell's Crown Cases	Crown Cases Reserved.
Com. B. Rep.	Common Bench Reports	Common Pleas.
Com. B. Rep. N.S.	_____ New Series	Common Pleas.
Dears. & B.	Dearley and Bell's Crown Cases	Crown Cases Reserved.
De Gex, F. & J.	De Gex, Fisher and Jones's Reports	Chancery.
De Gex & J.	De Gex and Jones	Chancery.
De Gex, M. & G.	De Gex, Macnaghten and Gordon	Chancery and Bankruptcy.
Drew.	Drewry's Reports	Chancery.
Dr. & Sm.	Drewry and Smale	Chancery.
E. & B.	Ellis and Blackburn	Queen's Bench.
E. & E.	Ellis and Ellis	Queen's Bench.
E. B. & E.	Ellis, Blackburn and Ellis	Queen's Bench.
Exch. Rep.	Exchequer Reports	Exchequer.
Giff.	Giffard	Chancery.
H.L. Cas.	House of Lords Cases	House of Lords.
Hurl. & N.	Hurlston and Norman	Exchequer.
Johna.	Johnson's Reports	Chancery.
Jo. & H.	Johnson and Hemming	Chancery.
Key & J.	Key and Johnson	Chancery.
Law J. Dig.	Law Journal Digest	
Law J. Rep. (N.S.) Chanc.	Law Journal Reports, New Series	Chancery.
Law J. Rep. (N.S.) Prob. & M.	_____	Probate and Divorce.
Law J. Rep. (N.S.) Prob. M. & A.	_____	{ Probate, Divorce and Admiralty.
Law J. Rep. (N.S.) Bankr.	_____	Bankruptcy.
Law J. Rep. (N.S.) Q.B.	_____	Queen's Bench.
Law J. Rep. (N.S.) C.P.	_____	Common Pleas.
Law J. Rep. (N.S.) Exch.	_____	Exchequer.
Law J. Rep. (N.S.) M.C.	_____	{ Magistrates' Cases. } Queen's Bench, Common Pleas and Exchequer.
Law J. Stat.	Law Journal Statutes	Abridgment of Statutes.
Moore's P.C.	Moore's Privy Council Cases	Privy Council.
Sm. & G.	Smale and Giffard's Reports	Chancery.
Swab. & T.	Swabey and Tristram	Probate and Divorce.

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AN

ANALYTICAL DIGEST

OF THE

CASES REPORTED AND PUBLISHED

FROM TRINITY TERM 1855 to MICHAELMAS TERM 1860,

AND CONTAINED IN

THE LAW JOURNAL REPORTS,

And other Contemporary Reports;

WITH

REFERENCES TO STATUTES PASSED WITHIN THE SAME PERIOD.

ABATEMENT.

[Of action by death of defendant, see LIMITATIONS, STATUTE OF: *Sturgis v. Dayrell*—Of appeal by insolvency of appellant. See Privy Council: *Goorochum Sein v. Radanauth Sein*.]

ABORTION.

ADMINISTERING OR CAUSING TO BE TAKEN.

A pregnant woman applied to the prisoner for something to procure abortion. The prisoner supplied her with a drug for that purpose, and gave her directions how to take it. The woman, some little time after, and in the prisoner's absence, took the drug as directed, which, in a few days, procured a miscarriage:—Held, that the prisoner was guilty of the felony, under section 6. of the statute 7 Will. 4. & 1 Vict. c. 85, of causing poison, or some other noxious thing, to be taken by the woman with intent to procure her miscarriage. *The Queen v. Wilson*, 26 Law J. Rep. (n.s.) M.C. 18; Dears. & B. 127.

The prisoner was convicted on an indictment, under section 6. of 7 Will. 4. & 1 Vict. c. 85, containing several counts, for administering and causing to be taken by L C certain noxious drugs, with intent to procure abortion. It appeared that the prisoner delivered certain drugs to L C in order that she might take them with a view to produce abortion, and told her where she could procure other drugs, with the same view; that the last-mentioned drugs were procured by L C, and afterwards made into pills by the prisoner, and that L C did, for the purpose aforesaid, take not only the drugs so

delivered to her by the prisoner, but also the drugs so procured by L C and made into pills by the prisoner; and that enough of each was taken to be noxious. It did not appear that the prisoner was present when any of the drugs were taken:—Held, that the conviction was right, and that the case was not distinguishable from *The Queen v. Wilson*. *The Queen v. Farrow*, Dears. & B. 164.

ACCESSORY.

[See LARCENY.]

ACCIDENT.

[See DAMAGES—INSURANCE—NEGLIGENCE.]

ACCORD AND SATISFACTION.

[See ACCOUNT STATED: *Perry v. Attwood*—CARRIER: *Coombs v. the Bristol and Exeter Rail. Co.*]

ACCOUNT.

[AUDIT AND AUDITOR OF ACCOUNTS, see POOR LAW—ESTOPPEL BY ACCOUNT, see ESTOPPEL.]

(A) WHEN AN ACCOUNT WILL BE DEEMED IN EQUITY.

(B) TAKEN IN EQUITY.

(a) *Settled Accounts*.

(b) *Accounts recorded in Jamaica*.

(A) WHEN AN ACCOUNT WILL BE DEERED IN EQUITY.

Lapse of time will bar the right of the next-of-kin of an intestate to an account against the administrator. Distinction between the right to an account and the right to the administration of a fund admitted to be in hand. In the absence of any averment in the bill, the Court will not, upon demurrer, assume that assets have come to the hands of an administrator without assuming also that they have been duly administered. *Kohler v. Reynolds*, 26 Law J. Rep. (N.S.) Chanc. 415.

On the death of A B, tenant for life of certain estates, a bill was filed to determine the question who was entitled to the estates, the two claimants being a married woman and a lunatic. Pending the suit, the trustee of the married woman, and who was also committee of the lunatic, received the rents and paid them to the married woman, believing her to be entitled, and she and her husband took possession of part of the property. The Court then decided that the other claimant, the lunatic, was entitled to the estates as tenant in tail. The lunatic died, and a bill was filed by his representative, five years after his death, praying an account of the rents received by the trustee and committee, and handed over to the married woman, and an occupation-rent against the husband, and that the separate estate of the married woman might be charged with the amount paid to her. One of the Vice Chancellors decided that, under the circumstances of the case, the rule as to giving rents only from the time of filing the bill did not apply, and that the claimant was entitled to the rents during the life of the lunatic; that the trustee was liable to account for such rents as he had received; that the husband was liable for an occupation-rent, but that the separate estate of the married woman was not liable, there having been no specific contract on her part. On appeal, the decision was affirmed; but the order was in some degree varied on a point of costs. *Wright v. Chard*, 29 Law J. Rep. (N.S.) Chanc. 415, 82; 1 De Gex, F. & J. 567; 4 Drew. 673, 702.

A decree was made in this suit for taking and adjusting a complicated series of accounts. It was limited to a given period, under the impression that all previous accounts were correct. Upon the discovery of errors in the earlier accounts,—Held, notwithstanding a compromise had been entered into upon payment of a sum of 220,000*l.*, that the earlier accounts must be taken, and for that purpose that the Court would set the compromise aside. *Stanton v. the Carron Company*, 29 Law J. Rep. (N.S.) Chanc. 587.

Where a plaintiff at law gives notice of his intention to move for a reference, *semble*—this alone is a sufficient ground for a Court of equity to assume jurisdiction over the matter and restrain the action; a reference at common law being necessarily a more imperfect method of taking accounts than that furnished by the practice in equity. *Croskey v. the European and American Steam Shipping Company; Oakford v. Same*, 1 Jo. & H. 108.

It is not necessarily a fatal objection to a bill for an account, and a motion to restrain an action at law, that the bill is filed by some only of the defendants at law. *Ibid.*

(B) TAKEN IN EQUITY.

(a) *Settled Accounts.*

An account between A and B having been settled, A executed a general release to B:—Held, that the account could not be opened by A, on the ground of usury, until the release had been set aside, and that the release could not be set aside on the mere ground of usurious items having entered into the account, of which both parties were cognizant. *Fowler v. Wyatt*, 24 Beav. 232.

Observation on the application of the doctrine of undue influence. *Ibid.*

(b) *Accounts recorded in Jamaica.*

The executor of a testator, who died in Jamaica, annually recorded the accounts of the estate in the secretary's office there, in accordance with an act of the legislature of Jamaica. In directing the accounts to be taken in a suit instituted here for the administration of the estate of the same testator, the Court ordered that the accounts recorded in Jamaica should be taken as *prima facie* evidence of the matters therein contained, with liberty to the plaintiff to surcharge and falsify. *Sleight v. Lawson*, 26 Law J. Rep. (N.S.) Chanc. 553; 3 Kay & J. 292.

ACCOUNT STATED.

To a declaration on a covenant in a lease of mines alleging non-payment of certain sums due for fixed and tonnage rents, and not keeping books of accounts, the defendants pleaded that during eight years ending March 1854, the defendants did keep such books containing an account of all ore gotten, and that such account was submitted for examination to the plaintiff, and the plaintiff and defendants in each of those years stated an account concerning all the ore got by the defendants during the preceding year and the tonnage rent payable in respect of the same, and that in each of such accounts a certain sum was agreed upon between the plaintiff and the defendants to be the balance due, which sum was paid by the defendants to the plaintiff, and accepted by him in full satisfaction and discharge of the tonnage rent payable by the defendants during the said period. Replication, that the said accountings were not true and correct accountings according to the intent and meaning of the deed; but were erroneous in this, that divers tons of ore which ought to have been included in the account, and divers quantities of tonnage rent payable in respect thereof, were by mistake and ignorance of the facts on the part of the plaintiff omitted from the said accounts, and that the balances were erroneously agreed to be the balances due from the defendant to the plaintiff under the deed:—Held, that the plea afforded no answer to the action; and that if it afforded a *prima facie* defence, it was answered by the replication. *Perry v. Atwood*, 25 Law J. Rep. (N.S.) Q.B. 408; 6 E. & B. 691.

T, by her will, desired that a sum of 500*l.* lent by her to the defendant, should be allowed to remain in his hands during the life of her sister, he paying the interest to her sister; but that on her sister's death T's executors should collect the 500*l.* and divide it between her two nieces, one of whom was

the plaintiff, and the other the defendant's wife, the same to be for their sole and separate use respectively, free from the control and debts of any husband, with benefit of survivorship, &c. During the lifetime of the tenant for life, the plaintiff's husband took from the defendant his acceptance for 242*l.*, payable in twelve months, as and for the share of the plaintiff's wife in the legacy. The plaintiff and her husband, and the defendant and his wife, signed a receipt to the executor of T's will as and for a receipt of the legacy of 500*l.* But no money ever, in fact, passed; the 500*l.* was never collected from the defendant; the acceptance was never negotiated; and, on the death of the plaintiff's husband, the defendant procured a return of it to him. Again, the plaintiff's father, by his will, bequeathed to her the proceeds of a life policy, and made the defendant his executor, who, acting in that capacity, received 200*l.* upon the policy. Afterwards, and after the death of the plaintiff's husband and the defendant's wife, the plaintiff claimed from the defendant payment of the two sums of 242*l.* and 200*l.*, and a further sum for money lent by her to him. At an interview between them, in the presence of the plaintiff's attorney, the defendant dictated, and the attorney wrote out, a memorandum, by which the defendant charged himself with the two sums of 242*l.* and 200*l.*, and the item for money lent, and with interest from the date of the death of the plaintiff's husband. At the same interview he mentioned certain claims of his against the plaintiff's husband, and asked whether he could set them off, but did not enter them in the memorandum. He also afterwards, at the same interview, signed on the back of the memorandum an authority to his attorney to pay the plaintiff the amount due to her out of any monies that might be received on his account, referring verbally to an intended sale of some property on his behalf. At the trial no evidence was given of any set-off. In an action on the common counts, it was objected that the 242*l.* had been reduced into possession by the plaintiff's husband, and therefore she had no right of action at law in her personal capacity, and that the 200*l.* was held by the defendant as executor, and therefore he could not properly be sued in his personal capacity, and that the memorandum and authority taken together were not, under the circumstances, a statement of an account as due *in presenti*.—Held, that the jury were justified in finding that the memorandum was a statement of account sufficient to entitle the plaintiff to maintain her suit in respect of both the sums. *Topham v. Morecroft*, 8 E. & B. 972.

ACKNOWLEDGMENT.

[Of deeds by married women, see **FINE AND RECOVERY**. And see **LIMITATIONS, STATUTE OF**.]

ACTION.

[Consolidation of Actions, see **PRACTICE, AT LAW**—Removal of, into Superior Court, see **CERTIORARI**—Particulars of personal injuries, see **PRACTICE, AT LAW**—*In forma pauperis*, see **PRACTICE, AT LAW**—Of debt *qui tam*, see **PENALTY: Hollis v. Marshall**—On a judgment, see **COSTS: Lomax v. Bury**—Against

Public Commissioners, see **NEGLIGENCE**—Against Industrial and Provident Societies, see **PARTIES TO ACTIONS**—For tort maliciously done, see **COMPANY**—By agent for damage sustained on behalf of principal, see **PRINCIPAL AND AGENT**—For contribution, see **MONEY COUNTS; MONEY PAID**—For compensation for injury or death by accident, under 9 & 10 Vict. c. 93, see **DAMAGES: Dalton v. the South-Eastern Rail. Co., and see **NEGLIGENCE**—On agreements *inter partes*, see **PARTIES TO ACTIONS: Robinson v. Rudkins**. And see **BAILMENT**—**COSTS, Security for—COMPANY—MALICIOUS PROSECUTION—SEDUCTION.**]**

(A) WHEN MAINTAINABLE.

- (a) *On Order of the Judicial Committee of the Privy Council.*
- (b) *By Client against his Counsel for Excess of Authority.*
- (c) *Remedy by Action, whether Exclusive or Cumulative.*
- (d) *Exemption from Personal Liability.*
- (e) *Against Returning Officer at an Election for Refusing a Vote.*
- (f) *Against a Witness for Defamation.*
- (g) *By Poor-rate Collector for Poundage.*
- (h) *By Licensee against a Stranger for Polluting an Artificial Watercourse.*
- (i) *For Exposure of Glandered Horses.*
- (k) *Meaning of "Recovered as Damage."*
- (l) *When Damage too Remote or not Resulting.*

(B) CIRCUITY OF ACTION.

(C) NOTICE OF ACTION.

- (a) *Effect of not giving, under 3 Geo. 4. c. 126. s. 143.*
- (b) *Service of, on Companies.*
- (c) *Who entitled to.*
- (d) *Thing done in pursuance of Act of Parliament.*
- (e) *Under Malicious Trespass Act.*

(D) FORM OF ACTION.

- (a) *Trespass or Case.*
- (b) *Covenant or Money Lent.*

(A) WHEN MAINTAINABLE.

[*Livingston v. Ralli*, 5 E. & B. 132; 6 Law J. Dig. 12—Where no actual damage, see **SHERIFF: Tancred v. Allgood**, and **NEGLIGENCE: Duckworth v. Johnson**—Against a foreign ambassador, see **AMBASSADOR**—Against a Corporation for Libel, see **LIBEL**—Against Local Board of Health, see **NEGLIGENCE**—Against co-tenant, see **TRESPASS**—Against Parliamentary Candidate, see **PARLIAMENT**; Corrupt Practices Prevention Act—Against Master by his Guest, see **NEGLIGENCE**—For excess of jurisdiction, see **JUSTICE OF THE PEACE**—Against Master for Negligence of his Servant, see **NEGLIGENCE**—For fraudulent statements by Directors, see **COMPANY**—For omission of person appointed as Arbitrator to act, see **ARBITRATION: Cooper v. Shuttleworth**—For work and labour as a surgeon, see **PHYSIC: D'Allux v. Jones**—Power of trustees to bind their successors, see **TURNPIKE**—For illness arising from words spoken, see **SLANDER: Allopp v. Allopp**—Against persons doing work of a public nature, see

NEGLIGENCE: *Whitcomb v. the Birmingham Canal Co.*—For issuing *Ca. Sa.* where judgment for less than 20l. see **ARREST:** *Brooks v. Hodgkinson*—After proceeding before Justices, see **MASTER AND SERVANT**—For penalties for bribery, see **PARLIAMENT**—After election of plaintiff to proceed by bill in equity, see **PRACTION:** *Mortimore v. Soares*—Against Licensee of owner of the soil for obstructing a private way, see **NEGLIGENCE:** *Corby v. Hill*—For qualified right of owner of surface to support as against the owner of a mine, see **MINE:** *Rowbotham v. Wilson*—For not fencing Machinery, see **FACTORY:** *Doel v. Sheppard*—For work done by printer after refusal to print a part of a book which was libellous, see **FRAUDS, STATUTE OF**—Right to support of adjoining house, see **EASEMENT**—Whether damage the subject of Arbitration or Action, see **LANDS CLAUSES CONSOLIDATION ACT:** *Blagrove v. the Bristol Water Works*—By Guardians for relief administered to non-resident poor, see **POOR.**]

(a) *On Order of the Judicial Committee of the Privy Council.*

An action is maintainable in the Courts of this country upon an order of the Judicial Committee of the Privy Council directing payment of costs on an appeal from the judgment of a colonial Court, on a "petition of intervention" in a suit by creditors for the attachment of debts and property of their debtor; the decree of the Judicial Committee being final as regarded the petition of intervention, although not necessarily so in the main suit. *Hutchinson v. Gillespie*, 25 Law J. Rep. (N.S.) Exch. 103; 11 Exch. Rep. 798.

(b) *By Client against his Counsel for Excess of Authority.*

The defendant, a barrister, had been retained as leading counsel for the plaintiff, on the trial of an issue *deviseavit vel non*. He received his brief in the usual way, in which there was no express prohibition of a compromise, but it was mentioned that a certain offer had been made by the heir-at-law and declined. When the issue came on to be tried, the defendant, at the close of the first day's proceedings, after two of the most important witnesses for the plaintiff had been cross-examined, having reason to believe that the case was likely to go against her, re-opened negotiations with the other side, on a similar basis; but the plaintiff having gone home and taken time to consider, telegraphed a refusal. Before the opening of the Court on the next day, something occurred which, in the judgment both of the defendant and the plaintiff's attorney, made a compromise still more desirable; and on the Court being opened, negotiations were re-opened, which lasted nearly an hour, during which time the plaintiff was absent, and which resulted in the defendant's entering into a compromise on her behalf on the same basis as before refused. Immediately afterwards the plaintiff came into court, and on being informed of the compromise did not openly object to it, but never agreed to it, and resisted successfully an attempt made by the heir-at-law to enforce it against her, both in the Court of law, by attachment, and in Chancery, by bill for specific performance; but neither Court, considering all the circumstances, thought proper to give her costs. She obtained,

however, a new trial of the issue, and the result was a verdict in her favour, which was upheld by the Court of Chancery, with costs to her as the successful party. She then sued the defendant in the present action, for wrongfully and fraudulently entering into the compromise without her authority, laying as damage the delay, the extra expense, &c. At the trial it was attempted to be shewn on her part that the defendant had entered into the compromise in order the more quickly to dispose of the case, for the purpose of his own convenience, and the Judge left it to the jury whether the defendant entered into the compromise *bonâ fide*, and believing that he had authority; but just at the close of the summing-up, the plaintiff's counsel for the first time intimated that they should claim the verdict, even though the jury should negative any fraudulent or improper motive. The jury having found for the defendant, —Held, that though the point, that the action was maintainable without fraud and on the mere absence of authority, and that the word "fraudulently" might be omitted from the declaration, had been taken in time; yet that even assuming such an action might be maintained, it could only be so on proof of damage, and that no legal damage was laid or proved resulting from the act of the defendant; therefore, that the action was not maintainable. *Semble*, that no action would have lain at all. *Swinfen v. Chelmsford*, 29 Law J. Rep. (N.S.) Exch. 382; 5 Hurl. & N. 890.

(c) *Remedy by Action, whether Exclusive or Cumulative.*

By the 32 Geo. 3. c. 74. s. 8, the Ramsgate Harbour Act, certain duties are "to be paid by the master or owners" for every ship or vessel of a certain burthen passing from, to, or by Ramsgate. By section 14. no coasting vessel or fisherman is to pay the duty oftener than once a year. By section 15. the duties may be distrained for. By section 16. masters or owners eluding payment shall stand charged and be liable to the payment of the same, and the same shall be levied and recovered by the same method by which fines and penalties are by that act recovered, namely, by distress, under section 72. The defendant, against whom the action was brought for duties under the above act, was the owner of a vessel which, during the year, made frequent voyages in ballast to Jersey, bringing back oysters, which the defendant laid in beds at Milton: —Held, first, that the defendant was liable to be sued under the statute for the duties, and that the remedy by distress was merely cumulative; secondly, that the defendant's vessel was not a "coasting vessel" or "fisherman" within the meaning of the act; lastly, that the action being brought on a statute, the time of limitation under the 3 & 4 Will. 4. c. 42. s. 3. was twenty years. *Shepherd v. Hills*, 25 Law J. Rep. (N.S.) Exch. 6; 11 Exch. Rep. 55.

The 225th section of the Metropolis Local Management Act provides that where the amount of any costs or expenses is by that act directed to be ascertained or recovered in a summary manner, or the amount of any damages, costs or expenses is directed to be paid, and the method of ascertaining the amount or enforcing payment is not provided for, such amount shall, in case of dispute, be ascertained and determined by, and shall be recovered

before two Justices. The 105th section provides for paving new streets, and that the owners of the houses forming the street shall on demand pay to the vestry the amount of the estimated expenses, to be determined by the surveyor for the time being, and the actual expenses in case they exceed the estimate. The 217th section makes the occupier liable in the first instance, giving him a power to deduct the amount so paid from his rent:—Held, on demurrer, that the remedy given by the statute is exclusive, and therefore that no action lies at the suit of the vestry against an owner for the amount of such expenses. *The Vestry of St. Pancras v. Batterbury*, 26 Law J. Rep. (n.s.) C.P. 243; 2 Com. B. Rep. N.S. 477.

(d) *Exemption from Personal Liability.*

By the 11 & 12 Vict. c. 112, s. 128, no matter or thing done or contract entered into by the Commissioners, or by any clerk, &c., or person acting under their direction, shall, if the matter or thing were done or the contract were entered into *bond fide* for the purpose of executing that act, subject them personally to any action or liability whatever; and any expense incurred by them is to be borne and repaid out of the funds under the control of the Commissioners:—Held, that the effect of this is to absolve from personal liability to an action persons who *bond fide* do some act under the direction of the Commissioners which, but for that clause, would subject them to an action. *Ward v. Lee*, 26 Law J. Rep. (n.s.) Q.B. 142; 7 E. & B. 426.

(e) *Against Returning Officer at an Election for refusing a Vote.*

If a returning officer, without malice or any improper motive, but exercising his judgment honestly, refuse to receive the vote of a person entitled to vote at an election, no action will lie against him at the suit of such person. *Tozer v. Child* (Ex. Ch.), 26 Law J. Rep. (n.s.) Q.B. 151; 7 E. & B. 377.

(f) *Against a Witness for Defamation.*

An action will not lie against a witness who in the due course of a judicial proceeding has uttered false and defamatory statements concerning the plaintiff, even although he did so maliciously, and without reasonable and probable cause, and the plaintiff has suffered damage in consequence. *Revis v. Smith*, 25 Law J. Rep. (n.s.) C.P. 195; 18 Com. B. Rep. 126.

(g) *By Poor-rate Collector for Poundage.*

A collector of poor-rates, appointed by the guardians of a poor-law union, pursuant to an order from the Poor Law Board, directing the collector to be paid by poundage on the sums collected by him, cannot, if he be not paid, maintain an action against the guardians as having contracted to pay him his poundage. *Smart v. the Guardians of the Poor of the West Ham Union* (Ex. Ch.), 25 Law J. Rep. (n.s.) Exch. 110; 11 Exch. Rep. 867.

(h) *By Licensee against a Stranger for polluting an artificial Watercourse.*

Although it may be questionable whether a party merely licensed by the owner of a stream to use the water has such a possessory right to the water as to maintain an action for fouling it, yet if he, by the

owner's permission, has caused the stream to flow into his own pipes or cisterns on his own premises, he can then maintain such action, supposing the defendant had no right to foul the water, and the fouled water has caused damage to the plaintiff. And it will be no objection to the action that the actual injury to the plaintiff has been caused by his use of the fouled water in his boilers, &c.; for the principle that a party cannot recover for an injury to which he has himself contributed does not apply where the act of the defendant has been wrongful and wilful, and the act of the plaintiff, which has contributed to the actual injury, has been something he was lawfully entitled to do. Thus, where the plaintiff had been allowed by the owners of a canal to insert in it a pipe conveying the water to a cistern on his premises, whence it was drawn into his boilers to work his steam-engines, and the defendant fouled the water in the canal, whereby, the water being still used by the plaintiff, his boilers became injured,—Held, that the plaintiff was entitled to maintain an action for the injury, and that the defendant could not resist it, either on the plea of not guilty, or on a denial of an allegation in the declaration that the water ought of right to flow in the canal without pollution; that allegation being construed, not as an averment of the plaintiff's right to the flow of the water in the canal, but to a negative of any right of the defendant to foul it. *Whaley v. Leving*, 26 Law J. Rep. (n.s.) Exch. 327; 2 Hurl. & N. 476.

(i) *For Exposure of a Glandered Horse.*

A declaration alleged that the defendant was possessed of a horse, and knowing it to be afflicted with the glanders caused it to be sold by auction at a horse repository, and the plaintiff, believing it to be in a healthy state, became the purchaser, and paid a large sum for it; and by reason of its diseased state the horse was utterly worthless to the plaintiff, and he paid a veterinary surgeon for examining it; and in consequence of the horse being put into the plaintiff's stable, wherein another horse of his was, the last-mentioned horse became infected and died of the disease, and the plaintiff was obliged to pay a large sum in endeavouring to cure it:—Held, on demurrer (*Pollock, C.B. dubitante*), that the declaration disclosed no cause of action. *Hill v. Balls*, 27 Law J. Rep. (n.s.) Exch. 45; 2 Hurl. & N. 299.

(k) *Meaning of "Recovered as Damages."*

By a special act, incorporating the Railways Clauses Act, 1845, and the Towns Improvement Clauses Act, 1847, it was enacted, that certain expenses incurred by the Commissioners in paving streets, &c. might be "recovered as damages." An action having been brought to recover expenses so incurred,—Held, that such action was not maintainable, for that the proper construction of the several acts was, that the expenses were to be recovered as damages upon a proceeding before Justices. *The Mayor, &c. of Blackburn v. Parkinson*, 28 Law J. Rep. (n.s.) M.C. 7; 1 E. & E. 71.

(l) *When Damage too remote, or not resulting.*

[See post, (B).]

By the statute 9 Geo. 4. c. xxx. Commissioners of an inland navigation were required to, and in pur-

suance of the act did, execute a lease of the navigation and tolls for a term of years. The statute enacted, "that in case the lessee should at any time permit the said navigation, or the works thereof, to be out of repair, the Commissioners were thereby authorized and required to give notice thereof to such lessee, and in such notice to specify the particular repairs which ought to be done, and the Commissioners might by such notice require that such repairs should be commenced and finished within reasonable periods, to be named by the Commissioners; and in case the lessee should neglect, then it should be lawful for the Commissioners, and they were thereby authorized to take possession of the tolls, and to cause such repairs to be done, and to pay the expenses out of the tolls." A lock, forming part of the navigation, fell in for want of repairs, by reason of which the navigation was stopped, and the plaintiff, a master of a barge, was necessarily detained with his barge a number of days, with a load of wheat, which was ready to be conveyed through the lock. The fact that the lock had been for some time out of repair was known to the Commissioners; but they had given no notice to the lessee, although sufficient time had elapsed for giving such notice, and for the repairs being done, before the lock fell in. The plaintiff claimed as damages a uniform sum per day during the time he was detained, calculated according to the average weekly earnings of his vessel:—Held, that even assuming that there was a duty in the Commissioners to give notice of repairs required to be done, for neglect of which an action would lie at the suit of a party injured, still the above facts did not disclose any damage flowing from the breach of that duty, so as to give the plaintiff a right of action against the Commissioners; for the falling in of the lock was not the natural, proximate or necessary consequence of the omission of the Commissioners to give such notice. *Walker v. Gee* (Ex. Ch.), 28 Law J. Rep. (n.s.) Exch. 184; 4 Hurl. & N. 350: affirming the decision below, 27 Law J. Rep. (n.s.) Exch. 427; 3 Hurl. & N. 395.

Seemle, in the Court below, that if the action had been well founded, the amount of damages claimed was recoverable. *Ibid*.

The plaintiff, being indebted to C, agreed with the defendant that the defendant should, for certain considerations, take upon himself the debt, if C would accept him as his debtor; and C, being informed by the defendant of the arrangement, upon the faith of it accepted the defendant as his debtor in place of the plaintiff. The defendant afterwards, to induce C to sue the plaintiff, fraudulently wrote a letter falsely representing that no such agreement had been made between himself and the plaintiff, but that they had conspired together to make that false statement; and C, acting on the letter, sued the plaintiff for the debt, and recovered judgment against him, with costs:—Held, that the facts did not give a right of action by the plaintiff against the defendant. *Collins v. Cave*, 28 Law J. Rep. (n.s.) Exch. 204; 4 Hurl. & N. 225.

(B) CIRCUITY OF ACTION.

[See *BILLS OF EXCHANGE AND PROMISSORY NOTES: Beecham v. Smith*.]

Declaration for not delivering the plaintiffs' goods in good order and well-conditioned, received by the

defendant on board his ship to be conveyed from Glasgow to Colombo, and agreed by him to be there so delivered. Plea, setting out a charter-party by which the defendant, as owner, chartered the ship to the plaintiffs, and agreed to load a cargo from the plaintiffs' factors at Glasgow, and convey it to Colombo, and deliver the same to the freighters or their assigns. The plea then alleged that the plaintiffs shipped the goods mentioned in the declaration, and that the plaintiffs, not wishing to make up the whole cargo with goods of their own, contracted with M & Co. to receive from them and carry certain cases of sulphuric acid on board the said ship, for freight to be paid by M & Co. to the plaintiffs, and that M & Co. shipped the said cases on board, and that it was the duty of the plaintiffs, as the shippers, to give notice to the owners of the ship of the article being sulphuric acid, in order that it might be stowed in some place where, if it leaked, it would not come in contact with other parts of the cargo, and that neither the plaintiffs nor M & Co. gave the defendant notice, and that they caused the cases to be stowed near the goods mentioned in the declaration, and that some of the acid leaked and damaged the goods, and so prevented the defendant from performing the agreement, and that the damage was occasioned by the plaintiffs' neglect. The plea concluded with an averment that if the defendant was compelled to pay the plaintiffs any money for such damage, the defendant would be entitled to recover the same amount from the plaintiffs as damages sustained by him by reason of their omitting to give such notice. On demurrer to this plea,—Held, that it was no answer to the action, the act of the plaintiffs not being the proximate cause of the damage; and that, assuming a cross action would lie, the amount of damages would not necessarily be the same in both actions. *Alston v. Herring*, 25 Law J. Rep. (n.s.) Exch. 177; 11 Exch. Rep. 822.

(C) NOTICE OF ACTION.

[*Newton v. Ellis*, 5 E. & B. 115; 6 Law J. Dig. 14.]

(a) *Effect of not giving, under 3 Geo. 4. c. 126. s. 143.*

The statute 3 Geo. 4. c. 126. s. 143. provides, with regard to penalties, "if the same shall exceed the sum of 20*l.*, it shall be recoverable by an action of debt in any of His Majesty's Courts of Record," &c., "and the plaintiff, if he recover in any such action, shall have full costs; provided that there shall not be more than one recovery for the same offence, and that twenty-one days' notice be given to the party offending previous to the commencement of such action, and that the same be commenced within three calendar months after the offence for which such action is brought shall have been committed:—Held, that a plaintiff omitting to give the twenty-one days' notice, or not suing within the three months, was barred, not merely of his right to costs, but of his right of action altogether. *Cobbett v. Warner* (Ex. Ch.), 26 Law J. Rep. (n.s.) Exch. 11; 1 Hurl. & N. 388.

(b) *Service of, on Companies.*

By 8 & 9 Vict. c. 20. s. 138. any summons or notice or any writ or other proceeding at law or in equity, may be served by the same being left at or trans-

mitted through the post directed to the principal office of the company, or one of their principal offices, or by being given personally to the secretary, &c. The plaintiff served a notice of action upon the superintendent of the office of the G. W. R. Co. at Bristol. At that station there was no office different from that which is to be found at every station upon the line. The central government of the company was carried on at Paddington, where the staff of the company was stationed, where the secretary was to be found, and where the ordinary meetings of the directors for the general purposes of the company took place:—Held, that the service was not good, as Bristol was not the principal office of the railway. *Garton v. the Great Western Rail. Co.*, 27 Law J. Rep. (n.s.) Q.B. 375; E. B. & E. 837.

(c) *Who entitled to.*

Where the bailiff of a county court, under a warrant against the goods of A. by mistake takes those of B, this is an act done in pursuance of the act which entitles the bailiff to notice of action. *Burling v. Harley*, 27 Law J. Rep. (n.s.) Exch. 258; 3 Hurl. & N. 271.

Improvement Commissioners sued for an injury caused by negligence of their servants are entitled to notice of action. *Mason v. the Birkenhead Improvement Commissioners*, 29 Law J. Rep. (n.s.) Exch. 407.

A letter of the plaintiff's attorney, claiming compensation for the injury, and stating that he is instructed to commence proceedings, if no satisfactory arrangement is come to, is not a sufficient notice. *Ibid.*

(d) *Thing done in pursuance of Act of Parliament.*

Where a railway company were by their act entitled to notice of action before any action should be brought against them for anything done or omitted to be done in pursuance of their act, and an action was commenced against them for money received by them to the plaintiff's use, and on accounts stated, and they pleaded that no notice of action had been given, but failed to allege that the money was received or the accounts stated in pursuance of their act, the Court held, that the plea was bad, as they could not presume, even after verdict, that the receipt of the money, or the stating of the accounts, were things done in pursuance of the statute. *Garton v. the Great Western Rail. Co.* (Ex. Ch.), 28 Law J. Rep. (n.s.) Q.B. 321.

(e) *Under Malicious Trespass Act.*

A female who occupied a house belonging to the defendant saw a man on a Sunday throw a stone at the windows of the house. She immediately pointed out to the defendant two men running away, saying it was one of them, "the one with the stick," and telling him to arrest them. He did so, and one of them, the plaintiff, was proved to be the one who had thrown the stone:—Held, that there was reasonable ground for giving him into custody, and (the jury having found *bona fides*) that the defendant was entitled to notice of action. *Jones v. Howell*, 29 Law J. Rep. (n.s.) Exch. 19.

Quære—Whether there was a justification. *Ibid.*

(D) FORM OF ACTION.

(a) *Trespass or Case.*

Trespass lies for taking, under a distress for rent,

tools of trade not in use, there being other distrainable goods of sufficient value on the premises; and a special action on the case, as for an unreasonable distress, is not the only remedy for such a wrong. *Nargatt v. Nias*, 28 Law J. Rep. (n.s.) Q.B. 143; 1 E. & E. 439.

(b) *Covenant on Money Lent.*

[See MONEY COUNTS; MONEY LENT.]

ADMINISTRATION.

[See 23 Vict. c. 5, to regulate Administration with respect to certain Indian Government Securities; to repeal certain Stamp Duties; and to extend the Operation of the Act, 22 & 23 Vict. c. 39, to Indian Bonds—22 Vict. c. 30. The "Confirmation and Probate Act, 1858," amended by 22 & 23 Vict. c. 31. The Law relating to Letters of Administration in Ireland, amended by 22 & 23 Vict. c. 31. The Stamp Duties payable upon Letters of Administration altered, repealed and amended by 22 & 23 Vict. c. 36. The Law relating to the confirmation of Executors in Scotland amended, and the Extension over all Parts of the United Kingdom of the Effect of such Confirmation, and of Grants of Probate and Administration, enacted by 21 & 22 Vict. c. 56. And see title ACCOUNT.]

(A) WHEN AND TO WHOM GRANTED.

(a) *In general.*

(b) *De Bonis Non, to Residuary Legates where Executors renounce, are dead, or Chain of Executorship broken, &c.*

(c) *With Will annexed, to Universal Legatee.*

(d) *Of Effects of Intestate domiciled Abroad.*

(e) *To Creditors.*

(f) *To Factor Loco Tutoris of Infant of domiciled Scotchman.*

(g) *To Syndic of Corporation Aggregate.*

(h) *To Attorney of Person entitled to.*

(i) *Where incapacitated Persons solely entitled in Distribution.*

(k) *Where Husband survives, and not having administered to his Wife's Estate renounces or dies Intestate.*

(l) *Presumption of Death.*

(m) *Survivorship.*

(B) LIMITED GRANT OF.

(a) *To Part of Effects.*

(b) *When Executor or Next-of-Kin Abroad.*

(c) *Where Married Woman with Protection Order dies Intestate.*

(d) *With Will annexed, to Legatee.*

(e) *To Cestui que Trust where Trustee dead.*

(f) *Pendente Lite.*

(g) *To substantiate Proceedings in Chancery.*

(C) BOND.

(a) *Amount of Penalty.*

(b) *Alteration of usual Terms.*

(c) *Several Bonds.*

(d) *Assignment of.*

(D) PRACTION.

(a) *Swearing Affidavit.*

(b) *Service of Citation.*

(c) *Compelling Administration.*

(d) *Lost Letters of Administration.*

- (e) *Right to bring Error.*
- (f) *Diocesan Grant.*
- (g) *Taxation of Costs out of Estate.*

(A) WHEN AND TO WHOM GRANTED.

(a) *In general.*

By the will of J, who was at the time he made it of unsound mind, his personalty was bequeathed to a charitable purpose in such terms as would give the Queen the disposition of it under her sign-manual. The Queen's proctor, having been cited to propound the will or shew cause why administration should not be granted to the next-of-kin as in case of an intestacy, did not appear. A copy of the original will, which had been lost, having been brought into the registry.—Held, that administration might go. *Perry v. Dyke*, 27 Law J. Rep. (N.S.) Prob. & M. 7; 1 Sw. & Tr. 12.

The Court has no power, under section 73. of 20 & 21 Vict. c. 77, to grant general administration to a person who, before that act, would only have been entitled to a grant of administration during the minority of an infant, that section not conferring power to substitute one kind of administration for another, but merely to substitute another person as administrator in the place of the person who would by law be entitled to administration. *In the goods of Smith*, 27 Law J. Rep. (N.S.) Prob. & M. 105.

In 1817 certain land was devised to K for 1,000 years in trust for A. In 1852, the equitable interest in the term having previously, by various assignments, become vested in Z, K died in America, leaving a will which was proved in America by L, his sole executor, but was not likely to be proved in this country. Z sold his interest in the said term, but being unable to obtain a title for want of a personal representative to K, application was made, under section 73. of the 20 & 21 Vict. c. 77, for a grant of letters of administration to Z of the personal estate of K limited to the remainder of the said term. But the deeds shewing the deduction of the title to the terms not having been brought into the registry, and the executor of K not having been cited, the Court rejected the motion. *In the goods of Keene*, 28 Law J. Rep. (N.S.) Prob. & M. 34; 1 Sw. & Tr. 265.

Administration will not, under section 73. of 20 & 21 Vict. c. 77, be granted to a person other than the one who by law would be entitled to administration, though the latter may be resident abroad, if he has received no notice of the application, unless the Court be satisfied by other circumstances that it is necessary or convenient that the grant should be made. A mere general statement upon affidavit that "it is necessary for the preservation of the personal estate and effects of the deceased that administration should be granted" will not in the absence of such notice suffice. *In the goods of Cooke*, 28 Law J. Rep. (N.S.) Prob. & M. 43; 1 Sw. & Tr. 267.

The Court of Probate having, as a general rule, no jurisdiction to grant letters of administration unless the deceased leaves personal property in this country, where administration to the estate of a person, who died resident abroad, is applied for, it should appear upon affidavit that he left personal property in this country. *Evans v. Burrell*, 28 Law J. Rep. (N.S.) Prob. & M. 82.

Of the two rules for the guidance of the discretion of the Court in granting administration, where parties in equal degree dispute it, viz. "that, *ceteris paribus*, the male is preferred to the female," and "that the grant will follow the majority of interests"—the latter is the more stringent. The fact of a man having been bankrupt many years since is not to be pressed against him; but when he has been a second time a bankrupt, and under the second bankruptcy no dividend has been paid, *quære*, whether such bankrupt could be said to have any interest in the intestate's estate? The grant being made to persons representing three-fourths of the interest, their sureties were ordered to justify to the extent of the other fourth; their costs were directed to be paid out of the estate, and no order was made as to costs of the other party. *Iredale v. Ford*, 1 Sw. & Tr. 305.

B having been informed that he could not recover from the illness he then laboured under, expressed a wish that his wife should be in a position to receive, at his death, certain sums of money in two savings-banks, and signed, in the presence of witnesses, two orders on a savings-bank, to pay to his wife, at any time she might apply for the same, any money deposited. B died on the following day. The Court granted administration, with the two orders as together containing the will of B annexed, to his widow. *In the goods of Marsden*, 1 Sw. & Tr. 542.

(b) *De Bonis Non, to Residuary Legatee where Executors renounce, are dead, or Chain of Executorship broken, &c.*

Where A, B and C, executors and residuary legatees in trust, had renounced probate or administration, and administration with the will annexed had been granted to the residuary legatee for life, who died, leaving the estate unadministered, the Court refused to allow one of the residuary legatees in trust to retract his renunciation in that character, for the purpose of taking administration with the will annexed of the unadministered estate. *In the goods of Richardson*, 1 Sw. & Tr. 515.

A bequeathed the residue of his personal estate to W, his sole executor and trustee, in trust for such persons as B, a married woman, should appoint, and in default of appointment to B absolutely. W renounced. By deed B appointed and assigned to M and J, who accepted the trust, all her interest under the will, and her right to letters of administration with the will annexed, in order that they might obtain such letters of administration. Letters of administration with the will annexed granted to M and J. *In the goods of Martindale*, 27 Law J. Rep. (N.S.) Prob. & M. 29; 1 Sw. & Tr. 8.

A, by his will, after directing the payment of his debts and certain legacies, desired that his remaining property should be placed in proper securities, and appropriated to the education of the children of B as should seem most meet and beneficial to them by his executors. At the death of A, B's children had attained such an age as to require no further education:—Held, on the death of the executors, that B's children were entitled to administration as residuary legatees, the testator having intended that the residue should be appropriated for their benefit, although, under the circumstances, the particular mode in which he had intended to benefit them was incapable of being carried into effect. *Presant v. Goodwin*,

29 Law J. Rep. (N.S.) Prob. M. & A. 115; 1 Sw. & Tr. 544.

A died in 1832, leaving a will, whereof he appointed B, C and D executors, and B residuary legatee. C alone proved the will, power being reserved to grant probate to the other executors. In 1847 B died, leaving a will appointing E sole executrix, who duly proved B's will. In 1855 C died intestate, leaving part of the personal estate of A unadministered. D, the surviving executor of A, not having appeared to a citation, calling on him to accept or refuse probate of the will of A, administration with the will of A annexed was granted to the attorney of E, then abroad, as the personal representative of the residuary legatee of A, the chain of executorship having been broken. *Collison v. Maw*, 28 Law J. Rep. (N.S.) Prob. & M. 90.

A married woman made a will under a power, and appointed two executors. One of them proved, and the husband took out a *caterorum* administration. The deceased was the executrix of a will, which she had proved:—Held, that the chain of executorship was not continued by the appointment of executors made under the power, and that the residuary legatee of the testatrix was therefore entitled to a grant of administration *de bonis non*, without citing those executors to accept or renounce probate. *In the goods of Hughes*, 29 Law J. Rep. (N.S.) Prob. M. & A. 165.

A died in 1856 leaving a will, on the construction of which, in respect to a question between B, the asserted residuary legatee, and C, the next-of-kin, the Judge of the Prerogative Court of Canterbury decreed letters of administration with the will annexed to C, the testator's sister and next-of-kin. A bill was subsequently filed in Chancery for the administration of the estate, in determining which Wood, V.C. held that B was the beneficial residuary legatee. Afterwards C died, leaving goods unadministered, and a question arising in the Court of Probate as to the grant *de bonis non* between B and another next-of-kin,—Held, without going into the construction of the will, that the suit before Wood, V.C. was substantially an appeal from the decision of the Prerogative Court. Administration *de bonis non* granted to B in accordance with the decision in Chancery. *Warren v. Kelson*, 1 Sw. & Tr. 290.

In a will which contained specific bequests of several articles of plate, furniture, &c., the last specific bequest being that of 30*l.*,—Held, that a bequest to B of "the residue of my things" would not entitle B to a grant of administration as residuary legatee. *In the goods of Ludlow*, 1 Sw. & Tr. 29.

(c) With Will annexed, to Universal Legatees.

A B left in the hands of trustees, "all the property she might be possessed of at her death," &c., followed by an enumeration of properties, which however did not include the whole of her property:—Held, that the specific enumeration did not restrain the general terms preceding it, and that the trustees were entitled to administration with the will annexed as universal legatees in trust. *In the goods of Goodyear*, 1 Sw. & Tr. 127.

The universal legatee of a testamentary paper is entitled to administration with the will annexed, but not to probate. No trace of any different practice can be found in the registry. *Semble*, the 29th section of the 20 & 21 Vict. c. 77. relates to the

procedure of the Court, not to the principles on which it is to act. *In the goods of Oliphant*, 1 Sw. & Tr. 525.

(d) Of Effects of Intestate Domiciled Abroad.

Although the Court of Probate, in granting administration of the effects of a person who died domiciled abroad generally follows the law of the domicile, it will not grant administration to a person who, by the law of England is incapacitated from taking upon himself the liabilities of an administrator. It will, therefore, refuse to grant administration to a minor, although by the law of the domicile such a minor might be entitled to administer the estate of the deceased. *In the goods of the Duchesse d'Orléans*, 28 Law J. Rep. (N.S.) Prob. & M. 129; 1 Sw. & Tr. 253.

The proper person for a minor to elect as guardian is his next-of-kin. *Ibid.*

Administration of the effects of an intestate who died domiciled abroad granted to the agent of a foreigner entitled by the law of the domicile to administration. *In the goods of Bianchi*, 28 Law J. Rep. (N.S.) Prob. & M. 139; 1 Sw. & Tr. 511.

A, possessed of personal property in England, died domiciled in Brazil, intestate, leaving a widow and children, who were minors. The Judge of Orphans, who, by the law of Brazil, is, in cases of minority, the lawfully constituted authority to superintend the administration of the estate of the deceased, appointed B guardian to the children, and issued letters of request requiring the competent authorities in this country to deliver the effects of the deceased to C, resident abroad, who had been appointed by B his attorney for that purpose, or to C's substitute. C appointed D, resident in England, his substitute. Authenticated copies of the proceedings before the Judge of Orphans, and of the power of attorney to C, the original power of attorney to D, and an affidavit as to the law of Brazil, having been filed, the Court granted administration to D. *Ibid.*

(e) To Creditors.

A having died intestate and insolvent, leaving three children minors, who had no known relations, and were the only persons entitled in distribution, the Court appointed a creditor guardian to the children, for the purpose of taking out administration to the estate of A. *In the goods of Peck*, 27 Law J. Rep. (N.S.) Prob. & M. 106; 1 Sw. & Tr. 141.

The affidavits on which application is made for a grant of letters of administration to a creditor should state that all persons entitled in distribution of the effects of the deceased had been cited. Therefore, when the affidavits only stated that the deceased died a widower and intestate, leaving A. his natural and lawful son and only next-of-kin, and that he, though cited, had not appeared, but omitted to state that A. was the only person entitled in distribution, the Court refused to grant administration to a creditor. *Brown v. Wildman*, 28 Law J. Rep. (N.S.) Prob. & M. 54.

Where administration is applied for by the creditor of a person who died intestate without any known relation, a citation, calling upon the next-of-kin, if any, and all persons having interest in the estate of the deceased, should be issued, and an abstract of

be advertised twice, with an interval of a fortnight notice also being given to the Queen's Proctor. After the lapse of thirty days from the last advertisement, if there is no appearance, and the Queen's Proctor declines to interfere, administration will be granted to a creditor. *Clayton v. Brown*; *In the goods of Brown*, 28 Law J. Rep. (N.S.) Prob. & M. 126.

The husband is entitled to take out administration in right of the wife, to her next-of-kin deceased intestate; and her renunciation in favour of a third person, e.g. a creditor of the deceased, will not deprive the husband of his right. *Haynes v. Matthews*, 1 Sw. & Tr. 460.

Semble, a creditor applying for administration has no right to go into the question of the unfitness of the next-of-kin to administer. *Ibid*.

(f) *To Factor Loco Tutoris of Infant of Domiciled Scotchman.*

Administration of the personal estate in England of a domiciled Scotchman granted to A, appointed by the Court of Session at Edinburgh *factor loco tutoris* to the infant children of the deceased. *In the goods of Jones*, 28 Law J. Rep. (N.S.) Prob. & M. 80.

(g) *To Syndic of Corporation aggregate.*

When the executor named in a will is a corporation aggregate, administration with the will annexed will be granted to their syndic, i.e., a person specially appointed by the corporation for that purpose. *In the goods of Darke*, 29 Law J. Rep. (N.S.) Prob. M. & A. 71; 1 Sw. & Tr. 516.

(h) *To Attorney of Person entitled to.*

A, in April 1856, executed a power of attorney appointing L her attorney for the purpose of managing her real and personal estate, and giving him very extensive powers, but not in terms sufficient to constitute him her attorney for the purpose of taking out letters of administration. A then went abroad, and during her absence a sum of money having become payable to the personal estate of B, who had died intestate, and in respect of whose estate A was entitled to administration, it became necessary that an administrator should be appointed, in order that a discharge for that sum might be given. It being uncertain when A would return to this country, or where she was, the Court granted administration of the estate of B to L, under section 73. of the 20 & 21 Vict. c. 77. *In the goods of Escot*, 28 Law J. Rep. (N.S.) Prob. & M. 17.

Administration will be granted to the attorney of the next-of-kin, though such attorney resides out of the jurisdiction of the Court of Probate, provided the sureties to the administration bond reside within the jurisdiction. *In the goods of Leeson*, 29 Law J. Rep. (N.S.) Prob. & M. 19; 1 Sw. & Tr. 463.

(i) *Where incapacitated Persons solely entitled in Distribution.*

A died intestate, leaving her only sister solely entitled in distribution a lunatic, and without any committee of her estate or person. Administration for the use and benefit of the sister during her lunacy granted to the stepmother, who was co-executor and co-trustee with the deceased of the father's will, and beneficially interested under it. Surviving cousins not cited. *In the goods of Burrell*, 1 Sw. & Tr. 64.

A died intestate, leaving an aged uncle and aunt the only persons entitled in distribution; at their desire administration was granted for their use and benefit to their son on the sureties justifying. *In the goods of Roberts*, 1 Sw. & Tr. 64.

(k) *Where Husband survives, and not having administered to his Wife's Estate renounces or dies intestate.*

A died in 1831 intestate, leaving her husband and children by him surviving. Her husband afterwards married B, and upon his dying intestate, leaving B and children by both wives him surviving, administration of his effects was in 1832 granted to a creditor, the widow and children having been duly cited, but not appearing. In 1857 a sum of money to which A at the time of her death was entitled in reversion became payable to her estate, and the creditor renouncing his right to administration of A's estate, B applied that it might be granted to her:—Held, that B had no right to the grant, as she was the representative neither of her husband nor of A; but that on the renunciation of the creditor, the representative of B's husband, the children of A were entitled to the grant. *In the goods of Bell*, 29 Law J. Rep. (N.S.) Prob. M. & A. 162; 1 Sw. & Tr. 288.

Where the husband has survived the wife and died intestate, without administering to her estate, his next-of-kin must constitute themselves his legal personal representatives, before they have any claim to administer to the wife's estate. *In the goods of Crause*, 1 Sw. & Tr. 146.

(l) *Presumption of Death.*

N, intending to come to England, sailed on the 1st of July 1856 from New Zealand in a ship bound for Sydney. The ship never arrived at Sydney, nor was anything ever heard of her or the crew after she set sail. Some heavy gales having occurred at the time she would have been on her voyage and in her direct course, it was supposed she had foundered with all hands. Advertisements had not been inserted in the newspapers for information concerning N:—Held, that, under the above circumstances, as N's history was traced up to a certain point, and he was then lost sight of, advertisements were unnecessary, and that his death was to be presumed. *In the goods of Norris*, 27 Law J. Rep. (N.S.) Prob. & M. 4; 1 Sw. & Tr. 6.

On the 27th of January 1857, M, master of the ship B, sailed in her from L for V, the average duration of the voyage being ten weeks. The ship never arrived at V, and nothing having been heard or seen of her or any of her crew since she sailed from L, the underwriters had paid as for a total loss of the ship:—Held, that the death of M in or since January 1857, might be presumed. *In the goods of Main*, 27 Law J. Rep. (N.S.) Prob. & M. 5; 1 Sw. & Tr. 11.

On the 15th of November 1857 G S sailed from Barcelona to Constantinople, the average duration of the voyage being thirty days. The vessel had never arrived at her destination, nor had anything been since heard of her or the crew, and the insurers of the ship had paid as upon a total loss. The Court refused to grant administration to the effects of G S, as it did not appear that any inquiries had been made for the crew at Barcelona; but allowed administration to

pass conditionally on an affidavit of such inquiries having been made without result being filed in the registry. *In the goods of Smyth*, 28 Law J. Rep. (N.S.) Prob. & M. 1.

A, master of the X, sailed in her from Demerara, on the 23rd of October 1858, bound for London, the ordinary duration of the voyage being five or six weeks. A few days after sailing, a hurricane passed over the West Indian Islands, in which it was supposed that the X and all hands had been lost, neither the vessel nor any of the crew having been heard of since the vessel sailed. The underwriters on the vessel had arranged to pay the amount insured as upon a total loss. On affidavits of these facts, a motion made on the 30th of March 1859, for a grant of administration of the effects of A was rejected, the Court holding that the application was premature, since, though the vessel might be lost, the crew might have been picked up by a vessel bound on so long a voyage, that tidings of them could not have been received in the period that had elapsed since the vessel was last heard of; and, further, that inquiries should have been made at Demerara for the crew; but on the 22nd of June 1859, the underwriters having then paid the amount insured on the vessel, and nothing having been heard of either her or any of the crew, administration was granted. *In the goods of Bishop*, 28 Law J. Rep. (N.S.) Prob. & M. 93; 1 Sw. & Tr. 803.

In September 1859 the presumption arose that A, who had not been heard of for seven years, was dead; but there were no circumstances from which the date of his death could be inferred. In 1857 his father, who would have been entitled to administration had he survived A, died intestate, and no administration was taken out to him. It being uncertain whether A or his father survived, the Court, under the 73rd section of the Probate Act, granted administration of the effects of A to his sister, without requiring administration to the father to be taken out. *In the goods of Peck*, 29 Law J. Rep. (N.S.) Prob. M. & A. 95.

Semble—that if there had been a legal personal representative of the father, the Court would have required his consent before making such a grant. *Ibid.*

(m) Survivorship.

W, his wife and an only child, an infant, were killed in the Cawnpore massacre, in June 1857. W left no will. In the absence of any evidence as to survivorship, the Court granted administration of the personal estate of W, as having died a widower, to his next-of-kin. *In the goods of Wainwright*, 28 Law J. Rep. (N.S.) Prob. & M. 2; 1 Sw. & Tr. 257.

(B) LIMITED GRANT OF.

(a) To Part of Effects.

General letters of administration cannot be granted to a person having an interest only in part of the effects of the deceased; but the grant must be limited to that part. *In the goods of Dodgson*, 28 Law J. Rep. (N.S.) Prob. & M. 116; 1 Sw. & Tr. 259.

A, whose interest in the effects of a deceased intestate was confined to a particular fund, presented a petition to the Court of Chancery for the purpose of obtaining a transfer thereof to him. The person entitled to general letters of administration refusing to apply for them, letters of administration in the

usual form, "limited to the purpose of appearing upon and supporting the said petition," were granted to A's nominee. The Lords Justices declining to order the transfer of the fund to A's nominee, on the ground that the limited administration did not entitle him to receive the fund, the Court amended the grant by extending it also to the fund, the subject-matter of the petition; but refused to grant general letters of administration. *Ibid.*

(b) When Executor or Next-of-kin Abroad.

Upon the death of a testator A, the surviving executor, being resident in Sydney, B, who held a general power of attorney to act for A in this country, sent out to him for execution a special power of attorney to authorize B to take out administration with the will annexed for A's use and benefit, and also a proxy of renunciation, in case he should wish to renounce. The residuary legatee for life was incompetent from senility to take administration; and, subject to her interest, B and others were entitled to the residue. The majority of the persons interested under the will, being desirous that a grant should be made without waiting for the return of the power of attorney or renunciation, the Court granted administration with the will annexed to B, limited, until such time as A should apply for probate, or his attorney for administration with the will annexed. *In the goods of Lewis*, 29 Law J. Rep. (N.S.) Prob. M. & A. 94.

A died intestate, leaving personal property in England which required immediate management. B, his sole next-of-kin, resided in Australia, and had no duly constituted agent here. Administration was granted to C, the father-in-law of B, for the benefit of B until he should himself apply for administration, on condition that C should give justifying security and exhibit an inventory. *In the goods of Jones*, 27 Law J. Rep. (N.S.) Prob. & M. 17; 1 Sw. & Tr. 13.

(c) Where Married Woman with Protection Order dies intestate.

Upon the death, in the lifetime of her husband, of a married woman, intestate, who has obtained a protection order under section 21. of 20 & 21 Vict. c. 85, on the ground of the desertion of her husband, administration will be granted to her next-of-kin, limited to such property as she may have become possessed of since the commencement of the desertion. Such grant must be in general terms, and must not include specific property. *In the goods of Worman*, 29 Law J. Rep. (N.S.) Prob. M. & A. 164; 1 Sw. & Tr. 513.

(d) With Will annexed, to Legatee.

Limited administration *de bonis non* with the will annexed will not generally be granted to a legatee. The persons entitled to a general grant should be first cited, and if they do not take administration, the legatee will be entitled to a general grant. Where the surviving executor under a will, which did not dispose of the residue, died, leaving effects of the testator unadministered, and A, as legatee, was solely interested in 750l. 3l. per cents., the Court refused to grant administration *de bonis non* with the will annexed to A, limited to that fund, the persons entitled to a general grant not having been cited;

although it appeared that the service of a citation on them would be attended with great difficulty and expense. *In the goods of Watts*, 29 Law J. Rep. (n.s.) Prob. M. & A. 108; 1 Sw. & Tr. 538.

On application for grant of administration (with the will annexed) to the sole legatee, on an affidavit that the testatrix died possessed of no other property than that specifically described in the will,—Held, that no reason was shewn for not citing the next-of-kin; that they must be cited; or that administration might be taken, limited to the property specified in the will. *In the goods of Watson*, 1 Sw. & Tr. 110.

(e) *To Cestui que Trust where Trustee dead.*

The Court will grant letters of administration to a *cestui que trust* of a trust fund, limited to that fund, when the trustee in whose name the fund stands is dead and is without a personal representative, the parties entitled to represent the deceased trustee having been first cited. When there are several parties interested in the fund, the grant will be limited to the interest of the *cestui que trust* making the application, unless the other *cestui que trust* assent to the grant extending to their respective interests. *Pegg v. Chamberlain*, 1 Sw. & Tr. 527.

(f) *Pendente Lite.*

Administration *pendente lite*, under the 70th section of the 20 & 21 Vict. c. 77, was granted to the defendant in a testamentary suit, the plaintiffs not opposing the application. *De Chatelain v. Pontigny*, 27 Law J. Rep. (n.s.) Prob. & M. 18; 1 Sw. & Tr. 34.

An administrator *pendente lite* of personal estate was appointed, on his giving security to the amount of one year's income of the property; his administration to be under the direction of the Court. The Court directed that he should not discharge claims on the deceased's estate, until they had passed before the registrar. *Charlton v. Hindmarsh*, 1 Sw. & Tr. 519.

(g) *To substantiate Proceedings in Chancery.*

B filed a bill in Chancery against C, D and E, the trustees and executors under a Scotch probate and confirmation of the will of F, deceased, to set aside as fraudulent a purchase of certain shares in a Scotch company made by F from B's wife, then a spinster, in 1839. When the bill was filed no part of the estate of F was in England. To this bill a demurrer, on the ground that a legal personal representative of F constituted by an English Court must necessarily be a party to the suit, was allowed, and leave given to amend. B then cited C, D and E to take probate or administration, &c., or to shew cause why letters of administration limited as the Court might direct should not be granted to his nominees. C, D and E refused to take probate or administration, and contested B's right to letters of administration under any limitation whatever:—Held, that the Court, in accordance with the practice of the Ecclesiastical Courts, will make such grants limited to substantiate proceedings in Chancery on a mere averment of interest, without in any way considering the merits of the case, and that the 15 & 16 Vict. c. 86, s. 44, does not apply to cases where the estate to be represented is the very estate to be administered in the suit. *Maclean v. Dawson*, 1 Sw. & Tr. 425.

(C) BOND.

(a) *Amount of Penalty.*

G died a bachelor and intestate, leaving personal estate, sworn under 3,000*l.*, his debts amounting to about 44*l.* The Court, under section 82, of 20 & 21 Vict. c. 77, granted letters of administration to his mother, who was his sole next-of-kin, on her giving a bond with sureties for double the amount of the debts of the deceased. *In the goods of Gent*, 27 Law J. Rep. (n.s.) Prob. & M. 37; 1 Sw. & Tr. 54.

(b) *Alteration of usual Terms.*

When a party entitled to administration is abroad, and has given a simple power of attorney to his agent in England to take out the administration for his use and benefit, the Court will only grant administration to the agent on the same terms as it would have granted it to the party himself. And the Court, on application, refused to alter the usual conditions of the administration bond and the terms of the ordinary administration oath. *In the goods of Goldborough*, 1 Sw. & Tr. 295.

(c) *Several Bonds.*

The effects of an intestate having been sworn under 20,000*l.*, letters of administration were granted to A on the execution of the usual administration bond, in a penalty of double that sum. Subsequently, by the payment to the administratrix of a dividend upon the estate of a bankrupt debtor of the intestate, the value of the effects being increased beyond 20,000*l.*, and it becoming necessary to re-swear them as under 25,000*l.*, the Court, under the 82nd section of the 20 & 21 Vict. c. 77, which enables "the Court or a district registrar to direct that more bonds than one should be given":—Held, that a fresh bond in the penalties of 50,000*l.* need not be executed, but that a bond in the penalty of 10,000*l.* would, with that already executed, be sufficient. *In the goods of Wier*, 28 Law J. Rep. (n.s.) Prob. & M. 111; 1 Sw. & Tr. 506.

(d) *Assignment of.*

In 1854 an administration bond, with two sureties, was given to the Bishop of Chester. In 1854 a suit in Chancery was commenced by a creditor of the intestate against his administratrix, and, the condition of the bond having been broken, it was ordered by the Master of the Rolls that an action should be brought on it against the sureties. The proceedings required by the Ecclesiastical Court to be taken before commencing such action were not completed at the time the Probate Act came into operation, when the testamentary jurisdiction of the Court of Chester ceased. On motion that the Court should order the bond to be attended with, for the purpose of being put in suit, the Court decreed that the Registrar should order the bond to be assigned for the purpose of being put in suit. *Young v. Oxley*, 27 Law J. Rep. (n.s.) Prob. & M. 30; 1 Sw. & Tr. 25.

Quære—whether, since 20 & 21 Vict. c. 77, an action will lie on such bond. *Ibid.*

An administration bond given to the Ordinary, under 22 & 23 Car. 2. c. 10, is not assignable, by order of the Judge of the Court of Probate, under the 20 & 21 Vict. c. 77. Although such a bond is assignable, under the 21 & 22 Vict. c. 95, s. 15, that

statute is not retrospective, and therefore does not apply to a bond assigned before the passing of that act. *Young v. Hughes*, 28 Law J. Rep. (N.S.) Exch. 161; 4 Hurl. & N. 76.

(D) PRACTION.

[Attachment against administratrix feme covert, see ATTACHMENT.]

(a) Swearing Affidavit.

A requisition having issued to persons in New South Wales, under the seal of the Prerogative Court of Canterbury, to swear an administrator,—Held, that the Court of Probate might decree administration on an affidavit sworn under such requisition. *In the goods of Bedwell*, 27 Law J. Rep. (N.S.) Prob. & M. 8; 1 Sw. & Tr. 15.

(b) Service of Citation.

Service of citation on a minor is effected by serving it on him in the presence of his natural or legal guardian, or of some person upon whom the care and custody of the minor has for the time being devolved. *Brown v. Wildman*, 28 Law J. Rep. (N.S.) Prob. & M. 54.

Where A, the person primarily entitled to letters of administration, is abroad, and a citation has issued, but has not been personally served, calling on him to accept or refuse letters of administration, or shew cause why they should not be granted to B, who, in the event of A's refusing to accept administration, would be entitled to them, the Court, before granting administration to B, requires an affidavit that A has no agent in this country. *Evans v. Russell*, 28 Law J. Rep. (N.S.) Prob. & M. 82.

Where a person whom it is necessary to cite as interested in the estate of a deceased is a lunatic, and a committee of his estate has been appointed, service of the citation upon such committee is sufficient. It is not necessary that the lunatic should be personally served in the presence of some medical man. *In the goods of Surtees*, 28 Law J. Rep. (N.S.) Prob. & M. 89.

Where one of the next-of-kin of the deceased was a minor, aged seventeen, and was resident, in service, in Derbyshire, and her mother, her natural guardian, resided in Middlesex, the Court granted administration to a creditor, without requiring the citation to be served on the minor in the presence of her mother; a copy of it, sent by post, having been duly received by the minor. *Lainson v. Naylor*, 29 Law J. Rep. (N.S.) Prob. M. & A. 126.

(c) Compelling Administration.

An administrator, with the will annexed, who has intermeddled with the estate cannot be compelled to take a grant of administration with a later will annexed, upon the revocation of the original administration. *In the goods of Davis*, 29 Law J. Rep. (N.S.) Prob. M. & A. 72.

(d) Lost Letters of Administration.

Upon the revocation of letters of administration, which have been lost, an undertaking will be required from the person to whom they were granted, that, if found, he will bring them into the Registry, and that they will not be acted upon. *In the goods of Carr*, 1 Sw. & Tr. 111.

(e) Right to bring Error.

An administrator *de bonis non* has a right to bring error on a judgment obtained against a prior administrator of the intestate, and he may commence his proceeding by taking out a writ of *scire facias ad audiendum errores* in the court in which the judgment has been recovered. *Curleris v. the Earl of Mornington*, 27 Law J. Rep. (N.S.) Q.B. 269.

(f) Diocesan Grant.

Administration to the goods of A was granted in the Consistory Court of Lichfield, in September 1857. The property was sworn under, and the duty paid upon 9,000*l*. It was afterwards discovered that 3,000*l*. consols formed part of this amount. The Bank of England refused to register the letters of administration, which were certainly void under the old law. It was now sought to take the opinion or direction of the Court as to the effect of sections 86, 87, and 88. of the Probate Act on such a grant. No definite motion being made, the Court declined to give any opinion on the point. *In the goods of Elwell*, 1 Sw. & Tr. 27.

(g) Taxation of Costs out of Estate.

When the costs of the unsuccessful party to a testamentary suit are directed to be paid out of the estate, they are not taxed on so liberal a scale as between proctor and client. *Jeffrey v. Jeffrey*, 28 Law J. Rep. (N.S.) Prob. & M. 43.

ADMINISTRATION OF ESTATE IN CHANCERY.

[The uniformity of administration of intestates' estates provided for by 19 & 20 Vict. c. 94.]

- (A) WHAT DEBTS MAY BE CLAIMED.
- (B) CALLS ON SHARES.
- (C) CONTINGENT LIABILITIES.
- (D) INTEREST ON DEBTS.
- (E) MARSHALLING DEBTS.
- (F) WHAT ARE LEGAL ASSETS.
- (G) MARSHALLING ASSETS.
- (H) PRACTION.

(A) WHAT DEBTS MAY BE CLAIMED.

In 1843 the testator in the cause, by way of gift to his infant godson, the child of a friend, gave to W a promissory note for 100*l*., payable on demand, for the benefit of such godson when he should attain the age of twenty-one years. In 1849 the testator, on the demand of W, paid six years' interest upon the note, and the next day cancelled the original note, and, by way of renewal, gave W another note for the same amount, and in the same terms. After the testator's death, his executor paid interest upon the note:—Held, in a suit for the administration of the testator's estate, that W's claim upon the note, for the benefit of his infant *cestui que trust*, was entitled to priority over the claims of legatees. *Dawson v. Kearton*, 25 Law J. Rep. (N.S.) Chanc. 166; 3 Sm. & G. 186.

A testatrix directed all her debts, funeral and testamentary expenses to be first paid. Her execu-

trix died indebted to her estate, and without having paid the testamentary expenses. A bill was filed to administer both estates, and the decree directed payment of testamentary as well as other expenses:—Held, upon petition by the proctor, that he was entitled to payment of the testamentary charges out of the estate of the testatrix before distribution of the assets. *Tanner v. Carter*, 25 Law J. Rep. (N.S.) Chanc. 664.

Payments to legatees is no answer to the claims of creditors, though no debt had arisen at the time of such payment. Thus, when the testator held shares in a banking company, and nine years after his death the bank was wound up, and a call made, it was held that payments to legatees in the mean time could not be allowed to the executors as against the official manager in respect of the call. *Official Managers of the Newcastle Banking Company v. Hymers*, 22 Beav. 367.

Payments to legatees, made under a decree in a legatee suit, cannot be allowed, as against creditors, if made without having the accounts taken, and therefore as upon admission of assets. *Ibid.*

Attendance by a medical man on the deceased,—Held, under the circumstances, to have been gratuitous, and his demand as a debt against the assets was rejected. *Packman v. Vivian*, 24 Beav. 290.

(B) CALLS ON SHARES.

A creditors' suit being instituted to administer the estate of a testator who died possessed of certain shares in a company, a claim was made by the company for payment of calls already due upon the shares, and for a provision as to future calls:—Held, that the calls already made were specialty debts, but that no provision could be made for future calls, as against the simple contract creditors. *Wentworth v. Chevill*, 26 Law J. Rep. (N.S.) Chanc. 760.

A testator, by his will, gave (after the death of his wife) any shares in railways, mines or other undertakings that might belong to him at his decease, to his second son, and in case of his death without issue the same to revert to his two other children. The testator was possessed of railway shares upon which, after his death, calls were made. The calls were paid by his widow, as executrix, and the company had power to make further calls. The residue was not sufficient to meet these calls. The Court directed a sale of the shares by the executrix, who was to retain the sums already paid by her for calls, and to invest the residue in consols, the dividends of which were to be paid to her for life; without prejudice to the question out of what fund the calls already paid were ultimately to be borne. *Day v. Day*, 28 Law J. Rep. (N.S.) Chanc. 947.

(C) CONTINGENT LIABILITIES.

A testator was possessed of leasehold estate in respect of which he was liable upon onerous covenants. In a suit for the administration of his estate the leaseholds were sold and the money brought into court:—Held, that the suit indemnified the executor from all future breaches of covenant; that no part of the testator's estate ought to be set aside to meet contingent liabilities; that the estate ought to be distributed, and that the remedy of any future creditor was not against the executor, but against the parties among whom the estate had been distributed.

Waller v. Barrett, 27 Law J. Rep. (N.S.) Chanc. 214; 24 Beav. 413.

A sum of money was set apart in November 1857 by executors, as an indemnity fund, to protect them from any liabilities in respect of the leaseholds of their testator. A petition that such indemnity fund might be paid over to the residuary legatee, on the ground that it had become unnecessary by the terms of the act, 22 & 23 Vict. c. 35. s. 27, was dismissed, the act not being retrospective. *Dodson v. Sammell*, 29 Law J. Rep. (N.S.) Chanc. 335.

On the sale of a leasehold before the passing of the act, 22 & 23 Vict. c. 35, the purchaser covenanted to indemnify the vendor against the covenants of the lease. He bequeathed the leaseholds to his widow, and appointed her his executrix:—Held, that the act applied, and that the executors of the widow were at liberty to distribute her estate without setting apart any fund to provide against the liability under the covenant. *In re Green*, 2 De Gex & J. 121.

(D) INTEREST ON DEBTS.

A testator, by his will, gave all his real and personal property to his wife, out of which he desired that she would discharge all his legal debts and enjoy the surplus for her life; and at her decease the property was to be divided as in the will mentioned. A farm servant of the testator left his wages from time to time in his master's hands, and it was agreed between them that the debt thus due should carry interest. The testator died in 1837:—Held, in a suit instituted after the death of the widow of the testator, in 1854, for the administration of his estate, that the Statute of Limitations did not operate as a bar to arrears of interest upon the sum left by the servant in his master's hands, the testator's hands. *Blower v. Blower*, 28 Law J. Rep. (N.S.) Chanc. 181.

(E) MARSHALLING DEBTS.

A testator who had assigned during his life certain leasehold property, bequeathed by his will other leaseholds and the residue of his property to tenants for life, with remainders over. The assignees of the leaseholds became bankrupt, and the executors of the testator took a re-assignment of those leaseholds. Liabilities having arisen under the covenants in the original lease, it was held, that those liabilities must fall upon the corpus, and not upon the income, of the testator's estate. *Allen v. Embleton*, 27 Law J. Rep. (N.S.) Chanc. 297; 4 Drew. 226.

A testator died indebted on bills of exchange. The creditor, before the executors proved the will, issued a writ under the Bills of Exchange Act (18 & 19 Vict. c. 67), and, the executors not appearing, the creditor signed judgment and levied on the goods of the testator in the hands of the executors, and the sheriff sold. Specialty creditors of the testator afterwards took out an administration summons and obtained a decree at the Rolls, and moved to restrain the sheriff from parting with the money arising from the sale, and that the money should be paid into court, and the same was ordered by the Master of the Rolls:—Held, upon appeal (reversing his Honour's order), that as the money was in the hands of the sheriff at the suit of the creditor on the bills of exchange before the decree in the administration suit, the motion must be refused, with costs. *Mar-*

riage v. Skiggs, 28 Law J. Rep. (n.s.) Chanc. 433; 4 De Gex & J. 4.

J B, being seized in fee of estates P and C, and also of other estates, made separate mortgages of P and C, and by his will devised all the estates to trustees upon trust by sale or mortgage to raise money to pay his debts and legacies, and subject thereto upon trust for his daughter, Mrs. H, for life for her separate use, with remainder upon such trusts as she should by deed or will appoint. Mrs. H, by virtue of her power, mortgaged P to A in fee by a deed reciting that the testator's debts and legacies had been paid (which was not the fact), and containing an unqualified covenant by Mr. and Mrs. H against incumbrances. Subsequently, Mrs. H, by virtue of her power, mortgaged C to Holmes in fee, and made similar mortgages of other parts of the devised estates:—Held, that, however the case might have stood if these mortgages had been made by virtue of an ownership in fee, the recital and covenant in A's mortgage gave him no right to have P exonerated from the testator's debts and legacies out of C, and the other estates as against Holmes and the other subsequent mortgagees under the power of appointment. *Stronge v. Hawkes*, 4 De Gex & J. 632.

Held, also, that the charge of debts contained in the will did not give A any right as against Mrs. H's other mortgagees to have the testator's mortgage on P paid out of all the devised estates rateably, but that it must be borne by P. *Ibid*.

H, the husband of the testator's daughter, was one of the trustees and executors of his will, and also entitled to a life estate under a settlement, the funds subject to which consisted almost entirely of a large debt due from the testator. H received the rents of the devised estates for a number of years. At the testator's death, the corpus of the estates was sufficient to pay debts and legacies. H paid more than he received in respect of the personal estate; and treating him as having received the rent in right of his wife, and as only bound to keep down the interest on the debts and legacies as tenant for life, there was nothing due from him to the estate. The estate having become insufficient to pay the debts and legacies,—Held, that an account of rents had been properly directed against H, and that what was coming to him in respect of his life interest under the settlement was liable to be applied in payment of what was found due on such account; and that such liability had priority over the claims of judgment creditors of H, who had obtained a charging order on his life interest, and that it had priority over the claims of the trustees of his settlement for part of the settled fund received by him. *Ibid*.

(F) WHAT ARE LEGAL ASSETS.

A testator died possessed of an equity of redemption of an equitable charge upon real estate:—Held, that although the testator's interest was equitable, the money was recoverable by the executor *virtute officii*, and it must, therefore, be regarded as legal and not equitable assets. *Cook v. Gregson*, 25 Law J. Rep. (n.s.) Chanc. 706; 3 Drew. 547.

A trader being in insolvent circumstances assigned his business and stock-in-trade, part of the consideration consisting of two annuities, one payable to himself for life, the other payable to his wife during her life, in case she survived him. The trader died,

having appointed his wife his executrix. Upon a creditors' suit being instituted, it was decided that the annuity to the wife was void as against creditors. It was now held, in an administration suit, that the annuity was legal and not equitable assets in the hands of the wife. *Hue v. French*, 26 Law J. Rep. (n.s.) Chanc. 317: nom. *Shee v. French*, 3 Drew. 718.

Surplus produce of the sale, under the Court, of leaseholds for lives mortgaged by the testator, held legal and not equitable assets. *Christy v. Courtenay*, 26 Beav. 140.

A testator died in 1842 entitled in reversion to a moiety of a settled fund of personality. His other property, consisting of real estate charged by his will with debts, was administered by the Court. In 1858 the reversion fell into possession, the trustees of the settlement paid the money into court under the Trustees' Relief Act, and the testator's moiety was paid out to his executors:—Held, reversing the decision of the Court below, that this fund was distributable as legal assets. Held, further, that this fund must bear a share of the costs of the suit, which had been paid out of the equitable assets. *Mulrow v. Mulrow*, 4 De Gex & J. 539.

(G) MARSHALLING ASSETS.

A testator bequeathed his personal estate to his wife, discharged from the payment of his debts. He then devised his real estate in Herefordshire in trust to sell and pay "all his just debts, funeral and testamentary expenses," in exoneration of his personal estate, and he devised his real estate in Norfolk without any expressed trust, for payment of his debts. The produce of the Herefordshire estates being insufficient to pay the debts,—Held, that the Norfolk estates were next liable to pay them in exoneration of the personal estate. *Young v. Young*, 26 Beav. 522.

The Act 3 & 4 Will. 4. c. 104. has not affected the law as to the marshalling of assets in favour of pecuniary legatees against devisees of real estates charged with or devised subject to the testator's debts; the question now as before the Act is one simply of construction on the whole of the will; and a mere charge of debts upon the real estate, or a mere devise of the real estate subject to testator's debts without any trust, is sufficient, in the event of the personal estate proving inadequate to pay both debts and legacies, to entitle the legatees to come upon the real estate so far as the personality has been applied in payment of debts. *Rickard v. Barrett*, 3 Kay & J. 289.

(H) PRACTICE.

If a testator entitled to real and personal estate dies indebted upon mortgage and by simple contract, and a suit is instituted for the administration of his estate, declarations of right to tack simple contract debts to securities will not be made before the accounts of the testator's estate are taken. *Chester v. Rolfe*, and *Rolfe v. Chester*, 25 Law J. Rep. (n.s.) Chanc. 247.

Upon taking the accounts in a suit to administer real and personal estate, if a question arises between the tenant for life and the remainderman, as to the proper mode of applying the personal estate, the Court will, if the justice of the case require it, for the purpose of seeing to what extent and in what form the real estate is to be exonerated by means of

the personality, investigate the application of the personal estate, and proceed, as a general rule, upon the principle of applying the capital of the personal estate to pay the principal of debts, and the income of the personal estate to pay the interest of debts. *Shore v. Shore*, 26 Law J. Rep. (N.S.) Chanc. 386; 4 Drew. 219.

The rule that where there are two suits for administration of an estate in different branches of the Court, they shall both be prosecuted in that branch where a decree is first made, is subject to the qualification that the first decree is fairly obtained. *Harris v. Gandy*; *Wills v. Gandy*, 29 Law J. Rep. (N.S.) Chanc. 38; 1 De Gex, F. & J. 13.

Where a testator dies, leaving creditors and assets in England as well as in India, the creditors in England are not entitled to be satisfied out of the assets in England in priority of the Indian creditors. *Reynolds v. Lewis*. *Re Brett*, 29 Law J. Rep. (N.S.) Chanc. 296.

Where the chief clerk disallowed debts alleged to have accrued due after the testator's death, and distributed the assets, and the creditor without moving to vary the certificate, filed his bill against the legatees alone for an account and for repayment of monies paid after the certificate on a continuing obligation of the testator, the Court held the suit maintainable. *Thomas v. Griffith*, 2 Giff. 504.

Where there is a deficiency of assets, the costs of creditors of proving their debts are not payable in the first instance, but are added to their debts and apportioned with them. *Morsehead v. Reynolds*, 21 Beav. 638.

ADMIRALTY.

[See CINQUE PORTS—COAST GUARD—INSURANCE—SALVAGE—SHIP AND SHIPPING.]

- (A) STATUTES.
- (B) ADMIRALTY REGULATIONS.
- (C) PLEADING AND PRACTICE.

(A) STATUTES.

Amendment of 20 & 21 Vict. c. 77, by 21 & 22 Vict. c. 95, enabling the Judge of the Admiralty Court and the Judge of the Probate Court to sit for each other.

Serjeants, Barristers-at-Law, Attorneys, and Solicitors enabled to practise in the High Court of Admiralty by 22 & 23 Vict. c. 6.

Transfer to the Postmaster General of Securities entered into with the Commissioners of the Admiralty in relation to the Packet Service, 23 Vict. c. 6.

Certain Provisions for Admiralty Jurisdiction in the Colonies extended to Her Majesty's Territories in India by 23 & 24 Vict. c. 88.

(B) ADMIRALTY REGULATIONS.

Whether the Admiralty Regulations issued under the provisions of the statute 14 & 15 Vict. c. 79, are repealed by the statute 17 & 18 Vict. c. 120, which repeals the 14 & 15 Vict. c. 79.—*quære*. *Churchward v. Palmer*, 10 Moore's P.C. 472.

(C) PLEADING AND PRACTICE.

Where matter arises out of the defence, with

which the plaintiff was, at the time of giving in his libel, unacquainted, he may take issue upon it in his responsive allegation. *The Bothnia*, 29 Law J. Rep. (N.S.) Prob. M. & A. 65.

Where a party intends to rely upon section 296. of the Merchant Shipping Act, he ought to plead specifically a violation of the statute. *Quære*, as to the extent of that section. *Ibid*.

Where, on a collision between an English and a foreign vessel, cross actions were brought by the owners of the two vessels, and in the action by the English vessel the foreign vessel did not put in an appearance.—Held, that the Court could not stay the action brought by the foreign vessel until she had entered an appearance in the action against her. *The Heart of Oak*, 29 Law J. Rep. (N.S.) Prob. M. & A. 78.

Where, after a formal tender made upon action brought, the plaintiffs proceeded with their action, but afterwards accepted a considerably less tender, the Court refused to allow them the costs incurred subsequently to the tender. *The Sovereign*, 29 Law J. Rep. (N.S.) Prob. M. & A. 113.

ADULTERATION.

[The prevention of the adulteration of articles of food or drink provided for by 23 & 24 Vict. c. 84.]

ADVANCEMENT.

A transferred a sum of stock into the joint names of himself and wife and child, without however declaring any trust thereof, and for nine years regularly received the dividends thereof, and applied them to his own use. He then filed his bill for a retransfer by the Bank to himself. Retransfer ordered upon motion for decree, founded upon the plaintiff's own affidavit, stating that the transfer of the stock into the joint names had not been intended by him as an advancement. *Devoy v. Devoy*, 26 Law J. Rep. (N.S.) Chanc. 290; 8 Sm. & G. 403.

In the event of the object failing for which money has been advanced by trustees under a power of advancement, the money belongs to the person for whose benefit it was advanced, and cannot be recalled into the original fund. Therefore, where, under such a power, the trustees purchased a commission in the army, and the person for whom the commission was purchased sold out shortly after joining his regiment, there being no fraud,—Held, that he, and not the trustees, was entitled to the purchase-money. *Laurie v. Banks*, 27 Law J. Rep. (N.S.) Chanc. 265; 4 Kay & J. 142.

Purchase of stock in the names of the purchaser and his deceased wife's sister, whom (in form) he had married since the act 5 & 6 Will. 4. c. 54, and always treated as his wife:—Held, not to raise a presumption that it was intended as an advancement or provision for her. The authorities have established that this presumption will arise where a purchase is made in the name of a wife, a legitimate child or a grandchild whose father is dead; and also, as it would seem, upon a purchase made in the name of an illegitimate child. *Soar v. Foster*, 4 Kay & J. 152.

A sum of consols invested by a father in the names

of his two daughters.—Held, under the circumstances, to form part of his estate, and not to be an advancement to them. *Bone v. Pollard*, 24 Beav. 283.

ADULTERY.

[See DIVORCE.]

ADVOWSON.

[See CHURCH.]

AFFIDAVIT.

[To hold to Bail: see BAIL.—Of execution of an award: see ARBITRATION.]

(A) WHAT AFFIDAVITS ARE ADMISSIBLE.

(B) FORM AND REQUISITES.

(a) *Entitling*.

(b) *Deponent's Description*.

(C) ERASURE.

(A) WHAT AFFIDAVITS ARE ADMISSIBLE.

[See HABEAS CORPUS.]

On an application to set aside a final judgment signed for want of appearance under the Common Law Procedure Act, 1852, (15 & 16 Vict. c. 76. s. 27).—Held, per Parke, B. and Platt, B., Pollock, C.B. *hesitante*, and Martin, B. *dissentiente*, that an ordinary affidavit of merits is sufficient. Held, also, per Pollock, C.B. and Platt, B., that an affidavit in reply ought not to be received. *Warrington v. Leake*, 25 Law J. Rep. (N.S.) Exch. 27; 11 Exch. Rep. 304.

Upon a motion for a new trial in an action of *crim. con.*, on the ground of surprise, the Court will receive the affidavit of the defendant, but not that of the plaintiff's wife. *Hawker v. Seale*, 17 Com. B. Rep. 595.

Upon a motion for a new trial in an action of *crim. con.*, on the ground of surprise.—*Semble*, that the affidavit of the plaintiff's wife cannot be received for any purpose. *Ling v. Croker*, 2 Com. B. Rep. N.S. 760.

(B) FORM AND REQUISITES.

(a) *Entitling*.

Upon a motion for a *sci. fa.* against a shareholder in a railway company, the affidavits are properly instituted in the original action. *Edwards v. the Kilkenny and Great Southern and Western Rail. Co., In re Roberts, In re Colls*, 3 Com. B. Rep. N.S. 786, 787.

(b) *Deponent's Description*.

[See BILL OF SALE.]

An attorney was struck off the roll at his own request, and afterwards (in the same term) applied to be restored. His affidavit described him as "one of the attorneys of the court." The Court required it to be amended. *In re Thomas Simpson*, 1 Com. B. Rep. N.S. 554.

(C) ERASURE.

Although an erasure appeared in the jurat of an Digest, 1855—60.

affidavit, the Court, being satisfied that the substance of the statute (3 & 4 Will. 4. c. 74), which required the affidavit, had been complied with, allowed it to be filed, notwithstanding Reg. Hil. Term, 1853, rule 140. *Re Denton*, 28 Law J. Rep. (N.S.) C.P. 255; 6 Com. B. Rep. N.S. 287.

AFFIRMATION.

[The form of affirmation to be made in certain cases by Quakers and other persons by law permitted to make an affirmation instead of taking an oath, settled by 22 Vict. c. 10.]

ALEHOUSE.

(A) LICENCE.

(a) *Jurisdiction of Borough Justices to grant*.

(b) *Certificate of Overseer*.

(B) OFFENCES.

(a) *Gaming*.

(b) *Allowing Prostitutes to assemble in*.

(c) *Sunday Trading*.

(A) LICENCE.

(a) *Jurisdiction of Borough Justices to grant*.

It is not necessary that a borough should have a separate Quarter Sessions in order to be a "town corporate," within the Ale Licensing Act, 9 Geo. 4. c. 61. s. 1. *Brown v. Nicholson*, 28 Law J. Rep. (N.S.) M.C. 49.

The Justices of a borough which had not a separate Quarter Sessions appointed the 7th of September for granting licences for such borough, after the county Justices had appointed the 8th of September for their licensing meeting:—Held, that a person who had given the notices required by the 9 Geo. 4. c. 61. for the meeting appointed by the borough Justices, and not for that appointed by the county Justices, was rightly licensed to sell excisable liquors in the borough by the borough Justices, notwithstanding such Justices had not an exclusive jurisdiction, and the county Justices had so appointed their licensing meeting before the borough Justices had appointed theirs. *Ibid*.

(b) *Certificate of Overseer*.

The exception, in section 35. of 11 & 12 Vict. c. 43, of "any information or complaint, or other proceeding under or by virtue of any of the statutes relating to Her Majesty's revenue of Excise or Customs, Stamps, Taxes, or Post-office," does not apply where the particular information or complaint proceeds upon a section of a statute not relating to the revenue of Excise, &c., although there are other sections in the statute which do relate to the revenue of Excise, &c. A conviction, therefore, under section 8. of 4 & 5 Will. 4. c. 85, for signing a false certificate for the purpose of obtaining a licence for the sale of beer, drawn up according to the form provided in Schedule (I. 1.) of 11 & 12 Vict. c. 43, is valid. *The Queen v. Bakewell*, 26 Law J. Rep. (N.S.) Q.B. 150; 7 E. & B. 848.

The statute 3 & 4 Vict. c. 61. s. 1. enacts that no licence shall be granted for the sale of beer by retail to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed, and makes a licence granted contrary to the act null and void; and section 2. enacts, that the applicant shall produce to the grantor of the licence a certificate from the overseer of the parish, that such applicant is the real resident and occupier of the house:—Held, that although the fact that the applicant is the real resident holder and occupier is essential to give validity to the licence, the certificate of the overseer of the fact is not a condition precedent to the obtaining of the licence. Therefore, where the overseer declined to certify, but the supervisor of Excise obtained information which satisfied him that the applicant was the resident holder and occupier, and thereupon the licence was granted, the licence was held to be valid. *Thompson v. Harvey* (Ex. Ch.), 28 Law J. Rep. (n.s.) M.C. 163.

(B) OFFENCES.

(a) Gaming.

An innkeeper is guilty of an offence against the tenour of his licence (under 9 Geo. 4. c. 61), by which it is provided, "that he shall not knowingly suffer any unlawful games or any gaming whatsoever in his house or premises," if he allow private friends of his own, in his own private room in the licensed premises, to play at cards for money. *Patten v. Rhymer*, 29 Law J. Rep. (n.s.) M.C. 189.

(b) Allowing Prostitutes to assemble in.

A licensed alehouse is a place of public resort for the sale of refreshments, within the Town Police Act, 10 & 11 Vict. c. 89. s. 35, and the keeper of it is liable to penalties under that section for allowing prostitutes to assemble therein; although he may also at the same time be guilty of an offence against the tenour of his licence, under the 9 Geo. 4. c. 61. *Cole v. Coulton, Clerk to the Lynn Paving Commissioners*, 29 Law J. Rep. (n.s.) M.C. 125.

A local act for the improvement and management of the town of L, after incorporating certain sections of the 10 & 11 Vict. c. 89, (amongst others the 35th,) enacted, that penalties recovered before Justices, not otherwise directed to be paid, should be awarded to the corporation of the town, or the Commissioners under the act, according as the proceeding for the penalty was taken on behalf of one or other of those bodies. An information, under the 10 & 11 Vict. c. 89. s. 35, against the keeper of a house of public resort for the sale of refreshments, was laid by the clerk to the Commissioners, but he had no authority from them, express or implied, otherwise than from having published, by their orders, a printed notice that the above 35th section would be enforced in the town:—Held, by *Cockburn, C.J.*, that the information being for an offence against public policy might be laid by any one, without authority from the party to whom the penalties to be recovered were to be awarded, so long as he professed that the recovery of the penalties should enure to the benefit of that party; by *Crompton, J.*, that authority from the Commissioners to prosecute on their behalf sufficiently appeared on the facts. *Ibid.*

(c) Sunday Trading.

The statute 18 & 19 Vict. c. 118, by which alehouses are required to be closed within the hours of three and five on Sundays, operates as a repeal of so much of the 9 Geo. 4. c. 61. (which imposes a penalty on offences against the tenour of the licence) as prohibits the opening of the house during the usual hours of the afternoon divine service in the church or chapel of the parish or place in which the house is situate. It is, therefore, no offence to keep such a house open between half-past two and three, although that may be during the usual time of afternoon service in the parish. *Whiteley v. Heaton*, 27 Law J. Rep. (n.s.) M.C. 217.

It is a question of fact what is "a traveller," within the exception of 18 & 19 Vict. c. 118. s. 2, by which licensed victuallers are not allowed to open their houses for the sale of beer, &c. between the hours of three and five on Sundays, except to a traveller; but a person is not less a traveller, within the meaning of such exception, because he travels for pleasure. *Atkinson v. Sellers*, 28 Law J. Rep. (n.s.) M.C. 13.

A party of persons left, on a Sunday afternoon, the town of L, in a vehicle, for pleasure, and after driving a round of eight to ten miles, arrived at the inn of a licensed victualler at G, which is situate about five miles from L, where they were served with beer and refreshments between the hours of three and five. None of the persons lived at G:—Held, that, on these facts, the Justices ought not to convict the victualler, under the 18 & 19 Vict. c. 118. s. 2, as the persons whom he had so served were travellers, within the meaning of the exception to that section. *Ibid.*

An information was laid, under statute 11 & 12 Vict. c. 49. s. 1, against a licensed beerhouse keeper, that he, on a Sunday, did open his house for the sale of beer before half-past 12 p.m., the same not being refreshment for travellers. On appeal, under the 20 & 21 Vict. c. 43, against a conviction on this information,—Held, that it was not necessary, especially since statute 11 & 12 Vict. c. 43. s. 14, to give evidence negating the exemption as to travellers, introduced in section 1. of statute 11 & 12 Vict. c. 49, and negated on the face of the information; but that it lay upon the defendant to bring himself within the exemption. The evidence in support of the information was, that, a little after midnight on Saturday, the door of the house was closed, and all appeared quiet; that a little after two on the Sunday morning persons looking through the window saw a man drinking with the defendant in the house; and that afterwards the defendant let the man out:—Held, on appeal, that this constituted no evidence of the offence charged in the information; inasmuch as it did not appear but that the man was let into the house on the Saturday, or that the house was open at all on Sunday before he was let out; and the conviction was quashed. *Tennant v. Cumberland*, 1 E. & E. 401.

ALIEN.

[Persons enabled to establish legitimacy and the validity of marriages, and the right to be deemed natural-born subjects, by 21 & 22 Vict. c. 93.]

The wife of an alien enemy cannot maintain an action in her own name on a contract made either before or during coverture. *De Wahl v. Braune*, 25 Law J. Rep. (N.S.) Exch. 343; 1 Hurl. & N. 178.

If real estates are devised to British-born subjects, upon trust for the benefit of aliens, the trust will, in equity, be executed for the benefit of the Crown. *Barrow v. Wadkin*, 27 Law J. Rep. (N.S.) Chanc. 129; 24 Beav. 327.

ALIENATION.

In 1700 Charles Earl of Shrewsbury settled certain lands in tail male, with the reversion in fee to himself, and died in 1718, leaving Gilbert Talbot, who then became heir, his heir-at-law. The persons entitled to take under the said settlement were affected by the Roman Catholic Disability Acts; and after their deaths and that of Earl Gilbert without issue male the title of the earldom would, by course of descent, have come to William then Bishop of Salisbury. In 1718 an arrangement was made with the Bishop, by which Earl Gilbert settled the lands in tail male in favour of the persons entitled to take as tenants in tail under the settlement of 1700; and an estate act (6 Geo. 1. c. 29.) was obtained from parliament, which confirmed this settlement of 1718, and annexed the settled estates to the title of the earldom. The act expressly prohibited alienation by the tenants in tail, with a proviso that such tenants as, within six months of their attaining the age of eighteen, took the oaths and subscribed the declaration provided for by the 1 W. & M. c. 8. and the 30 Car. 2. c. 1. (stat. 2.) should not be disabled from alienating while they continued Protestants. This proviso was inserted in consequence of an opposition made in parliament to the passing of the act, on behalf of an infant heir in tail under the settlement of 1700, who was also such heir under the settlement of 1718. The proviso was afterwards repealed by a private act (6 & 7 Vict. c. 28.) passed after the general act of the 10 Geo. 4. c. 7. for removing Roman Catholic disabilities. Earl Bertram (the last tenant in tail in possession) died in 1856, having in that year executed a disentailing deed for the purpose of barring the entail. On his death the title to the earldom descended to the plaintiff, who thereupon claimed the estates which had been so annexed to the title:—Held, that at the time of the passing of the said estate act (6 Geo. 1. c. 29.) Roman Catholics were not deprived of the power of alienation by any general law then existing; and therefore the clause in that act prohibiting alienation was not declaratory of the general law, and consequently the 10 Geo. 4. c. 7, which removed only disabilities imposed by the general law, did not affect such clause, and the disentailing deed executed by Earl Bertram was void. *Shrewsbury v. Scott*, 29 Law J. Rep. (N.S.) C.P. 34; 6 Com. B. Rep. N.S. 1.

Held, also, that as regards such restraint against alienation, it was immaterial whether Earl Bertram was or was not tenant in tail under the settlement of 1700, as that settlement was so far controlled by the settlement of 1718 and the said estate act as to be subject to the condition against alienation. *Ibid.*

Held, also, that since the said estate act treated Earl Gilbert as having the reversion in fee, both he

and that reversion were bound, although he might, in fact, have been incapacitated from granting any estate by reason of his being a Jesuit priest, and within the statute 1 Jac. 1. c. 4. s. 6. *Ibid.*

Held, further, that as the rights of the infant tenant in tail were brought to the knowledge of the legislature at the time of passing the said estate act, that act was binding on him notwithstanding his infancy, and although he was not a party concurring in its provisions. *Ibid.*

Held, by *Cockburn, C.J.*, that even if the effect of the 10 Geo. 4. c. 7. was to make it impossible to perform the condition of taking the oath and making the declaration required in the proviso to the said estate act, in order to enable the tenants in tail to alienate, the consequence would only be to take away altogether such power of alienating. *Ibid.*

And upon appeal, held, by the Exchequer Chamber, that whether there was, under the settlement of 1700, a prior estate, and paramount to the estate which (but for the private act, 6 Geo. 1. c. 29.) Earl Bertram might have taken under the settlement of 1718, the governing instrument was the private act which incorporated and modified both settlements, and vested the estates in the plaintiff as tenant in tail under the act; that the prohibition against alienation, contained in section 8. of the same act, was not repealed by the Roman Catholic Relief Act, 10 Geo. 4. c. 7; and, consequently, that Earl Bertram had no power to bar the entail, or prevent the right of the plaintiff from prevailing. *Ibid.*, 29 Law J. Rep. (N.S.) C.P. 190.

ALIMONY.

[See DIVORCE.]

ALLUVION.

Land formed by gradual accretion belongs to the owner of the adjacent soil. *Doe d. Seeb Kristo v. the East India Co.*, 10 Moore's P.C. 140.

AMBASSADOR.

The public minister of a foreign state accredited to and received by the Sovereign of England, having no real property in this country, and having done nothing to disentitle him to the privileges generally belonging to such public minister, cannot be sued in the Courts of this country for a debt, while he remains such public minister, even though neither his person nor his goods are touched by the suit. *The Magdalena Steam Navigation Co. v. Martin*, 28 Law J. Rep. (N.S.) Q.B. 310.

AMENDMENT.

[Nunc pro Tunc, see ARBITRATION: *Bell v. Postlethwaite*—Of indictment, see PERJURY: *The Queen v. Whatley*.]

(A) OF PROCESS.

(B) OF SPECIAL CASE.

(a) *Stated by Consent.*

(b) *Stated by Justices.*

- (C) OF JUDGE'S ORDER.
- (D) OF ORDER OF JUSTICES ON CERTIORARI.
- (E) AT NISI PRIUS.
- (F) BY THE COURT AFTER REFUSAL OF JUDGE AT NISI PRIUS.
- (G) IN SUITS FOR DISSOLUTION OF MARRIAGE AND JUDICIAL SEPARATION.
- (H) BY QUARTER SESSIONS.

(A) OF PROCESS.

A writ issued under section 1. of the Summary Procedure on Bills of Exchange Act, 1855, by the indorsee against the maker of a promissory note, omitted the maker's name in the copy of the note indorsed upon it pursuant to that section and Schedule (A.) Upon a motion by the defendant to set aside the copy of the writ and the service thereof, and all subsequent proceedings, for this omission, the Court, under the Common Law Procedure Act, 1852, ordered the writ and copy to be amended, and the service to stand good, the plaintiff undertaking to pay the costs of the application. *Knight v. Pocock*, 25 Law J. Rep. (N.S.) C.P. 31; 17 Com. B. Rep. 177.

A plaintiff may, before service of a writ of summons in an action, correct a mistake in the name or the number of the defendants, and cause it to be re-sealed without altering the teste of the writ. *Gibson v. Varley*, 26 Law J. Rep. (N.S.) Q.B. 79; 7 E. & B. 49.

The Court has no power to alter the date of a writ, after it has been once issued, so as to save the Statute of Limitations, even in the case of a mistake. *Clark v. Smith*, 27 Law J. Rep. (N.S.) Exch. 155; 2 Hurl. & N. 758.

(B) OF SPECIAL CASE.

[See LANDLORD AND TENANT: *Carpenter v. Parker*.]

(a) Stated by Consent.

Where a special case has been stated for the opinion of the Court, under section 46. of the 15 & 16 Vict. c. 76, the Court will not, on the application of one of the parties, amend the case to enable the party applying to raise a point which the other party refuses to consent to raise, unless the point has been omitted by error or through fraud. *Mersey Dock and Harbour Commissioners v. Jones*, 29 Law J. Rep. (N.S.) C.P. 239; 8 Com. B. Rep. N.S. 124.

(b) Stated by Justices.

[See PAWNBROKER: *Shackell v. West*.]

Justices having stated a case for the opinion of the Court, under the 20 & 21 Vict. c. 43. s. 2, this Court will not, before the case comes on for argument, entertain a motion to send it back to be amended. *Christie v. the Guardians of the Poor of St. Luke, Chelsea*, 27 Law J. Rep. (N.S.) M.C. 153.

Where Justices, in a case stated for the opinion of this Court, omitted to set out a material document, which, as appeared by affidavit, was in evidence before them, the Court sent the case back to them for amendment, on motion, before the case came on for argument. *The Yorkshire Tire and Axle Co. v. the Rotherham Local Board of Health*, 27 Law J. Rep. (N.S.) C.P. 235; 4 Com. B. Rep. N.S. 362.

(C) OF JUDGE'S ORDER.

If an order made by consent is, through mistake, capable of an interpretation contrary to the real intention, it will be amended by the Court so as to make it plainly and clearly represent that intention. Where the parties had agreed to a special case, the order by consent containing these words: "the parties agreeing in every respect to be bound by the judgment of the Court;" and after judgment the unsuccessful party brought error; and the other party obtained an order to stay proceedings in consequence of the former order, which he represented as an agreement not to bring error; and the party who brought error swore that the words were inserted in the order because there were questions besides mere liability, as amount, &c.; and the parties wished all the questions raised to be decided; and the other party did not distinctly deny this; and there were in fact various questions raised by the case,—the Court rescinded the second order, and also amended the first order, by striking out the words inserted: the Court, considering that they did not amount to an agreement not to bring error, but that the party who sought to sue out error might not be embarrassed by any difficulties arising from an order which has been made in terms not intended. *Oldershaw v. King*, 26 Law J. Rep. (N.S.) Exch. 384; 2 Hurl. & N. 399.

(D) OF ORDER OF JUSTICES ON CERTIORARI.

An order was made for the removal of F, a pauper, from the parish of B to the parish of H. The execution of this order was duly suspended in consequence of the illness of F. After the death of F, an order was made upon the officers of the parish of H, for the payment of the expenses of relieving him. The Justices who made this last order described themselves as Justices, &c. for the borough of B in the county of S. The order, having been brought up by certiorari, was amended by the Court, by adding the words "in and" before the word "for." *The Queen v. the Inhabitants of Hellingley*, 28 Law J. Rep. (N.S.) M.C. 167.

(E) AT NISI PRIUS.

[See CONTRACT: *The Times Fire Assurance Company v. Hawke*—COVENANT: *Martyn v. Williams*.]

The plaintiff declared as for an injury to land in his possession, which, however, turned out on the trial to have been in the possession of his tenant. The real question in controversy between the parties was, whether the land was the plaintiff's property, and whether there was a right of way across it:—Held, that the Judge had power to amend the declaration so as to adapt it to an injury to plaintiff's reversionary interest. *May v. Footner*, 25 Law J. Rep. (N.S.) Q.B. 35; 5 E. & B. 505.

The 222nd section of the Common Law Procedure Act, 1852, which enables a Judge to amend all defects and errors in proceedings in civil causes, does not apply to cases of misjoinder of parties. The 37th section, which enables a Judge to amend a misjoinder of defendants, as a variance, at the trial, does not apply to a case where a defendant has been joined, not by mistake, but for the purpose of trying his liability.—*Semble*, "at the trial" means before verdict. In an action of contract against two defendants, the jury having found that one only was liable,

the plaintiff's counsel, who throughout the trial contended that both were liable, thereupon and before the verdict was recorded, applied for leave to amend by striking out the name of the other:—Held, that the Judge was right in refusing to allow the amendment to be made. *Wickens v. Steel*, 26 Law J. Rep. (n.s.) C.P. 241; 2 Com. B. Rep. N.S. 488.

Where a party who is entitled to a limited right, exercises it in excess, so as to cause a nuisance or create a right of action entire in its nature (as where a window or a drain is enlarged or applied to other purposes than originally authorized), as the entire nuisance may be abated, an action for an obstruction of the original right of easement cannot be maintained, until its exercise has been reduced within its original limits; and if an action is brought for the obstruction, in which the right is declared upon according to its enlarged exercise, and the declaration is not supported by the proof, on a traverse of the right as laid, an amendment will not be allowed, as the effect would be to evade, and not to determine, the question really in controversy between the parties. Thus, where the declaration was for obstructing a drain, over which the plaintiff was alleged to have had a right of user, and which he had used for general drainage, and the right proved was only to use the drain not for foul drainage, but for ordinary refuse water, the plaintiff failed at the trial, and the Court refused an amendment. *Crookwell v. Russell*, 26 Law J. Rep. (n.s.) Exch. 34.

On a count charging that the defendant falsely represented that a business produced "100l. a month" (which was admitted to be true), an amendment had been allowed at the trial, by inserting the words "over the counter":—Held, that the amendment was rightly made. *Roles v. Davis*, 28 Law J. Rep. (n.s.) Exch. 287; 4 Hurl. & N. 484.

Count on a contract by plaintiff to deliver to defendant at C a cargo in March. Breach, that defendant would not accept, or pay for, the goods. Pleas—(1) Non assumpsit; (2) That plaintiff was not ready or willing to deliver at C in March. Issue thereon. At the trial, it appeared that defendant had by letter requested plaintiff to postpone the shipment for defendant's convenience; that the ship arrived in C on the evening of the 31st of March, and, consequently the cargo was not ready for delivery till April. The Judge, on plaintiff's application, amended the count by inserting an averment that, at defendant's request, the plaintiff delayed the shipment, and the defendant promised to accept a delivery of that shipment with reasonable speed, and exonerated the plaintiff from delivering in March. The defendant objected to the amendment being made, and requested a postponement of the trial, which the Judge refused. Thereupon the defendant refused to alter his plea, or appear further; and the jury, under the Judge's direction, assessed the damages. On a motion for a new trial,—Held, that whether the discretion of a Judge at Nisi Prius in making an amendment to raise the real point in controversy and in imposing terms be reviewable in banc or not, it was in this case properly exercised; and that no injustice being suggested to have been sustained by the defendant in consequence of the refusal to postpone the trial, the discretion of the Judge in that respect ought not to be reversed. Rule refused. *Tennyson v. O'Brien*, 5 E. & B. 497.

(F) BY THE COURT, AFTER REFUSAL OF JUDGE AT NISI PRIUS.

No appeal lies against the refusal *simpliciter* of an amendment by a Judge at Nisi Prius, but the Court will review such refusal of the Judge when it becomes necessary to do so for the purposes of justice. *Brennan v. Howard*, 25 Law J. Rep. (n.s.) Exch. 289; 1 Hurl. & N. 138.

If the Judge at a trial refuses to amend, under sections 35. and 37. of the Common Law Procedure Act, 1852, by striking out the name of a defendant, who has been misjoined with another defendant, because he is not satisfied that the misjoinder was not for the purpose of obtaining an undue advantage, and that injustice would not be done by the amendment, the Court has no power to review his decision and order the amendment to be made. *Holden v. Ballantyne*, 29 Law J. Rep. (n.s.) Q.B. 149.

(G) IN SUITS FOR DISSOLUTION OF MARRIAGE AND JUDICIAL SEPARATION.

Leave to amend a petition for dissolution of marriage, no notice of the motion having been given to the respondent, granted, on condition that the petition should be withdrawn, and served again when amended. *Wright v. Wright*, 27 Law J. Rep. (n.s.) Prob. & M. 32; 1 Sw. & Tr. 80.

Where the petitioner, after an adjournment of the case part heard, in order to procure further evidence, asks leave to amend his petition by adding a new charge, it is an objection to granting his application that the charge in question had come to his knowledge before the petition in its original form was drawn. *Bannister v. Bannister*, 29 Law J. Rep. (n.s.) Prob. M. & A. 53.

Semble—That where a cause has been part heard before the full Court, and adjourned for further evidence, the Judge Ordinary sitting alone has not power to dismiss the petition, or to allow an amendment to be made thereon. *Ibid*.

Semble, also, that the Court will not dismiss the petition on the prayer of the petitioner after evidence has been given in the cause entitling the respondent to a matrimonial remedy. *Ibid*.

Quære—Will the Court make a decree of judicial separation in favour of a respondent, who has proved an answer entitling respondent to a judicial separation unaccompanied by a prayer for the same? *Ibid*.

A petition by a wife for a judicial separation on the ground of adultery, contained a paragraph alleging that the respondent had had two illegitimate children, the issue of an adulterous connexion with H M, born on certain specified days:—Held, that the paragraph was objectionable as pleading merely evidence, and should be struck out. *Matison v. Matison*, 29 Law J. Rep. (n.s.) Prob. M. & A. 80.

(H) BY QUARTER SESSIONS.

Where, by a local act, a select vestry, consisting of the rector, churchwardens and overseers of the parish, for the time being, and twenty-one other persons elected under the act, is made a board of guardians of the poor of the parish, an order of Justices, under the 16 & 17 Vict. c. 97. s. 97, adjudging the settlement of a lunatic pauper to be in the parish, addressed to and served on the churchwardens and

overseers of the parish, and ordering them to pay for the maintenance of the lunatic, is bad; and on appeal by the overseers to the Quarter Sessions, the Sessions have not power under the 113th section to amend the order by inserting "guardians" for "overseers." *The Queen v. the Inhabitants of Liverpool*, 29 Law J. Rep. (N.S.) M.C. 137.

ANATOMY ACT.

A master of a workhouse, in order to prevent the relatives of certain deceased paupers from requiring their bodies to be buried without anatomical examination, after shewing them the bodies, changed the coffins and caused the relatives to follow empty coffins to the grave. The bodies were then, with all the formalities prescribed by the statute 2 & 3 Will. 4. c. 75, taken to Guy's Hospital, dissected, and afterwards buried. The master was paid by the hospital certain sums of money proportionate to the number of bodies brought:—Held, that an indictment charging the prisoner in one count with selling the bodies, in another with taking away the bodies for gain for the purpose of delaying the burial, with intent to have them dissected, and in a third with taking them away with intent to sell and dispose of them, could not be sustained, as the prisoner was protected by section 7. of the statute 2 & 3 Will. 4. c. 75, since the relatives, though prevented by the prisoner's fraud, in fact made no requirement that the bodies should not be dissected. *The Queen v. Feist*, 27 Law J. Rep. (N.S.) M.C. 164; *Dears. & B.* 590.

ANCIENT LIGHTS.

[See EASEMENT—LANDS CLAUSES CONSOLIDATION ACT.]

ANIMALS.

[See HORSE RACE—WARRANTY.]

Certain Acts to prevent the spreading of contagious or infectious Disorders among Sheep, Cattle, and other Animals, amended by 19 & 20 Vict. c. 101; and continued by 21 & 22 Vict. c. 62.

By 12 & 13 Vict. c. 92. s. 3, "every person who shall keep or use, or act in the management of any place for the purpose of fighting or baiting any bull, &c. shall be liable to a penalty," &c., "and every person who shall in any manner encourage, aid or assist at the fighting or baiting of any bull," &c. "or other animal, as aforesaid, shall forfeit and pay," &c.—Held, that this last offence can only be committed in a place so used, as mentioned in the former part of the section. *Clarke v. Hague*, 29 Law J. Rep. (N.S.) M.C. 105.

ANNUITY.

[See LEGACY—REVENUE; Income and Property Tax: *Attorney General v. Shield*.]

Her Majesty enabled to settle an Annuity on Her Royal Highness the Princess Royal, by 20 & 21 Vict. c. 2.

(A) REFUND OF SUBSCRIPTION. (B) ARREARS OF.

(A) REFUND OF SUBSCRIPTION.

A scheme was promoted by the East India Company for granting annuities to their civil servants, who subscribed to a fund upon stated terms, which in the result proved, in certain cases, more favourable to the fund than to the annuitants: but, upon the construction of the regulations forming the contract, it was held, affirming the decision of the Master of the Rolls, that in such cases the annuitant was not entitled to a refund. *Boldero v. the East India Company*, 29 Law J. Rep. (N.S.) Chanc. 125; 1 De Gex, F. & J. 313; affirming 28 Law J. Rep. (N.S.) Chanc. 24; 26 Beav. 316.

(B) ARREARS OF.

The chief clerk of one of the Vice Chancellors, in taking an account directed by the Court, certified that 1,002*l.* was due to J. P. in respect of the arrears of an annuity charged on real estate. The certificate was dated in November 1855. J. P. claimed interest on the debt from the date of the certificate being signed by the Judge, in November 1855, to the time of the hearing on further consideration, which a subsequent incumbrancer opposed:—Held (affirming a decision of the Vice Chancellor), that J. P. was not entitled as against a subsequent incumbrancer to such interest. *Mansfield v. Oyle*, 28 Law J. Rep. (N.S.) Chanc. 422; 4 De Gex & J. 38.

Whether, if the claim had been against the assets of the grantor, it would have prevailed—*quære*. Ibid.

Interest on arrears of an annuity will not be given, except under special circumstances. Ibid.

A certificate of the chief clerk finding money due is not "an order for payment" within the 18th section of the statute 1 & 2 Vict. c. 110. Ibid.

APOTHECARY.

[See PHYSIC.]

APPEAL.

[From County Courts, see INFERIOR COURT—From Petty Sessions, see JUSTICE OF THE PEACE—At Quarter Sessions, see SESSIONS—In Error, see PRACTICE, AT LAW. And see PRACTICE, IN EQUITY—JURY COUNCIL.]

APPORTIONMENT.

[See LANDS IMPROVEMENT ACTS—PRESCRIPTION: *Nichols v. Chapman*.]

Under 4 & 5 Will. 4. c. 22.

(A) RENTS. (B) DIVIDENDS.

(A) RENTS.

An estate was devised to W for life, with remainder to his first and other sons in tail, with remainder to the right heirs of the testator. W was the heir of the testator, and died without issue:—Held, that his

apportionment of the rent growing due at his death. *Re Chulow's Will*, 26 Law J. Rep. (n.s.) Chanc. 513; 3 Kay & J. 689.

Where a tenancy from year to year has been originally created by parol by the tenant in fee, it is not determined by the death of a tenant for life claiming under the original creator, and the statute 11 Geo. 2. c. 19. s. 15. does not therefore apply to such a case. *Cutley v. Arnold*, 28 Law J. Rep. (n.s.) Chanc. 352.

Nor does the 4 & 5 Will. 4. c. 22. apply to rents reserved by parol. *Ibid*.

Therefore, where the tenant in fee demised by parol to tenants from year to year, and died, having devised the estates to a tenant for life, with remainder over, it was held that upon the death of the tenant for life, the remainderman was entitled to the whole of the rents accruing for the half-year in which he died, without apportionment. *Ibid*.

A testator, by his will, which came into operation before the passing of the Apportionment Act (4 & 5 Will. 4. c. 22.), devised all his real estate to trustees, upon trust for the maintenance of his son until he should attain twenty-one, and afterwards upon trust to permit the son to receive the rents for life. The will directed that any part of the trust funds might be invested in government securities or in the purchase of land. Various large estates were purchased by the trustees. The son attained twenty-one in July 1854, and died in the October following:—Held, that the representatives of the son were entitled to the whole of the rents which became payable in September 1854, without apportionment. *Fletcher v. Moore*, 26 Law J. Rep. (n.s.) Chanc. 530.

The Apportionment Act, 4 & 5 Will. 4. c. 22, applies to rents reserved by leases granted after the passing of the act in pursuance of a power created before the act. *Plummer v. Whiteley*, 29 Law J. Rep. (n.s.) Chanc. 247; *Johns*, 585.

(B) DIVIDENDS.

A B died leaving shares in a joint-stock company, the dividends upon which were declared half-yearly and made payable at a fixed period, about a month afterwards. There was a further sum of money due to the shareholders in the company arising from profits upon the sale of shares:—Held, that the dividends upon the shares were apportionable under the statute 4 & 5 Will. 4. c. 22, payment to be calculated from the last day on which the dividend was made payable, and not the day on which it was declared; but that the additional amount was not in the nature of a dividend, and therefore not apportionable under the act. *Hartley v. Allen*, 27 Law J. Rep. (n.s.) Chanc. 621.

APPRENTICE.

[See POOR; Settlement.]

To a declaration upon an indenture of apprenticeship for a breach of covenant to instruct the apprentice in the art and trade of a chemist and druggist, and to provide him with sufficient diet, &c., the defendant pleaded that the apprentice did not faithfully serve the defendant or behave himself as a faithful apprentice, but, on the contrary thereof, conducted himself in so improper and unfaithful and dishonest

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a manner in the defendant's business, and defrauded and robbed the defendant, so that it became unsafe for the defendant to continue the apprentice in his service, wherefore he dismissed him:—Held, that the plea was bad, as affording no answer to the action. *Philps v. Clift*, 28 Law J. Rep. (n.s.) Exch. 153; 4 Hurl. & N. 168.

ARBITRATION.

[See COMPANY—FRIENDLY AND OTHER SOCIETIES—HABEAS CORPUS: *Graham v. Glover*—LANDS CLAUSES CONSOLIDATION ACT.]

(A) SUBMISSION.

(a) *By Compulsory Order under the Common Law Procedure Act, 1854.*

(b) *By Partners.*

(c) *Staying Proceedings in Actions commenced after a Submission, under the Common Law Procedure Act, 1854.*

(d) *Making the Submission a Rule of Court.*

(B) EFFECT OF AGREEMENT TO REFER.

(C) ARBITRATOR.

(a) *Judge of County Court.*

(b) *When disqualified by Interest or Bias.*

(c) *Power and Duty.*

(D) UMPIRE.

(E) AWARD.

(a) *Form and Validity in general.*

(b) *When final.*

(c) *Taking up the Award.*

(d) *Right to bring Error on.*

(e) *Enlarging Time for making.*

(f) *Setting aside or remitting for Amendment.*

(g) *Enforcing.*

(1) *Specific Performance.*

(2) *Attachment and Rule.*

(3) *Signing Judgment.*

(F) COSTS.

(a) *In general.*

(b) *Taxation of.*

(A) SUBMISSION.

(a) *By Compulsory Order under the Common Law Procedure Act, 1854.*

Where the matter in dispute in a cause consists wholly, or in part, of matters of mere account, the Court or a Judge may in either case, if they or he think fit, order the whole matter in dispute to be deferred, or a part only, under section 3. of the Common Law Procedure Act, 1854. *Browne v. Emerson*, 25 Law J. Rep. (n.s.) C.P. 104; 17 Com. B. Rep. 361.

When, on the application of a plaintiff, a compulsory order of reference of the action has been made under the Common Law Procedure Act, 1854, the Court has power, at any time before the award, to amend the particulars of demand. *Gibbs v. Knightley*, 26 Law J. Rep. (n.s.) Exch. 294; 2 Hurl. & N. 84.

Where a case is referred to a Master under the 8th section of the Common Law Procedure Act, 1854, on the ground of the matter in dispute being

matter of mere account, the Master must proceed as in an ordinary arbitration; and he has no right to refuse to inquire into a question of fraud raised before him as to a part of the accounts in dispute. *Insull v. Mooges*, 27 Law J. Rep. (N.S.) C.P. 75; 3 Com. B. Rep. N.S. 359.

An action for dilapidations when money is paid into court, and the question in dispute is only as to the amount of the damages, may be a matter of account and the subject of a compulsory reference within the meaning of the act. *In re Cummins v. Birket*, 27 Law J. Rep. (N.S.) Exch. 216; 3 Hurl. & N. 156.

Where, upon a summons at chambers, to refer a suit to the Master, as involving matter of account, an order so to refer it has been assented to on the part of the plaintiff, and it has been arranged that he shall have the carriage of the order so to refer it, he cannot, after some delay, apply to rescind the order on the ground that it is not a matter of mere account. *Rogers v. Kearns*, 29 Law J. Rep. (N.S.) Exch. 328.

The Court refused to refer an action upon bills of exchange to the Master, under the compulsory clauses of the Common Law Procedure Act, 1854. *Pellatt v. Markwick*, 3 Com. B. Rep. N.S. 760.

(b) By Partners.

The Court will not grant an attachment, or make absolute a rule for payment of money found due by an award against a person who was made a party to the action, which was referred without his consent, and who did not authorize the action which was referred, nor the reference to arbitration, and had no notice of it until after the award; and although he might be liable in law on an implied authority, by reason of the action and reference relating to partnership transactions in a firm of which he was a member, yet, if it appears that he then had retired from the firm, the applicant will be left to enforce the award in an action, and the Court will not enforce it by the exercise of a summary jurisdiction. *Robertson v. Hatton*, 26 Law J. Rep. (N.S.) Exch. 293.

One partner has no implied authority to bind another by submission to arbitration (especially if it be after dissolution), at all events if the submission be of "all matters in difference"; and where such submission took place in an action brought by one partner in the name of both, to recover debts due to the firm, and there was an authority so to do; yet as the other partner, although apprised of the action, had no knowledge of the submission, it was held, that there was no evidence of any authority on his part to refer, and that he was not liable in an action on the award. *Hatton v. Royle*, 27 Law J. Rep. (N.S.) Exch. 436; 3 Hurl. & N. 500.

(c) Staying Proceedings in Actions commenced after a Submission, under the Common Law Procedure Act, 1854.

A charter-party between the plaintiff, on behalf of the shipowner, and the defendant as charterer, stipulated for the payment of a certain sum per ton per month for the hire of the vessel; and, further, that any difference of opinion between the parties, either in principle or detail, should be referred to arbitration. The plaintiff brought an action for the sum which appeared to be clearly due from the defendant for the hire of the vessel. The defendant resisted

payment, on the ground of a *bond fide* cross-claim to damages for a breach of the charter-party, by reason of the unseaworthiness of the vessel at the time she was placed at the defendant's disposal under the charter-party. The defendant had always been ready and willing to refer the matter to arbitration; but the plaintiff had refused to do so, and insisted on his right to recover the claim for the hire of the vessel:—Held, that the defendant was entitled to stay the proceedings in the action under the 11th section of the Common Law Procedure Act, 1854, there being a *bond fide* difference of opinion between the parties in respect of a matter within the agreement to refer; and that it was not necessary that the action should be brought in respect of the same matter of difference, if brought in respect of a matter within the agreement to refer. *Russell v. Pellegrini*, 26 Law J. Rep. (N.S.) Q.B. 75; 6 E. & B. 1020.

F having sued the defendant for the price of timber delivered under a contract, and the defendant having brought a cross-action against F to recover unliquidated damages for a breach of the same contract, both actions and all matters in difference were by Judge's order, made by consent of the parties, referred to arbitration. Before any proceedings in the reference F became bankrupt, and his assignees sued the defendant for the price of the timber. A motion having been made under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125. s. 11.), to stay proceedings in this action,—Held, that it was not a case in which the Court would interfere, assuming they had the power to do so. *Pennell v. Walker*, 26 Law J. Rep. (N.S.) C.P. 9; 18 Com. B. Rep. 651.

Semble—That the 11th section does not apply to such a case. *Ibid*.

Semble, also—That the assignees are not "persons claiming through or under" the bankrupt within the meaning of that section. *Ibid*.

In an action on a charter-party against a surety for freight, the defendant was not allowed a reference under the Common Law Procedure Act, 1854, s. 11, of a claim for compensation for a breach of a warranty of the capacity of the vessel; that being a claim of which the principal, the charterer, only could take advantage, and not the surety. And, *quære*, whether the Court, notwithstanding *Russell v. Pellegrini*, will allow a reference of a matter not available as a defence, or in reduction of damages in the same action, but only a ground for a cross-claim in another action. *Dunst v. Lazard*, 27 Law J. Rep. (N.S.) Exch. 399.

Where, in an action of ejectment against a builder, on a clause of forfeiture in a building contract, an order of Nisi Prius had been made, under which the buildings were to be sold and the builder paid the balance due to him out of the proceeds, and he afterwards sued the employers for money had and received and also for improperly selling, the Court declined either to stay the action or to refer it to the Master. *The Trustees of the Orphan Working School v. Henley; Henley v. the Trustees of the Orphan Working School*, 27 Law J. Rep. (N.S.) Exch. 426.

The plaintiff, who had been engaged by contract under seal to conduct the defendant's business for five years as manager, having been dismissed during the term for mismanagement, sued upon the contract, which provided that in case any dispute or question should arise between the parties in

respect of the carrying on of the business, or otherwise, or any matters connected with the contract, the same should be referred to arbitration:—Held, that a Judge at chambers had jurisdiction under section 11. of the Common Law Procedure Act, 1854, to stay the proceedings in the action, or refer it to arbitration; and that in so doing he properly exercised his discretion. *Wickham v. Harding*, 28 Law J. Rep. (N.S.) Exch. 215.

It appearing that matters of account were involved, —*Quare*—as to the jurisdiction under section 3. as to compulsory reference “wholly or partly” matter of account. *Ibid*.

By a charter-party, it was agreed that the charterers should insure the vessel, and that the policies should be delivered to and be the property of the owners: and the charter-party contained a stipulation that “any question or difficulty which might thereafter arise out of that charter-party should be decided by arbitration,” in a manner pointed out. An action having been brought by the owners against the charterers for refusing to deliver them the policies, against which action it was admitted that there was no defence,—Held, not a case for the application of the 11th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. *Lung v. Pearson*, 1 Com. B. Rep. N.S. 639.

(d) Making the Submission a Rule of Court.

An order of reference with the appointment of an umpire, and two enlargements of the time for making the award, indorsed thereon, having been accidentally destroyed, the Court (on payment of costs) allowed a duplicate of the order, together with copies of the indorsements on the original, verified by affidavit to the best of the deponent's knowledge and belief, to be made a rule of Court. *Parker v. Bach*, 17 Com. B. Rep. 512.

(B) EFFECT OF AGREEMENT TO REFER.

[See CONTRACT: *Hill v. Levey*.]

An agreement to settle disputes between two parties as to the amount to be paid by one of them in respect of the value of goods belonging to, or work done by the other of them, by a reference to two valuers, one to be appointed by each party, does not import any undertaking by the former that the valuer whom he may appoint shall act in the valuation, nor any liability for his not acting. The party is only bound to appoint a valuer on his part; and if the person appointed does not act, the other party is remitted to the original cause of action, and may revoke his submission; or may possibly, if the valuer has undertaken to act and failed in his duty, have a right of action against him; but has no right of action against the party who appointed him. *Cooper v. Shuttleworth*, 25 Law J. Rep. (N.S.) Exch. 114.

Where parties to an agreement provide for the settlement of disputes arising out of the contract by the arbitration of persons mentioned in the agreement, or to be determined when the disputes arise, this does not oust the ordinary tribunals of jurisdiction in such disputes. But where a contract provides for the determination of the contractor's claims and liabilities by the judgment of a particular person, everything depends on his decision, and until he has spoken no right arises which can be enforced either at law or in equity. *Scott v. the Corporation of*

Liverpool, 28 Law J. Rep. (N.S.) Chanc. 230; 3 De Gex & J. 334; 27 Law J. Rep. (N.S.) Chanc. 641; 1 Giff. 216.

J S granted a lease of a coal-mine to E S for a term of years at a rent or royalty of one-eighth of the value of the coal-mine, and E S covenanted to raise at least 4,000 tons, and it was thereby agreed between the parties that if any difference or question should arise between them touching any covenant, matter or thing expressed in the deed, or the meaning thereof, it should be settled by two arbitrators, to be nominated within two months after the difference arose; with mutual covenants to obey and perform the award, and not to bring any action at law or in equity without first submitting all matters to arbitration:—Held (Martin, B. *dubitante*), that, as the agreements and covenants to refer were absolute to oust the jurisdiction of the superior Courts, they were void for that purpose, and could not be pleaded in bar to an action for not raising 4,000 tons of coal. *Horton v. Sayers*, 29 Law J. Rep. (N.S.) Exch. 28; 4 Hurl. & N. 643.

Where the parties, on the eve of the trial of a suit by the wife for judicial separation, by reason of cruelty, agreed that the cause should not be moved, and that arbitration should be resorted to, the Court refused to allow the petitioner to proceed with the original suit she having wilfully interposed obstacles to the progress of the arbitration. *Hayward v. Hayward* distinguished. *Hooper v. Hooper*, 29 Law J. Rep. (N.S.) Prob. M. & A. 59; 1 Sw. & Tr. 602.

A cause stood for trial at Nisi Prius. The action was for rent in arrear. One issue was on a plea of an eviction by P by title paramount to that of the plaintiff. P was not a party to the cause, but claimed the reversion in the premises held by the defendant. P became, by parol, party to an arrangement, by which the matter was to be settled by a reference of the cause to an arbitrator, who was to determine, *inter alia*, on what terms the plaintiff's interest in the premises should be purchased, and in what proportion P should contribute to the payment and to the amount of the damages. An order of Nisi Prius was drawn up, incorporating these terms, and containing a provision that P should become a party to the reference. It was not expressed to be drawn up by his consent, but it was shewn by other evidence that it was in fact by his consent. P afterwards refused to be bound by this order:—Held, that, having submitted to the order in fact, he was bound by it, and could not retract; and that the Court had jurisdiction to enforce obedience in a summary manner. *Williams v. Lewis*, 7 E. & B. 929.

(C) ARBITRATOR.

(a) Judge of County Court.

An order referring a cause to the arbitration of a Judge of a county court under the powers of the Common Law Procedure Act, 1854, (17 & 18 Vict. c. 125.) s. 3, is obligatory on the Judge, who has no option of declining the reference. *In re Cummins v. Birkett*, 27 Law J. Rep. (N.S.) Exch. 216; 3 Hurl. & N. 156.

If for any reason the Judge is desirous to have the propriety of the reference to him questioned, the proper course is to apply to set aside the order. *Ibid*.

(b) *When Disqualified by Interest or Bias.*

A dispute having arisen as to the result of a horse-race, stewards (who, by the rules of the course, were to be the arbiters of all disputes) decided against a horse against which one of them had made a bet:—Held, that the decision of the stewards was not invalid on the ground of one of them being an interested arbitrator. *Ellis v. Hopper*, 28 Law J. Rep. (N.S.) Exch. 1; 3 Hurl. & N. 766.

The existence of any circumstance calculated to bias the mind of an arbitrator, unknown to either of the parties who have submitted to his decision, is a sufficient ground for the interference of the Court. Therefore, where a builder by his contract bound himself to abide by the decision and certificate of an architect as to the amount to be paid for work, not knowing that the architect had given an assurance to the employer that the building should not exceed a certain specified amount, although he refused to guarantee that amount, the Court did not consider the decision of the architect made under such a bias as binding, but gave directions so as to ascertain under the authority of the Court how much remained justly due to the plaintiff. *Kemp v. Rose*, 1 Giff. 259.

The Court will not readily act on parol evidence to fill up a blank in a written contract when the object of the evidence is to inflict a penalty or forfeiture. *Ibid.*

(c) *Power and Duty.*

Where an arbitrator has made an appointment, and one of the parties, although under the mistaken notion that there will be notice of another meeting before an award is made, goes away without tendering evidence, or intimating that he intends to offer it, the arbitrator may proceed *ex parte*, and without further notice make an award. *Tyler v. Shaw*, 27 Law J. Rep. (N.S.) Exch. 320.

Where a cause was referred at Nisi Prius to Y, a mining agent, objection having been made to any legal arbitrator, and Y called in an attorney to sit with him, whereupon the defendants protested and withdrew from the reference, and an award was made *ex parte* in their absence,—Held, that the award was bad. *Proctor v. Williamson*, 29 Law J. Rep. (N.S.) C.P. 157; 3 Com. B. Rep. N.S. 386.

Arbitrators may consult other persons without the assent of the parties, provided they act on their own judgment; but if they bind themselves to adopt the opinion of a person the parties have agreed they may consult, the award will be bad, as not being in fact their award. *Whitmore v. Smith*, 29 Law J. Rep. (N.S.) Exch. 402; 5 Hurl. & N. 824.

On a submission to arbitration, the parties agreed that the arbitrators might appoint an umpire, not to attend the meetings and hear the evidence, but to be consulted by them on any points on which they might disagree. They did so consult him, and agree to be bound by his decision, which they adopted. In an action on the award, plea *nul tiel agard*,—Held, that the award was bad, and that the point arose on that plea, as the award was not really the act of the arbitrators. *Ibid.*

(D) UMPIRE.

The appointment of an umpire under submission to arbitration is a judicial act; and where the power

to make the appointment was vested in two arbitrators, and it appeared that the appointment had not been made or signed by the arbitrators at the same time or in each other's presence, the Court refused to make absolute a rule for an attachment for non-performance of the award of the umpire. *Re Lord v. Lord*, 26 Law J. Rep. (N.S.) Q.B. 34; 5 E. & B. 404.

On a submission to the arbitration of two persons, with power to them, if they should not agree, to appoint a third person "to be umpire in or to concur and join with them in considering and determining all or any of the matters referred," there is a power to appoint such third person before any difference has arisen and before any proceedings have been taken on the reference; and that is, indeed, the proper course to pursue, and such third person when so appointed is not a third arbitrator, but an umpire. And the effect of his appointment is, that he is to sit with the arbitrators and hear and consider the matters referred; and if they do not agree in an award, to make an award upon all matters referred, and not merely those on which they do not agree. And it is sufficient to enable him so to act that at the conclusion of the evidence they arrive at different opinions on some of the matters referred; nor need he, if the time for making the award had expired, wait to see if they ever could agree; and on the other hand, their sitting with him till the time has expired and not then repudiating his authority, is a tacit exercise of their power to enlarge the time for making the award, so as to enable him to make it. *Winteringham v. Robertson*, 27 Law J. Rep. (N.S.) Exch. 301.

Arbitrators were named in a contract to determine the value of brewery premises and the plant, &c. Before entering upon the valuation they were to appoint an umpire, whose authority was to be limited to the matters in difference between the arbitrators. The arbitrators could not agree in the appointment of an umpire; and upon a summons under the Common Law Procedure Act, 1854,—Held, that this was not an arbitration within the meaning of the act, and that the Court had no authority to appoint an umpire. *Collins v. Collins*, 28 Law J. Rep. (N.S.) Chanc. 184; 26 Beav. 306.

Where by the terms of a submission to arbitration two arbitrators were to select a third, and each having named a different person, and refused to give up his nominee, they drew lots which of the two should be appointed, and the person so appointed was unknown to one of the arbitrators,—Held, that the appointment was bad. *In re the European and American Steam Shipping Co. (Limited) and Croskey & Co.*, 29 Law J. Rep. (N.S.) C.P. 155; 3 Com. B. Rep. N.S. 397.

(E) AWARD.

(a) *Form and Validity in general.*

Where a matter is referred to an arbitrator chosen by the parties to the reference, they are bound by his award, both as to fact and law, provided his award be good on the face of it, and there has been no misconduct on his part. *Hodgkinson v. Fernie*, 27 Law J. Rep. (N.S.) C.P. 66; 3 Com. B. Rep. N.S. 189.

Where disputes arising out of two partnerships were referred, by agreement, to an arbitrator, who

was also appointed by the parties receiver of the property of one of the partnerships, and had power to get in the estate, and dispose of it as he might think best for the parties, and the costs of the reference and award were left to his discretion, the arbitrator concluded his award by certifying that he had deducted the costs of the award out of the monies which he had received as receiver.—Held, *per Cockburn, C.J., Cresswell, J. and Willes, J.*, that the award was bad, because the arbitrator had no power to fix his own fees and pay his own costs out of the money he had received, and because it did not decide by whom his costs were to be paid. *Per Williams, J.*, That the award was good, the arbitrator having neglected no duty in omitting to adjudicate as to the costs, which he had chosen in his character of receiver to reduce to nothing by defraying them out of the money he had in his hands as receiver. By the Court, that on a plea of *nil tiel agard*, advantage may be taken of the invalidity of the award on the ground that all the matters in dispute were not determined by it. *Roberts v. Eberhardt*, 27 Law J. Rep. (N.S.) C.P. 70; 3 Com. B. Rep. N.S. 482.

But held, by the majority of the Judges in the Exchequer Chamber, overruling the above decision of the Court of Common Pleas, that the award was good, although the arbitrator had stated that he had deducted the costs of his award out of the money in his hands as receiver, and had not stated what the amount of those costs was, or which party he charged with them. *Ibid.*, 28 Law J. Rep. (N.S.) C.P. 75; 3 Com. B. Rep. N.S. 482.

Upon a reference to three arbitrators, or any two of them, an award made by two, in the absence of, and without finally consulting the third, cannot be supported. *In re Beck*, 1 Com. B. Rep. N.S. 695.

(b) When final.

By a submission to arbitration, under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18.), of a question of disputed compensation, the arbitrator was to determine what sum should be paid for the purchase of certain land, and what "other, if any," sum for severance damage. The arbitrator, by his award, after reciting the submission, and that he had considered the matters so referred to him, awarded a sum to be paid for the purchase of the land, without saying anything as to any severance damage:—Held, on motion to set it aside, that the award was final and good; that the arbitrator, by his silence, negated any right to compensation in respect of severance damage. *In re the Duke of Beaufort and the Swansea Harbour Trustees*, 29 Law J. Rep. (N.S.) C.P. 241; 8 Com. B. Rep. N.S. 146.

(c) Taking up the Award.

Where a party to an arbitration is compelled to pay to a lay arbitrator an exorbitant sum in order to take up the award, he may maintain an action for money had and received to recover the excess beyond what is a proper remuneration for the arbitrator's services. *Barnes v. Braithwaite*, 2 Hurl. & N. 569.

(d) Right to bring Error on.

Where an action is referred by order of Nisi Prius to an arbitrator, who, at the request of the parties, states his award as to part, in the form of a special case for the opinion of one of the superior Courts,

as provided for by section 5. of the Common Law Procedure Act, 1854, and judgment is entered according to the opinion of the Court, such judgment is not one upon which, as provided for by section 32, proceedings in error can be had. *Gumm v. Fowler*, 29 Law J. Rep. (N.S.) Q.B. 189.

(e) Enlarging of Time for making.

Where a cause was referred to an officer of the Court under the compulsory powers of the 17 & 18 Vict. c. 125, and the award was not made within three months, and the time was not enlarged by the Court or a Judge, or the written consent of the parties, as required by section 15, but they continued to attend before the arbitrator after the expiration of the three months without objection, it was held that the party against whom judgment had been signed upon the award was estopped from alleging that there had been no written consent to the enlargement. *Tyerman v. Smith*, 25 Law J. Rep. (N.S.) Q.B. 359; 6 E. & B. 719.

By the 15th section of the Common Law Procedure Act, 1854, a Judge is authorized, "for good cause, to be stated in the order for enlargement," to enlarge the time for making an award:—Held, that an order for enlargement made under this section, is not invalid for omitting to state any cause for making it; and, therefore, if there is no application to set aside such order, and the award is made within the enlarged time, an objection to the award on the ground of such omission in the order cannot be sustained. *Re Burdon*, 27 Law J. Rep. (N.S.) C.P. 250.

Semble—The 3 & 4 Will. 4. c. 42. s. 39, which gives a Judge authority to enlarge the time for making an award, is not repealed by the 15th section of the Common Law Procedure Act, 1854. *Ibid.*

(f) Setting aside or remitting for Amendment.

[See post (g) (2) *Davies v. Pratt*.]

It may be questionable whether the old rule of law, that it is not open to the parties to a reference to complain of an error of the arbitrator, except when apparent on the face of the award, or in case of misconduct, as it rested on the principle that the parties must abide by the award of any arbitrator they had selected, applies to the case of a compulsory reference under the Common Law Procedure Act, 1854, or whether as the arbitrator under such a reference is the officer of the Court, and the reference is a procedure in the suit, in place of trial in the ordinary way, the Court has a jurisdiction to review his decision. And it may be doubtful how far an error arising from a wilful disregard of the pleadings or admissions in the case may amount to such misconduct in an arbitrator as will warrant the Court, under the old rule of practice, in correcting the error. *Brown v. Hellaby*, and *Hellaby v. Brown*, 26 Law J. Rep. (N.S.) Exch. 217; 1 Hurl. & N. 729.

But where the error has been extremely trivial in amount, as compared with the total amount adjudicated upon by the arbitrator, the Court will in any case of arbitration be reluctant to re-open the case, and will probably not do so unless there has been intentional injustices. *Ibid.*

Upon compulsory references to arbitration under the Common Law Procedure Act, 1854, section 3, there is, according to section 7, no other or greater

power in the Courts to set aside awards than under voluntary submissions to arbitration; and under section 8. there is no power to remit an award to the arbitrator, where there would not be power to set aside the award; and there is no such power, except in cases of misconduct, or of error on the face of an award. *Hogg or Hogge v. Burgess*, 27 Law J. Rep. (N.S.) Exch. 318; 5 Hurl. & N. 293.

It is no ground for setting aside an award that the unsuccessful party suffered a surprise; as an arbitrator would have power to postpone the proceedings upon any reasonable application for that purpose. *Solomon v. Solomon*, 28 Law J. Rep. (N.S.) Exch. 129.

The 9th section of the Common Law Procedure Act, 1854, as to applications to set aside awards made under the act, does not require that the rule shall be granted, provided it is moved within the first seven days of the term next following publication, at all events if moved on proper materials; and it is not necessary that an order of reference under the act should be made a rule of court before moving. *Bennett v. Watson*, 29 Law J. Rep. (N.S.) Exch. 357.

Semble—That neither the 9th section nor the 15th (as to enlargement of time for making the award) applies to orders of reference made by consent. *Ibid.*

That even where the 15th section does apply, the attendance of the parties before the arbitrator after the time mentioned therein has expired, and their assent to an indefinite adjournment, for the purpose of his making an award, may amount to evidence of a new parol submission for an award to be made in any reasonable time. *Ibid.*

But it being doubtful whether the case was within the 15th section or not, the Court refused to set the award aside on motion. *Ibid.*

On hearing the parties, and by consent, a Judge made an order referring a cause to an arbitrator to be named. On the 1st of July 1859, on hearing the parties, a further order was made, professing to be under the Common Law Procedure Act, 1854, by which the arbitrator was named and certain terms added by the Judge against the will of the plaintiff. The order gave power to the arbitrator "to adjourn from time to time," but mentioned no time within which the award was to be made. Meetings were held on the 25th of November 1859 and the 3rd of February 1860, which both parties attended. On the last-named day the arbitrator adjourned for the purpose of making his award. The award was made on the 28th of March, and notice of it given to the parties on the 3rd of April. The Court refused to set aside the award, on the ground that it was made after the arbitrator's power had expired, being more than a month after the last meeting. *Watson v. Bennett*, 5 Hurl. & N. 831.

A motion to set aside an award founded upon a Judge's order, made under the 3rd section of the Common Law Procedure Act, 1854, may be made on an affidavit setting out the Judge's order without making the order a rule of Court. *Ibid.*

Section 8. of the Common Law Procedure Act, 1854, which gives power to the Court or a Judge at any time to remit the matters referred to the consideration of the arbitrator, applies to references by consent as well as to compulsory references under that statute. Therefore, where a reference to arbitration was made by consent, by a submission which

might be made a rule of Court, and which provided that in case of a motion to set aside the award the matters might be remitted to the arbitrator, the Court or a Judge has power under that section to remit the matters, although no motion has been made to set aside the award. *In re Morris's Arbitration*, 25 Law J. Rep. (N.S.) Q.B. 261; 6 E. & B. 383.

Where an award is defective on its face in the mode of awarding costs, and is referred back to the arbitrator for the sole purpose of setting right that defect, he may correct the award in this respect, without giving notice to or hearing the parties. *Ibid.*

The 8th section of the Common Law Procedure Act, 1854, empowers the Court to remit the matters referred to the reconsideration of the arbitrator only in cases where, before that act, the Court might have remitted them if the submission had contained a clause empowering the Court to do so. *Hodgkinson v. Fernie*, 27 Law J. Rep. (N.S.) C.P. 66; 3 Com. B. Rep. 189.

When an award has been executed by one of several arbitrators at a different time and place from the others, or when any similar error has occurred, involving no misconduct in the arbitrators or substantial injustice to the parties, the award will not be set aside, but will be sent back to the same arbitrators to be re-executed or corrected. And that course was taken even when a third arbitrator, called in by two others, had not only heard the whole of the evidence already taken read over to him, but had asked questions of the witnesses, without notice to and in the absence of the parties and their attorneys. *Anning v. Hartley*, 27 Law J. Rep. (N.S.) Exch. 145.

Semble—There is no necessity for notice to the parties in such a case. *Ibid.*

Upon a motion to set aside an award, or to refer it back to the arbitrators, the Court will receive evidence by affidavit. *Mills v. the Master, &c. of Society of Boyers*, 3 Kay & J. 66.

Pending a reference to arbitration, the umpire held a communication with the agents of one of the parties, this fact being known to all the parties at the time, and not objected to by any of them, and the reference having proceeded and the award having been subsequently made:—Held, that it was too late for either of the parties, after the award was made, to object to it on the ground of such communication between the umpire and the agents of one of them. *Ibid.*

The 8th section of the Common Law Procedure Act, 1854, does not authorise the Court to send back the award for reconsideration by the arbitrators on any ground except such as before that statute would have induced it to set aside the award, or to treat it as a nullity in an action brought upon it. *Ibid.*

The object of that section was, when any error, formal or otherwise, had occurred, which would vitiate the award, to enable the Court to send it back, if they thought fit, to the arbitrators to correct such error, instead of setting the award wholly aside. *Ibid.*

If a mistake has been made in the award not apparent on the face of it, and such mistake is admitted in an affidavit by the arbitrators, such an admission is sufficient to authorize the Court to set aside the award under the former practice, or to refer it back under that statute. So also if the arbi-

trators insist that they have made no mistake, but state the principle upon which they made the award, and the Court is of opinion that such principle is not consistent with the reference. *Ibid.*

A cause in which the defendant had pleaded never indebted, the Statute of Limitations, payment, set-off, and accord and satisfaction, was referred to a county court Judge, under the compulsory clauses of the Common Law Procedure Act, 1854, the costs of the cause to abide the event of the cause, and the costs of the reference to be in the discretion of the arbitrator. The county court Judge certified "that the defendant was not at the time of the commencement of the action indebted to the plaintiff," and he found a (general) verdict for the defendant, and directed that the plaintiff should pay the costs of the reference:—The Court sent the certificate back to be amended by stating the manner in which the several issues were found. *Holland v. Judd*, 3 Com. B. Rep. N.S. 826.

By an order of reference an action was referred to the award of twelve persons, six to be named by each party to the action; and it was ordered that in the event of either of the parties disputing the validity of the award, &c., the Court should have power to remit the matters thereby referred or any of them to the reconsideration of the said twelve persons; and in the event of either of the said parties declining to act, or dying before they or he should have made their or his award, the parties might, or if they could not agree, one of the Barons of the Court might appoint fresh arbitrators. After the arbitrators had made an award, one of the twelve died. On motion to set aside the award, which was admitted to be bad, —Held, that the Court had power to remit back the matters referred, to the surviving eleven and a fresh arbitrator to be appointed in pursuance of the power in the submission. *Lord v. Hawkins*, 2 Hurl. & N. 55.

(g) Enforcing.

(1) Specific Performance.

By a submission to arbitration between patentees, all matters in difference between the parties relating to gutta percha were referred to the decision of the arbitrator, who was empowered to set aside certain deeds which had been executed by the parties, if he thought fit, and to order assignments to be executed for vesting in trustees all patents and applications for patents relating to gutta percha taken out or made or to be taken out thereafter by the parties or any of them. By the award, the arbitrator "if and so far as he had power and jurisdiction," set aside altogether certain deeds which he specified, but if he had not "power or jurisdiction to set the same or any or either of them aside," or to award any other matter in that his award contained, he declared that the rest of his award was yet to stand. He also by the award decided upon the rights of the parties under the deeds executed by the one, and not thereby set aside, and directed that neither of the parties should grant any licence of or work any of the patents, save under a licence from the trustees, to be appointed under the award which required the parties to nominate their respective trustees within fourteen days, and to signify their election to make licences within two calendar months from the date of the award. The award also directed that the parties should covenant with one another, that they and their licensees should assign

to the trustees any assignable interest which they might respectively have in any patents relating to gutta percha. The submission was made a rule of a Common Law Court. In a suit for a specific performance of the award:—Held, 1. That the award was bad for want of finality and excess of authority. 2. That if it had not been so a submission which would warrant such an award was not sufficiently reasonable to be enforced by way of specific performance. 3. That although the defendant had to some extent acted on the award by nominating trustees, and signifying an election to take licences, there had not been such an acquiescence in the award as to justify the Court in enforcing a specific performance of it against him on that ground, no one appearing to have been misled by his acts. 4. That many, if not all, of the principles applicable to suits for the specific performance of agreements, apply to those for the specific performance of a submission to arbitration, and that therefore the above objections were sufficient answer to such a suit. 5. That ordinarily this Court will not enforce specific performance of part of an agreement, nor consequently of part of an award. *Nichols v. Hancock*, 7 De Gex, M. & G. 800.

(2) Attachment and Rule.

Where an arbitrator in his award makes a mistake in the name of one of the parties to the reference, and the award is referred back to him by the Court to be amended, it is sufficient that he certify that the award "ought to be amended" in the particular manner, without his actually amending it. *Davies v. Pratt*, 25 Law J. Rep. (N.S.) C.P. 71; 17 Com. B. Rep. 183.

On a motion for an attachment, or for a rule, under the 1 & 2 Vict. c. 110. s. 18, for non-performance of an award, the parties cannot go into any matter *dehors* the award itself. Therefore, a party shewing cause against such a rule was not allowed to rely on the pleadings in an action referred which were brought before the Court on affidavit, for the purpose of shewing that the award was bad. *Ibid.*

Where, by an order of reference, the reference was not to be proceeded with till the arbitrator had made his award in another action, and it did not appear that he had made his award in the other action,—Held, that the Court would not presume that the arbitrator had not done his duty, and that this was no answer to a rule calling on one of the parties to shew cause why he should not pay costs in pursuance of the award. *Ibid.*

If after an award directing payment of money to the plaintiff matter arises which gives the defendant a counter claim against the plaintiff for an equal amount, the Court will not grant an attachment on the application of the plaintiff to enforce payment of the money to him. *Rees v. Rees*, 25 Law J. Rep. (N.S.) Q.B. 352.

If to the affidavit upon an application for an attachment for non-performance of an award, there be annexed a copy of the award, from which, and from the submission, which has been made a rule of Court, it appears that the award was within the time limited by the submission, it is not necessary that the affidavit should state the execution of the award within that time. *Higgins v. Street*, 25 Law J. Rep. (N.S.) Exch. 285.

Quare, whether an award made upon a reference

under the 3rd section of the Common Law Procedure Act, 1854, is enforceable by attachment or order under the 1 & 2 Vict. c. 110. s. 18? *Talbot v. Fisher*, 2 Com. B. Rep. N.S. 471.

(3) Signing Judgment.

Execution cannot issue upon an award, made under a compulsory reference pursuant to the 3rd section of the Common Law Procedure Act, 1854, without first signing judgment. *Kendil v. Merriitt*, 25 Law J. Rep. (N.S.) C.P. 251; 18 Com. B. Rep. 173.

The practice which has hitherto prevailed, and the Forms Nos. 9. and 10, issued by the Judges in Michaelmas Vacation, 1854, which direct the judgment to be omitted, are erroneous. *Ibid*.

Where the words "and all matters in difference" were impropriately inserted in an order of reference, made under the above 3rd section, and the arbitrator made his award in favour of the plaintiff, stating that there were no matters in difference but those in the cause, the Court, on a motion to set aside a *f. fa.* issued to enforce the award, amended the order by striking out the words "and all matters in difference." *Ibid*.

Where a verdict is taken for the plaintiff in an action, subject to a reference of the cause and all matters in difference by order of Nisi Prius, and an award is made directing the verdict in the action to stand for the plaintiff for a certain sum, and finding another sum to be due to the defendant in respect of the matters in difference, the plaintiff is entitled to sign judgment for the sum awarded to him in the action in fourteen days after the making of the award. *O'Toole v. Pott*, 26 Law J. Rep. (N.S.) Q.B. 88; 7 E. & B. 102.

(F) Costs.

(a) In general.

Where a rule, under section 3. of the Common Law Procedure Act, 1854, referring a cause to arbitration, is silent as to costs, the arbitrator has no power over the costs, and the successful party is not entitled to have his costs taxed. But where it appeared that the understanding of the officer of the court and the parties on the drawing up of the rule was, that the costs would abide the event, and the arbitrator had awarded in favour of the plaintiff, with costs, the Court amended the rule *nunc pro tunc* so as to give effect to the intention of the parties when the rule was drawn up. *Bell v. Postlethwaite*, 25 Law J. Rep. (N.S.) Q.B. 63; 5 E. & B. 695.

A cause in which a verdict had been entered for the plaintiff was referred with all matters in difference to arbitration, the costs of the cause to abide the event of the award. The arbitrator directed the verdict to stand for a certain sum, which he ordered the defendant to pay to the plaintiff; but he also ordered certain lamps in respect of which the plaintiff claimed damages in the action to be delivered to the defendant:—Held, that the event of the award was in favour of the plaintiff, who was therefore entitled to the costs of the cause. *Mallock Gaslight Co. v. Peters*, 25 Law J. Rep. (N.S.) Q.B. 273; 6 E. & B. 215.

At the trial of a cause a verdict was taken for the sum claimed, subject to a reference to an arbitrator to reduce the amount if he should think proper; the order of Nisi Prius was silent as to costs. The arbitrator made a formal award, directing the amount of

the verdict to be reduced to 1s.:—Held, that the decision of the arbitrator, though in form an award, was in substance a certificate; and that the plaintiff, therefore, was entitled to the costs of the reference as costs in the cause. *Sim v. Edwards*, 25 Law J. Rep. (N.S.) C.P. 175; 17 Com. B. Rep. 527.

Where, by an order of reference, the costs of the award and of the reference are to abide the event of the award, if the award be partly in favour of one party and partly in favour of the other, though there be a substantial balance in favour of one, each party has to pay his own costs. *Gribble v. Buchanan*, 26 Law J. Rep. (N.S.) C.P. 24; 18 Com. B. Rep. 691.

So, where an action and all matters in difference were referred, the costs of reference and award to abide the event of the award, and the arbitrator found for the plaintiff in the action for 80*l.*, and for the defendant for the matters in difference for 6*l.*, and directed the defendant to pay the balance to the plaintiff:—Held, that the plaintiff was not entitled to the costs. *Ibid*.

A declaration contained several counts, one in trover for converting two separate articles, and to this the defendant pleaded not guilty and not possessed, and to the other counts other pleas. At the trial, the record was withdrawn, and by order of Nisi Prius by consent the cause and all matters in difference were referred to an arbitrator, who was to have all the powers of certifying of a Judge at Nisi Prius; the costs of the cause to abide the event of the award, the costs of the reference to be in the discretion of the arbitrator. The arbitrator found all the issues in favour of the defendant, except as to the conversion of one of the articles mentioned in the count in trover, and as to that he found for the plaintiff with one farthing damages. He gave the defendant the costs of the reference, and did not certify:—Held, that the plaintiff was entitled to the costs of the cause. *Wigens v. Cook*, 28 Law J. Rep. (N.S.) C.P. 312; 6 Com. B. Rep. N.S. 784.

In an action on the case, it was referred to an arbitrator to find the facts and state a case, the costs of the reference and arbitration to be costs in the cause, and abide the event thereof; the judgment of the Court was for the plaintiff, but was ultimately arrested by the Court of error:—Held, that under the order of reference, coupled with the 145th section of the Common Law Procedure Act, 1852, the plaintiff was entitled to the costs of the arbitration, as if they had been costs of a trial at Nisi Prius, and also to the costs in the court below. *Whaley v. Laing*, 29 Law J. Rep. (N.S.) Exch. 313; 5 Hurl. & N. 480.

W & M entered into an agreement as to carrying on business together. Differences arose, and M brought an action against W, *inter alia* for fraudulent misrepresentations by which M was induced to enter into the agreement. After issue joined, it was agreed to refer all disputes, differences, and accounts respecting the original agreement, to arbitration; the action to be discontinued; "the costs of the reference and award, including such costs as might be taxed of the action, to abide the event of the arbitration." The arbitrator awarded that W was not guilty of the charges of fraud, and that he was indebted to M in a certain sum on the accounts:—Held, that neither party was entitled to any costs: by *Wightman, J., Crompton, J. and Hill, J.*, on the ground that where two parties agree to refer several disputes "the costs

of the reference and award to abide the event of the award," the costs are not distributable, and neither party is entitled to costs unless the event of the award is altogether in favour of one party; *Cockburn, C.J.* agreeing in the decision, inasmuch as the different matters in dispute were all connected and founded on one original subject-matter, but declining to decide whether or not, if the matters referred had been distinct and separate, "event" might be construed "events," so as to make the costs distributable. *In re Marsack*, 29 Law J. Rep. (N.S.) Q.B. 109.

Where a cause was referred before trial, the costs of the cause to abide the event, and the arbitrator awarded in the plaintiff's favour 81,—Held, that the County Court Act (13 & 14 Vict. c. 61. s. 11.) did not apply, and that the plaintiff was entitled to the costs of the cause. *Jones v. Jones*, 29 Law J. Rep. (N.S.) C.P. 151; 7 Com. B. Rep. N.S. 832.

Where there is a reference, by Judge's order, to arbitration, the costs of the action and the reference to be in the discretion of the arbitrator, the costs of making the award a rule of Court are in the discretion of the Court, and will not be allowed unless deemed necessary; nor will they be deemed so, if the step has been taken without a demand of the money. *Carter v. the Burial Board of Tonge*, 29 Law J. Rep. (N.S.) Exch. 293; 5 Hurl. & N. 523.

The creditor of a trader having in pursuance of the Bankrupt Law Consolidation Act, 1849, filed an affidavit of debt, and the amount having been disputed, an order was made that defendant should enter into a bond with two sureties. An action was then brought to recover the amount claimed. An agreement was then entered into between the plaintiff, the defendant and one K, in pursuance of which the order for the bond was discharged, and the bankruptcy proceedings were terminated, K depositing cheques for the debt and costs, if any, recovered in the action: in case of a verdict for the defendant the cheques to be returned to K, upon his paying 6l. for the costs of the trader debtor summons, and also the costs of any issue found for the plaintiff. At the trial of the cause it was agreed that a verdict should be entered for the plaintiff, subject to the award of an arbitrator, the costs of the cause to abide the event of the award, and the costs of the reference to be in the discretion of the arbitrator. The arbitrator awarded that the verdict should be reduced so that the creditor recovered a sum less than that sworn to:—Held, first, that the defendant's right to costs under the 86th section of the Bankrupt Law Consolidation Act, 1849, was not affected by the agreement or the termination of the bankruptcy proceedings in pursuance of it. Secondly, that as the verdict was to be operative the statute applied, notwithstanding that the cause has been referred to the award of an arbitrator. *Poster v. Hanson*, 1 Hurl. & N. 755.

(b) Taxation of.

Upon a reference of all matters in difference in a cause, the costs to abide the event of the award, the party in whose favour the action is decided by the award is entitled to the costs of the cause, although some of the issues may be found in favour of the other party. To one of several counts in an action of slander the defendant pleaded a multifarious plea of justification, setting forth a series of statements of facts, any one of which was a sufficient answer to

such count. Upon a reference of the cause, the arbitrator found that one of such statements in the plea was true, and that the others were untrue. The finding on the issues as to another count was for the plaintiff, who had the general costs of the cause:—Held, that the finding of part of such plea to be untrue was not a finding of an issue for the plaintiff within the 81st section of the Common Law Procedure Act, 1852, or of the rule Hil. term, 2 Will. 4. r. 74, and that the plaintiff was, therefore, not entitled to the costs of the issue on such plea. *Reynolds v. Harris*, 28 Law J. Rep. (N.S.) C.P. 26; 3 Com. B. Rep. N.S. 267.

Held, further, that the defendant was entitled to the costs of so much of the plea as was found in his favour, including costs of evidence applicable to such part, though also applicable to the residue of the plea, but not to the costs of any evidence applicable only to that part of the plea which was found to be untrue. *Ibid.*

It having been the general practice of this Court not to allow the costs of more than one counsel attending the arbitrator on each side in cases referred to arbitration, the Master, in taxing the plaintiff's costs of the reference, allowed the costs of only one counsel, two having been employed on each side: the Court refused to make absolute a rule calling on the Master to review his taxation in this respect. Where a professional accountant was employed by direction of the arbitrator to examine the defendants' books at the defendants' counting-house, and to ascertain, for the purposes of the reference, the amount of profits on certain contracts, as shewn by such books, which investigation would otherwise necessarily have been held before the arbitrator himself, and at a greater expense to the parties, the Master, in taxing the plaintiff's costs of the reference, allowed the charges of the accountant, but disallowed the costs of the plaintiff's attorney attending these meetings. The Court made absolute a rule calling on the Master to review his taxation as to the costs incurred at these meetings. *Hawkins v. Rigby*, 29 Law J. Rep. (N.S.) C.P. 228; 8 Com. B. Rep. N.S. 271.

An action was referred to arbitration, the costs of the arbitration and award to abide the event. The arbitrators awarded in favour of the plaintiff, who, in order to take up the award, paid their charges, which were exorbitant. The Master, on taxation of the plaintiff's costs, refused to allow the full charge paid by the plaintiff:—Held, that the excessive charge was properly disallowed. *Barnes v. Hayward*, 1 Hurl. & N. 742.

ARMY AND NAVY.

[Her Majesty's Royal Marine Forces regulated, while on Shore, by 19 & 20 Vict. c. 8.—The punishment of Mutiny and Desertion, and the better Payment of the Army and their Quarters, provided for by 19 & 20 Vict. c. 10.—Mutiny and Desertion of Officers and Soldiers in the Service of the East India Company punished, and the Payment of Regimental Debts and the Distribution of the Effects of Officers and Soldiers dying in the Service, regulated by 20 & 21 Vict. c. 66.—The making of Lists and the Ballots for the Militia of the United Kingdom, suspended by 21 & 22 Vict. c. 89.—The 22 & 23 Vict. c. 27.

repeals the 31st section of the 16 & 17 Vict. c. 95, and alters the Limit of the Number of European Troops to be maintained for local Service in India.—Reserve Volunteer Force of Seamen established, and the Government of the same provided for, by 22 & 23 Vict. c. 40.—The 22 & 23 Vict. c. 42. provides for the Establishment of a Reserve Force of Men who have been in Her Majesty's Service.—So much of the 22 & 23 Vict. c. 27, and of certain other Acts, as authorizes the Secretary of State in Council to give Directions for raising European Forces for the Indian Army of Her Majesty, repealed by 23 & 24 Vict. c. 100.—The Expenses of Constructing Fortifications for the Protection of the Royal Armaments and Dockyards and the Ports of Dover and Portland, and of creating a Central Arsenal, provided for by 23 & 24 Vict. c. 109.—The 23 & 24 Vict. c. 112. makes better Provision for acquiring Lands for the Defence of the Realm.—The 23 & 24 Vict. c. 123. amends the Laws relating to the Government of the Navy.—The 23 & 24 Vict. c. 140. facilitates the Acquisition by Rifle Volunteer Corps of Grounds for Rifle Practice.]

ARREST.

[See ASSAULT—BAIL—BANKRUPT—FALSE IMPRISONMENT—POLICE OFFICER—PRISONER.]

- (A) FOR DEBT UNDER 20*l*.
- (B) PRIVILEGE FROM.
- (C) DISCHARGE.

(A) FOR DEBT UNDER 20*l*.

A plaintiff who issues a writ of *ca. sa.* on a judgment for less than 20*l*. is liable to an action of trespass, without the writ being first set aside. *Brooks v. Hodgkinson*, 29 Law J. Rep. (N.S.) Exch. 93; 4 Hurl. & N. 712.

After judgment had been recovered for a debt exceeding 20*l*., the defendant paid certain instalments to the plaintiff, which reduced the amount due under the judgment to 18*l*. 1*s*. :—Held, that, notwithstanding the 7 & 8 Vict. c. 96. s. 57, the defendant might be taken in execution to satisfy such sum. *Holbert v. Starkey*, 4 Hurl. & N. 125.

(B) PRIVILEGE FROM.

An attorney, not being attorney in the cause, attended the Lord Mayor's Court for the purpose of advising the bail during the proceeding of putting in bail to dissolve an attachment against a defendant:—Held, that he was not privileged from arrest upon a *ca. sa.* *Jones v. Marshall*, 26 Law J. Rep. (N.S.) C.P. 229; 2 Com. B. Rep. N.S. 615.

Though an appellant comes to London long before it is necessary to do so in order to attend the hearing of his cause, so that if then arrested he would not be discharged, yet if no arrest is made until his cause is actually in the paper, he will be discharged out of custody. *Persee v. Persee*, 5 H.L. Cas. 671.

The privilege from arrest under civil process is entire—*cundo*, *morando* et *redeundo*. If, therefore, a party cannot claim his privilege *cundo* et *morando*, he will not be entitled to it *redeundo*. A voluntary prosecutor—as a common informer—is not entitled to any privilege from arrest. A person attended

before a Justice of the Peace to obtain a summons against a clerk to the trustees of a turnpike road for not transmitting a statement of the accounts of the trust, pursuant to section 5. of statute 12 & 13 Vict. c. 87. (which subjects the clerk so offending to a penalty), and obtained the summons:—Held, that he was not entitled to privilege from arrest in returning. *Ex parte Cobbett*, 26 Law J. Rep. (N.S.) Q.B. 293; 7 E. & B. 955.

A person attending before a police magistrate as a witness on a charge of felony after a remand, is privileged from arrest on civil process, *cundo*, *morando* et *redeundo*, though he was not under recognizances or summons to appear. *Montague v. Harrison*, 27 Law J. Rep. (N.S.) C.P. 24; 3 Com. B. Rep. N.S. 292.

(C) DISCHARGE.

A defendant who has been held to bail by a Judge's order under the 1 & 2 Vict. c. 110. s. 3. may, on appeal against the order, dispute the existence of the plaintiff's cause of action. *Stammers v. Hughes*, 25 Law J. Rep. (N.S.) C.P. 247; 18 Com. B. Rep. 527.

An arrest under a *ca. sa.* by a bailiff, to whom the warrant is not addressed, in the absence of the officer to whom it is addressed, even though such officer has engaged him to assist him in his absence, he himself being at a considerable distance at the time of the arrest, is irregular, and the defendant will be discharged out of custody. *Rhodes v. Hull*, 26 Law J. Rep. (N.S.) Exch. 265.

A rule to discharge him is properly directed to the plaintiff, and not to the sheriff. *Ibid*.

If the rule does not ask for costs, the Court will not impose it as a condition, that the defendant shall bring no action. *Ibid*.

The plaintiffs and the defendant being foreigners resident abroad, the debt having been also contracted abroad, the defendant was induced by S, acting in collusion with the plaintiffs, on the pretence of arranging an agency, to come to England, and immediately on his arrival was arrested at the suit of the plaintiffs on an order to hold to bail, under 1 & 2 Vict. c. 110. s. 3. The Court, on motion, rescinded the order and discharged the defendant, and set aside the service of the writ of summons and all proceedings thereunder. *Stein v. Valkenhuyzen*, 27 Law J. Rep. (N.S.) Q.B. 236; E. B. & E. 65.

Semble—that the Judge has an absolute discretion, under the 1 & 2 Vict. c. 110. s. 3, in granting or refusing an order to hold to bail. *Ibid*.

The plaintiff brought an action under the Summary Procedure on Bills of Exchange Act, 1855, against the defendant as drawer, and R as acceptor of a bill of exchange for 15*l*., and obtained judgment against the defendant for the debt and costs, and against R for the debt without costs; and a *fi. fa.* was issued against each, which the sheriff was unable to execute. The plaintiff then brought an action against the defendant on the judgment for debt and costs, which together exceeded 20*l*.; and judgment was signed, and a *ca. sa.* was issued for the whole amount of the judgment debt and costs in the new action. After the *ca. sa.* was issued the *fi. fa.* was executed on R's goods, and the amount of the debt, 15*l*., levied. Subsequently to this the defendant, being in custody, was detained under the *ca. sa.*, the amount due on the

judgment being then reduced below 20*l*. by the levy under the *f. fa.* against R:—Held, that the detainer under the *co. as.* was lawful, and that the defendant was not entitled to be discharged until he had paid the balance due on the judgment. *West v. Farlar*, 28 Law J. Rep. (N.S.) Q.B. 81; 1 E. & E. 179.

ARSON.

The prisoner was convicted on an indictment for unlawfully and maliciously setting fire to a stack of grain, under the statute 7 Will. 4. & 1 Vict. c. 89. s. 10. It was proved that the stack which the prisoner set fire to was a stack of the flax plant with the seed in it. The jury found that flax seed was a grain:—Held, that the conviction was proper. *The Queen v. Spencer*, 26 Law J. Rep. (N.S.) M.C. 16; Deane & B. 131.

A person who maliciously sets fire to his own goods in his own house with intent, by burning the goods, to defraud an insurance office, but does not set fire to the house, may be convicted of felony, under an indictment framed upon the statutes 14 & 15 Vict. c. 19. and the 7 Will. 4. & 1 Vict. c. 89. *The Queen v. Lyons*, 28 Law J. Rep. (N.S.) M.C. 33; Bell, C.C. 38.

ASSAULT.

[Arrest for, see POLICE OFFICER. And see FALSE IMPRISONMENT.]

(A) WHAT AMOUNTS TO AN ASSAULT.

(B) JUSTICE'S CERTIFICATE OF DISMISSAL OF CHARGE.

(C) PLEADING IN ACTIONS FOR.

(A) WHAT AMOUNTS TO AN ASSAULT.

In order to constitute an assault and battery, punishable by the criminal law, the act complained of must be done with a hostile intention. *Coward v. Baddeley*, 28 Law J. Rep. (N.S.) Exch. 260; 4 Hurl. & N. 478.

To an action for assaulting and beating the plaintiff, and giving him into custody, the defendant pleaded *son assault dememe*. The assault by the plaintiff consisted in the plaintiff placing his hands on the defendant's shoulders, in order to call his attention to the hose of a fire-engine which the defendant was superintending. The jury having found that what the plaintiff did was not with a hostile intention,—Held, that the plea was not proved. *Ibid*.

(B) JUSTICE'S CERTIFICATE OF DISMISSAL OF CHARGE.

The granting a certificate of dismissal, under section 27. of the 9 Geo. 4. c. 31, is a ministerial, and not a judicial act; and a magistrate having heard a charge of assault and dismissed such charge, on either of the grounds stated in that section, is bound to grant a certificate, stating the fact of such dismissal. *Hamcock v. Somes*, 28 Law J. Rep. (N.S.) M.C. 196.

Such certificate, though not applied for and not drawn up in the presence of the parties, is a good defence, under section 28, to an action for the assault. *Ibid*.

The word "forthwith" in section 27. of 9 Geo. 4. c. 31. means "forthwith upon the application of the

party entitled to the certificate," and not "forthwith upon the dismissal of the complaint." Therefore, where a charge of assault was heard and dismissed as not proved on the 17th of February, application for certificate made on the 22nd, but not obtained on that day in consequence of the absence of the magistrate, but on application on the 24th obtained, and dated as of the 17th, the day on which the charge was heard,—Held, that such certificate so obtained was a good defence, under section 28, to an action for the assault. *Costar v. Hetherington*, 28 Law J. Rep. (N.S.) M.C. 198.

Semble—that the application for the certificate may be made at any time after the complaint has been dismissed. *Ibid*.

(C) PLEADING IN ACTIONS FOR.

In an action for an assault, it is competent to the defendant to give evidence of an assault by the plaintiff, without a plea of *son assault dememe*. *Sykes v. Chapman*, 2 Com. B. Rep. N.S. 438.

ASSIGNMENT.

(A) WHAT AMOUNTS TO AN ASSIGNMENT.

(B) CONSTRUCTION AND EFFECT OF.

(A) WHAT AMOUNTS TO AN ASSIGNMENT.

A B, one of the next-of-kin of a testator, wrote to the executor to the following effect:—"I wish you would be so good as to pay to my cousin John one-third part of the personal estate which I am entitled to from my late uncle's effects. You will please to pay the remainder two-thirds of the personal effects due to me from my late uncle to my uncle George and yourself." Part of the testator's personal estate was set aside to answer an annuity, and the rest was distributed as to the share of A B (since deceased), according to his directions. When the annuitant died, A B's personal representatives claimed a share in the fund subsequently distributed:—Held, that the letter operated as an effectual assignment of A B's share, and that the parties named in it were entitled, not only to the share immediately distributed, but to the further share of the fund set apart to answer the annuity. *Lambe v. Orton*, 29 Law J. Rep. (N.S.) Chanc. 319; 1 De Gex & Sm. 125.

(B) CONSTRUCTION AND EFFECT OF.

The doctrine that a conveyance of property to trustees in favour of creditors operates as a mere power to mandatories or agents, revocable until communicated to or assented to by the creditors, does not apply where the trustee himself takes a beneficial interest under the deed. *Semble*, that where a deed of assignment has been executed to a stranger as trustee for creditors, a communication of the trust to a creditor, by reason of which he may not have pursued his remedy, or his position may have been altered, will render the deed irrevocable by the assignor, without any actual assent by any creditor. The rule of law, that a deed of conveyance *prima facie* passes the property to the party to whom it is conveyed (subject to the right of disclaimer) without any act of assent on his part, applies equally where

the deed creates an onerous trust. A, on the 19th of August, *bond fide* executed a deed of assignment to the plaintiff (who was a creditor of A), as trustee for the benefit of such of his creditors as should sign the deed, and placed it in the hands of his own attorney, undertaking to communicate himself with the plaintiff. Accordingly, on the 22nd, A wrote to the plaintiff, informing him that he had executed the deed, and asking him to act as trustee. This letter was received by the plaintiff on the 23rd, about 1 o'clock P.M.; and on the 24th the plaintiff replied, accepting the trust, and on the 30th executed the deed. About 4 o'clock P.M. on the 23rd, a *fi. fa.*, at the suit of the defendant against A, was delivered to the sheriff:—Held, first, that the assignee being a creditor taking a beneficial interest under the deed, and not a mere mandatory, the deed did not operate as a voluntary conveyance, revocable by A, until the assent of some third party as creditor. Secondly, that the title to the property vested in the plaintiff immediately upon the execution of the deed, and therefore prevailed against the defendant's execution. *Siggers v. Evans*, 24 Law J. Rep. (N.S.) Q.B. 305; 5 E. & B. 367.

By an assignment of looms on certain premises, and "other effects and things thereto belonging more particularly set forth in the schedule," articles used therewith, they having been upon the premises, were held to pass, although the looms only were mentioned in the schedule. *Cort v. Sagar*, 27 Law J. Rep. (N.S.) Exch. 373; 3 Hurl. & N. 370.

When on the face of an assignment of personality it is plain that it was intended to operate as a continuing security, and to apply to property afterwards acquired, and substituted for that which was originally assigned, it will, if the words are capable of such a construction, be so applied. *Carr v. Allatt*; *Allatt v. Carr*, 27 Law J. Rep. (N.S.) Exch. 385.

And where in such a case the deed was found capable of such a construction, although rather in the indirect form of a power of attorney than in the way of direct conveyance, it was construed to extend to stock and growing crops on a farm not occupied by the assignor at the time of the execution of the deed. *Ibid.*

A, by deed, conveyed all his property to trustees for the benefit of his creditors. The conveyance contained general words, amongst others "all and singular other the personal estate and effects whatsoever," and all "writings" belonging to the same. He was possessed, at the time, of a policy of insurance on his own life, the existence of which was not known to the trustees, and which remained in his possession. He died: the trustees, having afterwards learnt the existence of the policy, claimed it from his executor, who refused to deliver it up, and who obtained the money from the insurance office:—Held, by the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the legal property in the writing, and the beneficial interest in the contract, passed to the trustees by the deed; that they might maintain trover for the policy against the executor; and that the proper measure of the damages under the circumstances was the amount of the money obtained by it. *Watson v. M'Lean*, E. B. & E. 75.

ASSUMPSIT.

[See CONTRACT.]

ATTACHMENT.

[See INTERROGATORIES—PRACTICE, IN EQUITY—SHERIFF.]

- (A) FOR CONTEMPT OF PROCESS.
- (B) FOR DISOBEDIENCE OF ORDERS AND DECREES.
- (C) FOR DISOBEDIENCE OF INJUNCTION AT LAW.
- (D) PRACTICE AS TO RULE FOR, AND SERVICE.

(A) FOR CONTEMPT OF PROCESS.

The Court granted an order for an attachment against A for disobedience of a *subpoena* to bring in a will; but directed that the attachment should lie in the Registry for eight days after notice to A of its having issued, before proceedings should be taken to enforce it. *Simmons v. Dean*, 27 Law J. Rep. (N.S.) Prob. & M. 103.

The application for such attachment is contentious business. *Ibid.*

The Court refused to enforce a writ of sequestration by an attachment against the tenants who held under the person whose estate had been sequestered, and who refused to give up possession, but ordered a writ of assistance to the sheriff to be issued. *Bayley v. Bayley*, 29 Law J. Rep. (N.S.) Prob. M. & A. 72.

An administratrix was cited to bring in an account and file an inventory. After service of the citation she married. Not having brought in an account or filed an inventory, an attachment was issued against her, notwithstanding her coverture. *Baker v. Baker*, 29 Law J. Rep. (N.S.) Prob. M. & A. 138.

(B) FOR DISOBEDIENCE OF ORDERS AND DECREES.

An order by a Judge "that the plaintiff's attorney do forthwith declare, in writing, to the defendant's attorney or agent, the profession, occupation or quality, and place of abode of the plaintiff, and that after five days all further proceedings be stayed until such delivery," is not a good order under section 7. of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). *Malpas v. Mudd*, 27 Law J. Rep. (N.S.) Exch. 367; 3 Hurl. & N. 246.

Where a Judge's order in the above form was not complied with, the Court refused to attach the attorney for contempt, such order not being good under the statute, and if made under the common-law jurisdiction of the Courts, requiring to be made a rule of Court. *Ibid.*

Where a statute directs that a proceeding under it may be enforced by application to a Judge, upon an affidavit of the facts, for a summons, the granting of the summons without an affidavit sworn at the time is only an irregularity, and does not affect the validity of an order duly made in other respects upon such summons. *Ex parte Furber*, 27 Law J. Rep. (N.S.) Exch. 458: nom. *Furber v. Sturmer*, 3 Hurl. & N. 521.

The statute 19 & 20 Vict. c. 108, s. 48, enacted, that "no writ of mandamus shall henceforth issue to

a Judge or an officer of the county court, for refusing to do any act relating to the duties of his office; but any party requiring such act to be done may apply to any superior Court or a Judge thereof, upon an affidavit of the facts, for a rule or summons calling upon such Judge, &c. to shew cause why such act should not be done; and if after the service of such rule or summons good cause shall not be shewn, the superior Court, or Judge thereof, may by rule or order direct the act to be done, and the Judge or officer of the county court, upon being served with such rule or order, shall obey the same on pain of attachment." A summons was issued in the usual way at chambers, without an affidavit, calling upon a Judge of the county court to shew cause why he should not sign an appeal case. He did not attend, and an order founded on affidavits was subsequently made by a Judge at chambers, directing the Judge of the county court to sign the case. This order was disobeyed, and in the ensuing term a rule for an attachment was obtained. A cross-rule was subsequently obtained to set aside the summons and order:—Held, that the circumstance of an affidavit not having been made, was only an irregularity, and did not affect the validity of the Judge's order, and also that in answer to the rule for an attachment, it was too late for the county court Judge to object that the case was incorrectly stated. *Ibid.*

In the Ecclesiastical Courts, before a party could be pronounced in contempt for disobedience of a decree for restitution of conjugal rights, a monition issued calling on him to obey the decree. In this court, the decree should contain an order that it be obeyed within a time specified; if it does not, the Court will not grant an attachment until such an order has been served. *Cherry v. Cherry*, 29 Law J. Rep. (n.s.) Prob. M. & A. 141.

(C) FOR DISOBEDIENCE OF INJUNCTION AT LAW.

Where a writ of injunction has been granted by a Court of common law under the Common Law Procedure Act, 1854, s. 82, to restrain the defendant from committing the nuisance for which the action has been brought, such injunction continues until it is got rid of by the defendant; even after a reference to an arbitrator (on motion for an attachment) and alterations of the defendant's works in accordance with the arbitrator's recommendations, so as to prevent the recurrence of the nuisance. And it is competent for the plaintiff to apply at any time for an attachment in case of disobedience to the injunction; and, *semble*, during the long vacation he may apply to a Judge at chambers. *De la Rue v. Fortescue*, 26 Law J. Rep. (n.s.) Exch. 339; 2 Hurl. & N. 324.

If on such a reference, under the authority of the Court, pending a rule for an attachment, the arbitrator reports that after the injunction issued there was a continuance of the nuisance, the defendants will be liable to the costs of the rule and the reference (the costs having been reserved by the Court for its discretion), even although, in consequence of their having adopted his recommendations, the rule for an attachment is not proceeded with. *Ibid.*

(D) PRACTICE AS TO RULE FOR, AND SERVICE.

An attachment will not be granted absolute in the first instance for non-payment of costs when the rule

of Court ordering payment of the costs is a rule making the Judge's order ordering the party to do an act a rule of Court, and the applicant will not abandon the right to apply for an attachment on the other party for disobedience of the order. *Criep v. Groombridge*, 27 Law J. Rep. (n.s.) Q.B. 183.

An application on the last day but one of term to enlarge a rule for an attachment without any affidavit of attempts to serve, was refused. *Smith v. North*, 27 Law J. Rep. (n.s.) Exch. 421.

The Court will not break in upon the rule which requires personal service for the purpose of an attachment, although the defendant keeps himself secluded in order to evade service, and there is reason to believe that the rule of Court has been brought to his knowledge. *Thomas v. Rawlings*, 28 Law J. Rep. (n.s.) Exch. 347.

ATTACHMENT OF DEBTS.

[In the Lord Mayor's Court of London, see PROHIBITION, *Tredinnick v. Oliver—Baynard v. Simmons*, 5 E. & B. 59; 6 Law J. Dig. 45—*Holmes v. Tutton*, 5 E. & B. 65; 6 Law J. Dig. 45.]

- (A) WHAT DEBTS MAY BE ATTACHED.
- (B) SUIING OR DISCHARGING THE GARNISHEE.
- (C) PRACTICE.
- (D) LIABILITY OF GARNISHEE TO COSTS.

(A) WHAT DEBTS MAY BE ATTACHED.

A superannuation allowance, granted by a resolution of the Board of Directors of the East India Company to a retired clerk, under the authority of the 53 Geo. 3. c. 155, s. 93, is only a gratuity; and the grant, to be binding on the company, must be by deed. For both these reasons, the allowance is not a debt which can be attached on behalf of a judgment creditor of the grantee, under the Common Law Procedure Act, 1854. *Innes v. the East India Company*, 25 Law J. Rep. (n.s.) C.P. 154; 17 Com. B. Rep. 351.

By an act of parliament for improving certain parts of Westminster, Commissioners were incorporated for that purpose, and were empowered to borrow money on bond, and to advance money to builders for building purposes. By the terms of the bonds all bondholders were to be paid *pari passu*. The Commissioners accordingly advanced a sum to M, a builder. The plaintiff, a bondholder, brought an action against the Commissioners on one of these bonds, and they suffered judgment to go by default:—Held, that the debt due from M, the builder, to the Commissioners was not a "debt" which could be attached under the garnishment clause of the 17 & 18 Vict. c. 125, s. 61, as the attaching and compelling immediate payment thereof would give a preference to the plaintiff over the other bondholders, in violation of the terms of the bond. *Kennett v. the Westminster Improvement Commissioners*, 25 Law J. Rep. (n.s.) Exch. 97; 11 Exch. Rep. 349.

The debts owing from the garnishee to the judgment debtor spoken of in the 61st, 62nd and 63rd sections of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), and as to which a Judge is thereby empowered to make certain orders, do not include debts of which the judgment debtor has,

before judgment, divested himself by a *bond fide* assignment. *Hirsch v. Coates*, 25 Law J. Rep. (n.s.) C.P. 315; 18 Com. B. Rep. 757.

Where a plaintiff has sued in the county court on a judgment in the superior Court, and has obtained an order for payment by instalments, some of which have been paid,—Held (*hasitante Bramwell, B.*), that he cannot resort to the process of the superior Court to enforce the judgment of that Court. *Jones v. Jenner*, 25 Law J. Rep. (n.s.) Exch. 319.

A verdict in an action of contract for unliquidated damages, without judgment, is not "a debt owing or accruing," and cannot be attached under section 61. of the Common Law Procedure Act, 1854. *Jones v. Thompson*, 27 Law J. Rep. (n.s.) Q.B. 234; E. B. & F. 63.

Under the Common Law Procedure Act, 1854, s. 61, on a joint judgment against several, a debt due to any one or more of the judgment debtors may be attached. *Miller v. Mynn*, 28 Law J. Rep. (n.s.) Q.B. 324.

A sum for which a person obtains a verdict in an action on a marine policy of insurance, is not a debt "owing or accruing" to such person which can be attached under the Common Law Procedure Act, 1854, s. 61, until judgment has been signed in such action. *Dresser v. Johns*, 28 Law J. Rep. (n.s.) C.P. 281; 6 Com. B. Rep. N.S. 429.

Where, therefore, one judgment creditor of such person had, under the act, obtained an order to attach between the verdict and judgment, and another such judgment creditor had obtained a similar order after the judgment, the last order alone was allowed to take effect. *Ibid.*

Quere—If money in the hands of the judgment debtor's bankers, merely as such, is liable to attachment. *Seymour v. the Corporation of Brecon*, 29 Law J. Rep. (n.s.) Exch. 243.

A judgment debtor who is an executor or administrator is within the garnishee clauses of the Common Law Procedure Act, 1854; and, therefore, a debt due to such judgment debtor, in his representative capacity, may be attached by a judgment creditor of the executor in the same right. *Burton v. Roberts*, 29 Law J. Rep. (n.s.) Exch. 484.

A judgment creditor may proceed against the garnishee notwithstanding a decree for administration of the estate in Chancery. *Ibid.*

(B) SUING OR DISCHARGING THE GARNISHEE.

Under the Common Law Procedure Act, 1854, s. 64, it is discretionary in the Judge to order, if the garnishee disputes his liability, that the judgment creditor shall be at liberty to proceed against the garnishee by writ. *Wise v. Birkenhaw*, 29 Law J. Rep. (n.s.) Exch. 240.

Quere—Whether, if the Judge decline to make such an order, the Court will review his decision, unless by consent. *Seemle*—that they may do so; but they will not make the order unless such facts are shown as raise a reasonable ground for supposing that the judgment creditor is entitled to execution. *Ibid.*

And where (the matter having been referred to the Court by the Judge) the attorney of the judgment creditor had, after judgment, taken an assignment from the garnishee of a debt growing due, and which had been paid before the application, there

being nothing to shew that the assignment and the payment under it were not *bond fide*, the Court refused to make an order. *Ibid.*

Where on an order to attach debts, the Court cannot clearly, beyond all doubt, see that the garnishee is not liable to attachment, they will not set aside the order without allowing the judgment creditor to proceed against him by writ. So held where the order was made against the garnishee only as the treasurer of a corporation. *Seymour v. the Corporation of Brecon*, 29 Law J. Rep. (n.s.) Exch. 243.

Where an order for the attachment of debts due to a judgment debtor has been obtained *ex parte*, under the Common Law Procedure Act, 1854, s. 61, and a summons, calling on the garnishee to shew cause why he should not pay the money to the judgment creditor, has been issued, and the garnishee appears and disputes his liability, and the judgment creditor does not ask to be allowed to proceed against him by writ, the Judge may not only dismiss the summons, but discharge the attachment order altogether. *Windle v. Williams*, 27 Law J. Rep. (n.s.) Exch. 311; 3 Hurl. & N. 288.

(C) PRACTICE.

A garnishee whose debt has been attached, and who has been summoned under the garnishee clause of the Common Law Procedure Act, 1854, has no right to substitute a different mode of discharging his debt from that already existing between the judgment creditor and the judgment debtor. *Turner v. Jones*, 26 Law J. Rep. (n.s.) Exch. 262; 1 Hurl. & N. 878.

If before regular service of a garnishment summons the garnishee (an order for executors having been granted,) *bond fide* pays the debt, he is protected. *Cooper v. Brayne*, 27 Law J. Rep. (n.s.) Exch. 446.

If the judgment debtor receives a debt which has been attached, from the garnishee, with notice of the lien of the judgment debtor's attorney, he will be liable to repay it to the attorney. *Bisdell v. Coningham*, 28 Law J. Rep. (n.s.) Exch. 213.

(D) LIABILITY OF GARNISHEE TO COSTS.

Where, under the 17 & 18 Vict. c. 125, the Common Law Procedure Act, 1854, the garnishee disputes his liability to the judgment debtor, and the Court, by an order, under the 64th section, authorizes the judgment creditor to proceed by writ against the garnishee, omitting all mention of costs, the successful party is entitled to his costs in the ordinary way, and no order of the Court, under the 67th section, is necessary for that purpose. *Johnson v. Diamond*, 25 Law J. Rep. (n.s.) Exch. 40; 11 Exch. Rep. 431.

ATTORNEY AND SOLICITOR.

[The Laws relating to Attornies, Solicitors, Proctors, and certificated Conveyancers, amended by 23 & 24 Vict. c. 127.]

(A) ARTICLED CLERK.

- (a) *Execution of Articles.*
- (b) *Service under Articles.*
- (c) *Stamp and Enrolment of Articles.*

(B) ADMISSION AND RE-ADMISSION.

(C) RIGHTS AND PRIVILEGES.

(D) DUTIES AND LIABILITIES.

(a) *In general.*(b) *Summary Jurisdiction over.*(1) *At Law.*(i) *Attachment.*(ii) *Striking off the Roll.*(iii) *Answering Matters.*(2) *In Equity.*(i) *Order to Pay over Money.*(ii) *Striking off the Roll.*(c) *Care of Client's Papers.*(d) *Negligence.*(e) *Expenses of Skilled Witness.*(f) *Effect of Counsel's Opinion.*(g) *Acts of Partner.*(h) *Counsel's Fees.*(i) *London Agent.*

(E) CHANGE OF.

(F) DEALINGS WITH CLIENT.

(G) BILL OF COSTS.

(a) *Delivery of.*(b) *Heading and Contents.*(c) *Taxation of.*(1) *In general.*(2) *Who may Petition.*(3) *Special Circumstances.*(4) *Upon Terms.*(5) *Costs of Taxation.*(6) *Practice.*

(H) LIEN FOR COSTS.

(I) CHARGE ON COSTS.

(A) ARTICLED CLERK.

[See POOR; SETTLEMENT: *Clapham Parish v. St. Pancras Parish.*]

(a) *Execution of Articles.*

Articles of clerkship to an attorney were sent to Bombay to be executed by the father of the clerk. The father executed it on the 1st of January 1853, and put in the date in the deed. The articles were sent to England, and then, on the 16th of February 1853, executed by the clerk and the attorney:—Held, that the date from which the time of making and filing the affidavit was to count was from the 16th of February 1853. *Anonymous case*, 27 Law J. Rep. (N.S.) Q.B. 184.

(b) *Service under Articles.*

A person who has taken the degree of Bachelor of Laws or Bachelor of Arts must, in order to avail himself of the provision in the 6 & 7 Vict. c. 73. s. 7. (entitling him to be examined for admission as an attorney, after a service under articles for three years) have taken such degree before the time of his being bound. *Ex parte Bradford*, 28 Law J. Rep. (N.S.) Q.B. 188; 1 E. & E. 417.

Where an articulated clerk served four years, six months and twenty-four days, under his articles, and then was absent, with the consent of his master, for about three years, during part of which time he served as an ensign in a militia regiment and the remainder as a surveyor of taxes under the Inland Revenue, and then returned and served his master in his busi-

ness, but not under articles, for a period of five months and six days,—Held, that the latter period could not be reckoned to make up the requisite period of five years. But leave was granted to enter into fresh articles, and to serve under such articles to complete the requisite period. *Ex parte Hubbard and Ex parte Frost* questioned. *Ex parte Smith*, 28 Law J. Rep. (N.S.) Q.B. 263.

(c) *Stamp and Enrolment of Articles.*

Where articles of clerkship have not been stamped within six months from their execution, but have been subsequently stamped under the 19 & 20 Vict. c. 83, and the clerk has served under them from their execution, the Court will allow a subsequent enrolment of them, to count from the date of the execution, provided there has been no negligence or default on the part of the clerk. *Ex parte Norton*, 26 Law J. Rep. (N.S.) Q.B. 24.

It is the duty of the Master to refuse to enrol articles of clerkship to an attorney, unless they are stamped at the time they are produced to him; for to allow the enrolment (which is the act of the Court by means of its officer) would be to admit unstamped articles to be good, useful, and available in a court of law, contrary to the prohibition of the statute 9 Will. 3. c. 25. s. 59. *Ex parte Williams*, 26 Law J. Rep. (N.S.) Q.B. 167.

Articles of clerkship to an attorney were duly executed, but were not enrolled within the six months, being left unstamped, with a view of seeing whether the health of the clerk would enable him to continue to serve under them. The Court refused to allow the time of service to count from the execution of the articles. *In re Welch*, 27 Law J. Rep. (N.S.) Q.B. 213.

(B) ADMISSION AND RE-ADMISSION.

[Admission of Attorneys and Solicitors of Colonial Courts in Her Majesty's Superior Courts of Law and Equity in England, in certain Cases, regulated by 20 & 21 Vict. c. 39.]

The oath prescribed by the 21 & 22 Vict. c. 48. s. 1. need not be taken by any person upon an occasion on which he would not have been obliged before the passing of the statute to take the oath of abjuration. A person having a conscientious scruple against the form of the new oath was, therefore, admitted an attorney on taking the oath of allegiance and the attorney's oath. *In re Cornroodan Tyabjee*, 28 Law J. Rep. (N.S.) Q.B. 22: *nom. Cornroodeen Tyabjee*, 1 E. & E. 319.

In the year 1847 A was found guilty of forgery, but judgment was respited on the ground that the Judge had received evidence which was inadmissible, viz. admissions which the prisoner had been compelled to make when under examination as a witness in an action in the Court of Queen's Bench; and he, in consequence, received a free pardon. In 1849 A was struck off the roll for perjury in an affidavit of increase. The Court refused, in 1856, to re-admit him to the roll, although he produced very strong affidavits and testimonials as to his conduct since 1849. *In re Garbett*, 18 Com. B. Rep. 403.

An attorney was re-admitted, although the rule of Hilary Term, 1853, which requires a copy of the affidavit on which the application is founded to be left at the chambers of the Chief Justice of the

Court of Queen's Bench had not been complied with. *Ex parte Makinson*, 18 Com. B. Rep. 661.

(C) RIGHTS AND PRIVILEGES.

[*Robinson v. Anderson*, 7 Law J. Dig. 47; on appeal, 7 De Gex, M. & G. 239.]

The privilege of an attorney, suing in person, to lay and retain the venue in Middlesex is not affected by the Uniformity of Process Act, or the Reg. Gen. Hil. T. 1853, r. 18; and, consequently, the defendant cannot, under any circumstances, change the venue in such an action. *Grace v. Wilmer*, 26 Law J. Rep. (n.s.) Q.B. 1; 6 E. & B. 982.

An attorney acting as counsel is entitled to privilege of speech as such. And this privilege extends to anything reasonably relevant to the matter in dispute. *Mackay v. Ford*, 29 Law J. Rep. (n.s.) Exch. 404; 5 Hurl. & N. 792.

Therefore, where the defendant had attended before magistrates on a summons for an assault upon the plaintiff in turning him off the premises of one J, his employer, and the defendant, who appeared for parties claiming under J and was instructed by J, stated, in addressing the magistrates, that the plaintiff had been justly dismissed by J because he had "robbed" him,—Held (the question having been reserved for the Court) that it was so far relevant as to be within the privilege of counsel; and therefore that a verdict for the plaintiff must be set aside, and that an action for slander was not maintainable. *Ibid*.

If an attorney issues a *ca. sa.*, which is afterwards set aside on the ground that 20*l.* was not due, the client is liable in an action for false imprisonment at the suit of the party arrested—*Bramwell, B. dubitante. Collett v. Foster*, 26 Law J. Rep. (n.s.) Exch. 412; 2 Hurl. & N. 356.

A complaint being made to a creditor that her attorney had improperly (by mistake or wilfully) arrested her debtor, wrote in reply stating that she had seen her attorney, and that the cause of complaint arose from a misunderstanding on the debtor's part in supposing that a particular sum of money ought to have been appropriated in reduction of the debt, but that instructions had been given by the attorney to allow the sum in question:—Held, that this was some evidence for the jury of an actual authority by the client to her attorney to make the arrest, so as (on proof that 20*l.* was not due) to render her liable in an action for false imprisonment, independently of the general liability of a client for the acts of his attorney. *Ibid*.

If an attorney have express authority from his client to compromise the case only on condition of securing for him a certain net sum, that (coupled with the fact that he afterwards compromised the suit on payment of a larger sum, and professed to have compromised it in pursuance of that authority,) may be evidence of an agreement upon his part to accept the surplus of the money paid over the amount of the net sum his client expected to receive, in satisfaction of his costs, not only as between party and party, but between attorney and client. *Churchyard v. Watkins*, 27 Law J. Rep. (n.s.) Exch. 13.

If a client repudiates his retainer of an attorney to conduct a suit, the latter is entitled to bring an action for his costs without waiting for the final completion of the suit. Where a person lends his name as the

next friend of an infant plaintiff, and for the purpose of complying with the rules of the Court of Chancery signs a retainer to an attorney to conduct the suit, although he does not further interfere in the matter, and the attorney receives his instructions from third parties, the next friend is liable on his retainer for the costs, unless he displaces his *prima facie* liability by clear proof that the attorney acted on the credit of other persons. *Hawkes v. Cottrell*, 27 Law J. Rep. (n.s.) Exch. 369; 3 Hurl. & N. 243.

An attorney who compromises an action against the express directions of his client is liable to an action for damages at the suit of his client. The client, and not the attorney, is *dominus litis*. To a declaration in an action by a client against her attorney for consenting to an order for a *set process* in two actions, in which the client was the plaintiff, on certain terms in the said order mentioned, "without the authority and consent, and against the will, and contrary to the directions," of the client,—the defendant pleaded that in entering into the said *set process* and committing the grievances complained of, "he acted in a reasonable, skilful and proper manner, and in pursuance of and in obedience to, and in accordance with, the advice, opinion and discretion of certain counsel learned in the law, then retained and employed by the plaintiff, and acting as her counsel in and for the conduct, management and direction of the actions on her behalf, and that the said order was a reasonable and proper order to be consented to and made in that behalf, and that it was essential and necessary, and beneficial to, and for the protection of the plaintiff and her interests with respect to the said actions, that the defendant should consent to the said order being made":—Held, on demurrer, that the plea was bad. *Fray v. Fowles*, 28 Law J. Rep. (n.s.) Q.B. 232.

Upon the dissolution of partnership between H. and A. solicitors, it was agreed that H, continuing the business on his own account, should grant to A. an annuity, and be at liberty to continue his name in the firm, guaranteeing him against all liability by reason thereof:—Held, that such an agreement is not void as being against public policy. *Aubin v. Holt*, 25 Law J. Rep. (n.s.) Chanc. 36; 2 Kay & J. 66.

A compromise of a trial at law, made by counsel, upon the suggestion of an attorney that it would be desirable, was held by the Master of the Rolls not to be binding upon the client who was not aware of it, had not sanctioned it, and would not acquiesce in it; and a bill to enforce the specific performance of the compromise was dismissed by the same Judge, but without costs, the Court being of opinion that the compromise arose from the mistake of parties acting for their respective clients, and a new trial of the issue was directed in the original suit. On appeal by the plaintiff in the suit for specific performance,—Held, affirming the decision, that an attorney has no authority to compromise a suit without the sanction and consent of the client, and that the bill must be dismissed, but differing from his Honour, that (the client having repudiated the compromise from first to last, and refused to comply with it) the bill must be dismissed with costs. *Swinfen v. Swinfen*, 27 Law J. Rep. (n.s.) Chanc. 36, 491; 2 De Gex & J. 381; 24 Beav. 549.

An attorney and solicitor of the Court of Chancery,

while on his direct road to transact professional business, first in the Insolvent Debtors Court, and next in the Taxing Master's Office, was arrested on an attachment issued against him for contempt of an order of the Court of Chancery; the Court, on motion, ordered his discharge and gave him his costs of the application. *Eyre v. Barrow*, 27 Law J. Rep. (N.S.) Chanc. 784.

The rule as to privileged communications between an English solicitor and his client, applies equally to a Scotch solicitor resident in England, and his client in Scotland. *Lawrence v. Campbell*, 28 Law J. Rep. (N.S.) Chanc. 780; 4 Drew. 485.

An agreement between A, a certificated conveyancer, and B, an attorney, that in case A should introduce to B any matters of professional business for which B would have a claim for costs, B would allow and pay to A. certain sums of money by way of commission, is not such a permitting by the attorney of his name to be made use of upon the account or for the profit of an unqualified person, as was intended to be provided against by the 32nd section of the Attorneys and Solicitors Act (6 & 7 Vict. c. 73.), nor would such an agreement subject the parties to the penalties for common barratry; and, therefore, where a defendant, an attorney, by his answer declined to answer interrogatories founded on a statement of such an agreement, on the ground that if the facts alleged in the bill were true, he was liable to be struck off the roll, and was liable to other pains and penalties under the statutes and laws in force concerning common barratry and maintenance, it was held, that the answer was insufficient. *Scott v. Miller*, 28 Law J. Rep. (N.S.) Chanc. 584; John. 220, 328.

A witness claiming to be privileged from answering, on the ground that he is not bound to criminate himself, must at all events swear that he is advised or believes that his answer will have that effect; and it is not sufficient to say that his answer would or might criminate him or tend to criminate him. *Ibid.*

(D) DUTIES AND LIABILITIES.

(a) *In general.*

To a bill against a trustee and his solicitor, alleging that trust monies had been improperly paid to the solicitor for costs, a demurrer of the solicitor was allowed, he being a mere agent, and the matter complained of being one merely of account as between the trustee and *cestui que trust*. *Maw v. Pearson*, 28 Beav. 196.

(b) *Summary Jurisdiction over.*

(1) *At Law.*

(i) *Attachment.*

An attorney not appearing pursuant to a rule calling on him to answer the matters of the affidavit, on being called three times in open court, a writ of attachment was ordered to be issued against him. *Easton v. Neville*, 18 Com. B. Rep. 548.

(ii) *Striking off the Roll.*

Where an attorney has been struck off the roll of the Court of Queen's Bench, for misconduct, he will, on production of the rule for that purpose, be struck off the roll of the Court of Common Pleas. *In re John Collins*, 18 Com. B. Rep. 272.

Excessive and extortionate charges in a bill of costs as between attorney and client, form no ground for a summary application against the attorney, in the absence of evidence of wilful fraud,—the suitor being sufficiently protected by the taxation of the bill. *Meuz v. Lloyd*, 2 Com. B. Rep. N.S. 409.

(iii) *Answering Matters.*

Upon a rule calling upon an attorney to answer matters, the charge against him being that he had received from a defendant an excessive sum for costs, upon a false statement that judgment had been signed and execution issued, when in fact no judgment had been signed,—it appearing that the attorney himself had no personal knowledge of the matter, the Court discharged the rule, but ordered him to refund the overcharge, and pay the costs of the application. *In re Eyre; Palmer v. Evans*, 1 Com. B. Rep. N.S. 151.

(2) *In Equity.*

(i) *Order to Pay over Money.*

The Court will not, in the exercise of its summary jurisdiction over solicitors, call upon a solicitor to account for monies received by him where they were received by him, not in the character of solicitor to the person making the application, but of solicitor to another person. *Dixon v. Wilkinson*, 4 De Gex & J. 508; 4 Drew. 614.

D was solicitor to the plaintiff in a cause, and also to the receiver, and the receiver was in the habit of remitting the rents to him:—Held, that D must be considered to have received the rents as solicitor or agent of the receiver, and that the plaintiff could not call upon him to account for them under the summary jurisdiction. *Ibid.*

Assuming the Court to have jurisdiction to make a solicitor answerable for losses occasioned to his client by mere ignorance, mistake, neglect or mismanagement, apart from fraud or malfeasance, the Court has a discretion as to exercising or declining to exercise that jurisdiction according to the circumstances of each particular case. *Ibid.*

Per Lord Justice Turner—semble, the Court has such a jurisdiction. *Ibid.*

(ii) *Striking off the Roll.*

[*In re Collins—Wheatley v. Bastow*, 7 Law J. Dig. 48; 7 De Gex, M. & G. 558.]

A solicitor induced his co-trustee to join him in executing a power of attorney, by which trust stock standing in their joint names was sold, and he obtained from such co-trustee an authority to place the proceeds to his private account at his banker's. The proceeds were subsequently lost through the solicitor's insolvency; and although he was himself entitled to a reversionary interest in a portion of the trust property, he was struck off the rolls of the Court. *In re Chandler*, 25 Law J. Rep. (N.S.) Chanc. 396; 22 Beav. 253.

The respondent (a solicitor) was appointed a member of a committee of a company, with power to compromise two suits. He, with the approbation of his co-committee, compromised them and received the money. A summary application that he might pay over the money or be struck off the rolls was refused, with costs. *Re Harvey*, 27 Beav. 330.

(c) *Care of Client's Papers.*

An attorney who has received his client's deed to keep for him, and has lost it for want of proper care, cannot set up such loss as an answer to an action of detinue. *Reeve v. Palmer*, 27 Law J. Rep. (n.s.) C.P. 327; 5 Com. B. Rep. N.S. 84: affirmed in Exchequer Chamber, 28 Law J. Rep. (n.s.) C.P. 168; 5 Com. B. Rep. N.S. 91.

(d) *Negligence.*

The defendant instructed the plaintiff, an attorney, to take proceedings on his behalf to recover a percentage, which he claimed to be due to him from the underwriters on certain policies of assurance. From the circumstances of the case it was clear that to establish his claim it would be necessary to take the evidence of witnesses at Calcutta. The plaintiff first wrote letters, demanding payment from the underwriters, and this being refused, he then issued writs against them in the Lord Mayor's Court, which Court he afterwards discovered had no power to issue a commission to examine witnesses, and so the proceedings were useless:—Held, that the plaintiff had been guilty of such negligence in suing in the Lord Mayor's Court without first ascertaining whether that Court had power to issue a commission, as to disentitle him from recovering his charges in respect of the actions; but that he was entitled to recover for the letters written before action. *Cox v. Leech*, 26 Law J. Rep. (n.s.) C.P. 125; 1 Com. B. Rep. N.S. 617.

An attorney being instructed to take proceedings against the acceptor of a foreign bill of exchange, brought an action against him in the name of his client, the holder of the bill, without ascertaining whether his client's title was complete by special indorsement, as required by the law of the foreign country, and it being afterwards ascertained that there was no such indorsement, the action was discontinued:—Held, that the attorney was guilty of such negligence as disentitled him from recovering the costs of the abortive proceedings. *Long v. Orai*, 26 Law J. Rep. (n.s.) C.P. 127; 18 Com. B. Rep. 610.

After the writ in an action upon a bond to secure 1,000*l.* had been served, the defendant wrote a letter stating that he had paid 430*l.* over and above all interest which he was liable to pay, and that he was ready to pay the balance, 570*l.* After receipt of this, the attorney for the plaintiff delivered the declaration, to which the defendant pleaded payment. When the cause was in the paper for trial, a Judge's order was taken, by consent, for a reference to the Master, who afterwards made his allocatur in the plaintiff's favour for 741*l.* 2*s.* 6*d.* and costs. The defendant became bankrupt between the receipt of the letter and the making of the allocatur:—Held, an action being brought by the attorney for his bill of costs, and a cross-action for negligence (*Lord Campbell, C.J.* differing in opinion), that there was no negligence on the part of the attorney in his not applying, after the receipt of the letter, for an order to refer the case to arbitration, under the 3rd section of the Common Law Procedure Act, 1854. *Chapman v. Van Toll*; *Van Toll v. Chapman*, 27 Law J. Rep. (n.s.) Q.B. 1; 8 E. & B. 396.

Semle, per Wightman, J. and Erle, J., that an application in such a case would not be within the section. *Ibid.*

An attorney having been retained by two trustees

about to advance trust money upon the security of property already mortgaged, to see that the security was sufficient and that the proper deeds were executed, one of the trustees advanced the monies on the execution of the mortgage without receiving an assignment of the first mortgage. It having turned out that there was another previous mortgage, and the security proved insufficient,—Held, that there was no evidence of negligence on the part of the attorney, although, by the agreement which he had prepared, part of the money advanced was to be applied to the redemption of the prior mortgage; it not appearing that the defendant was aware of the trustee's intention to act as he did. *Brumbridge v. Massey*, 28 Law J. Rep. (n.s.) Exch. 59.

The defendant, as attorney for P, obtained judgment in a suit against W F, and thereupon caused a *f. fa.* to issue against the goods of the defendant in that suit, and delivered the writ to the sheriff, the present plaintiff. The writ was indorsed, "The defendant is [a blank], and resides at Redcar, in your bailiwick." W F, in fact, lived at Coatham, a village adjoining Redcar, at which latter place his son, of the same name, was living. The writ was handed by the sheriff to an officer, who went to Redcar, and took possession of the goods of W F, the son, who subsequently brought an action against the sheriff, and recovered damages. The defendant believed that W F, the son, was the person against whom the judgment had been obtained, and the sheriff and his officers had no knowledge of the person intended by the writ, except that which they derived from the indorsement upon it. In an action by the sheriff to recover damages from the defendant, on the ground of his having directed and required the plaintiff to seize the goods of W F, of Redcar, the defendant pleaded that at the time, &c., he had good and probable reason to believe, and did in good faith believe, that W F, named in the writ, resided at Redcar, and that he so indorsed and delivered the writ, with no other intent or view than to furnish such information as he believed to be true, for assisting the plaintiff, as sheriff, in duly ascertaining whether there were in his bailiwick goods and chattels of W F, named in the writ:—Held (*dissentiente Wightman, J.*), that the action was not maintainable, as the indorsement upon the writ was nothing more than a statement by the defendant, for the purpose of affording information to the sheriff, leaving him to his discretion as to how he would act. *Childers v. Wooler*, 29 Law J. Rep. (n.s.) Q.B. 129.

Where, in consequence of the absence of the plaintiff's attorney from the assize town when the cause was called on for trial, the plaintiff was non-suited, the Court made absolute a rule for a new trial on the undertaking of the attorney to pay, out of his own pocket, the costs of the day to the defendant. *Townley v. Jones*, 29 Law J. Rep. (n.s.) C.P. 299; 8 Com. B. Rep. N.S. 289.

(e) *Expenses of Skilled Witness.*

An attorney, being in the position of an agent for his client, is not liable for the charges or expenses of a skilled witness, retained by him, in pursuance of his general instructions, to make surveys, researches, calculations or experiments, with a view to examination as a witness in his client's cause. *Lee v. Everest*, 26 Law J. Rep. (n.s.) Exch. 334; 2 Hurl. & N. 285.

The client, in such a case, is *prima facie* liable; and although it is competent to the attorney to make himself personally liable to pay the charges, there must be evidence of an express undertaking on his part so to do; and the mere fact that the attorney has employed the witness in such a way, and that in the course and conduct of the case he has had communications with the skilled witness, that being in the course of his business as the attorney, is no evidence of such an undertaking. *Ibid.*

Therefore, where, in a proceeding upon a poor-rate, it being deemed necessary that the evidence of valuers should be obtained on the part of the parish, the defendant, by the authority of the parish officers and as their attorney, wrote to the plaintiff to secure his services for that purpose, and directed him to make such surveys as should qualify him for giving evidence as to the rateable value of the premises rated, and the plaintiff made such surveys and gave such evidence, and the defendant, throughout the case, communicated with him as attorney,—Held, that the defendant was not liable, either for the plaintiff's charges or expenses, there being no evidence of any personal undertaking on his part to pay; and a rule for a non-suit was made absolute. *Ibid.*

(f) *Effect of Counsel's Opinion.*

In an action against an attorney, or any other party, for a malicious or fraudulent proceeding, it is not enough to excuse the defendant that he acted on counsel's opinion, unless he also shews a case fairly stated and advice obtained *bona fide* and properly pursued; and in an action against an attorney for fraudulently obtaining, on behalf of a third party pretending to be plaintiff's partner, debts due to the plaintiff, it was held no answer on the part of the defendant to shew that he had, upon oral statements, suppressing material facts known to himself, obtained counsel's opinion that there was a partnership, and that the proper course was to write to the customers on behalf of the firm warning them not to pay the plaintiff: he having written letters to them on behalf of the plaintiff and the pretended partner requesting payment. *Andrews v. Hawley*, 26 Law J. Rep. (N.S.) Exch. 328.

It was also held, that the right question for the jury was, whether the letters were fairly written in consequence of counsel's opinion that the defendant might legally use the plaintiff's name, or whether they were written really in order to induce the customers to believe that the plaintiff actually authorized the defendant to write such letters and to receive payment. And the jury having found the latter to be the case, it was held, that the evidence warranted their finding, and sustained a verdict for the plaintiff on a special count for falsely and fraudulently obtaining by the use of the plaintiff's name payment of debts due to him, or on an indebitatus count for money had and received, the defendant being clearly liable in some form of action to repay to the plaintiff the monies so received. And the Judge having so directed the jury and told them that they might, under one count or the other, give a verdict for the plaintiff to the amount of the monies received, this was held no misdirection. *Ibid.*

Quare, however, as to the precise form in which the monies were recoverable, whether as special or general damage under the special count, or as money

received to the plaintiff's use? *Semble—per Pollock, C.B.* under the latter count, *per Martin, B.* as general damage, *per Bramwell, B.* as special damage under the special count. *Ibid.*

(g) *Acts of Partner.*

M, a member of a firm of two solicitors, M & H, in 1847, without any authority given by B, instituted a suit in B's name, as one of several co-plaintiffs, and carried it on for nine years, when B, on being served with a *subpoena* for payment of costs of some unsuccessful exceptions, became for the first time aware of the unauthorized use of his name:—Held, upon petition by B in the suit, that M was responsible for the costs of the suit from beginning to end; and that H, though not personally cognizant of his partner's misconduct, was also liable, at all events, for costs incurred up to the time when, upon the dissolution, in 1849, of the partnership between himself and M, his name ceased to appear on the records of the Court as one of the solicitors for the co-plaintiffs in the suit. *In re Manby*, 26 Law J. Rep. (N.S.) Chanc. 331; 3 Sm. & G. 375.

Semble—That if B had during the course of the litigation become aware of the use of his name, his subsequently omitting to interfere actively to prevent its continuance would not *per se* have been sufficient to relieve the solicitors from liability to him for the costs. *Ibid.*

(h) *Counsel's Fees.*

The Court will not, on motion, interfere to compel an attorney to pay counsel's fees. *Angell v. Oodeen*, 29 Law J. Rep. (N.S.) C.P. 227.

(i) *London Agent.*

Under a *f. fa.*, at the suit of P, lodged with the sheriff of Hants, the goods of the execution debtor F were seized on the 22nd of March. Before the return of the writ P issued a *ca. sa.*, under which the debtor was arrested in Middlesex. The attorney of P thereon, by letter, directed the sheriff of Hants to withdraw the *f. fa.* Another *f. fa.*, against F, at the suit of W, the attorney of F, had been lodged with the same sheriff on the 14th of April; and under this *f. fa.* F had executed a bill of sale of the goods seized to W. No directions were in fact given to the bailiff in possession to withdraw, and he continued in possession, holding both warrants. On the 3rd of May the London agents of W, acting as attorneys for F, took out a summons for F's discharge from custody, on the ground that the *ca. sa.* had been irregularly issued; and an order was thereon made by consent, on the 4th of May, that on payment of the debt and costs no *ca. sa.* should be issued, but that P should be at liberty to proceed on the *f. fa.* already issued, and "under which the sheriff of Hants is in possession." W did not at the time know of or consent to this order. But though he was soon afterwards acquainted with it, he did not make any objection to it for many months. On an interpleader issue to try whether W's title to the goods under the bill of sale was valid as against P's *f. fa.*,—Held, that W was precluded from disputing the fact that the sheriff of Hants was in possession under the *f. fa.* as the order of the 4th of May recited it; that he, as attorney of F, was bound by the act of his London agents, in assenting to it; and that if he, W, as a private indi-

vidual, had felt aggrieved by that order, as prejudicial to his interest, he ought immediately to have applied to have it rescinded, and not have lain by in silence for so long a period. *Withers v. Parker* (Ex. Ch.), 29 Law J. Rep. (n.s.) Exch. 320; 5 Hurl. & N. 725.

(E) CHANGE OF.

Where a solicitor by arrangement with his client retired from the conduct of the suit, and another solicitor conducted it thenceforth to its conclusion,—Held, on there being a deficiency in the fund applicable to the payment of costs, that the latter solicitor had priority. *Cormack v. Beidly*, 3 De Gex & J. 157.

(F) DEALINGS WITH CLIENT.

[See **BANKRUPT**: *Morgan v. Taylor*—**INFANT**: *Collins v. Brook*.]

The plaintiff obtained a verdict for 50*l.* against the defendant in an action in which all the proceedings, down to final judgment, were carried on in the name of A, as attorney for the plaintiff, and judgment was signed in that action for 85*l.* damages and costs in March 1855. A few days before the trial B entered into an arrangement with A that he should have the conduct of the suit as the plaintiff's attorney, A's name being still continued on the record until February 1856, when B's name was substituted. On the day after the trial, B, at the request of the plaintiff, who was in want of money, purchased the verdict for the sum of 50*l.*, and gave notice of his claim to the defendant's attorney, and requested that the damages recovered should be paid only to himself or A. In July 1855 the plaintiff was nonsuited in another action against the same defendant, and judgment of nonsuit for 71*l.* costs was signed in that action in January 1856:—Held, that the defendant was, under the circumstances, entitled to set off his judgment for 71*l.* against that for 85*l.* recovered by the plaintiff, without reference to B's claim as purchaser, but subject to the lien of the plaintiff's attorney for costs. *Simpson v. Lamb*, 26 Law J. Rep. (n.s.) Q.B. 121; 7 E. & B. 84.

Held, also, that the purchase of the verdict by B being made *pendente lite*, and when he was substantially the attorney having the management of the cause for the plaintiff, and not being for the purpose of enabling the plaintiff to carry on the suit, was against the policy of the law, and could not be recognized. *Ibid.*

The right of setting off one judgment against another is not a legal right, but is given by the equitable jurisdiction of the Court with reference to all the circumstances of the transaction, and will not be allowed so as to defeat either the attorney's lien for costs, or the right acquired by an assignee. *Ibid.*

Although ordinarily, notwithstanding that it is understood that the attorney of the lessor or mortgagee, who prepares the lease or mortgage, is to be paid by the lessee or the mortgagor, the latter will not be liable directly to the attorney, slight evidence will suffice to render them so; as, if he receives his instructions directly from the proposed lessee or mortgagor; and this applies, even although the agreement has proved abortive through defect in the title of the lessor, and although in a written agreement for the lease, the name of another party is introduced as the proposed lessee, at the desire of the real principal;

and any evidence that tends to shew who is the real principal, and has really employed the attorney in the particular matter (although the general attorney of the lessor or mortgagee) is admissible. *Smith v. Clegg*, 27 Law J. Rep. (n.s.) Exch. 300.

After verdict, but before judgment, W, a plaintiff in ejectment, on the 11th of July, assigned a field of potatoes, with the crop growing on it, which he held under a lease, the subject-matter of the action, to his attorney in the action, as a security for money advanced by the attorney, and for the amount due for costs already incurred in the action. One of the defendants, a sheriff's officer, on the 17th of July, seized the crop of potatoes, under a *f. fa.*, against W. On the same day, but afterwards, possession was delivered by another sheriff's officer of the field in question, under a *habere facias possessionem*, to W, who immediately transferred the possession to an agent attending for the attorney. On the 30th of July the first sheriff's officer sold the potatoes, by auction, as a separate lot, after notice given him of the plaintiff's title, to J, who, after taking an assignment of the lease from the sheriff, entered and took the potatoes:—Held, (affirming the judgment below, 28 Law J. Rep. (n.s.) Q.B. 32; E. B. & E. 806), that the assignment to the attorney was not void by reason of the statutes against maintenance and champerty, or as being against public policy, since it was not an absolute sale of the subject-matter of the ejectment, but only a security for past advances; and that an action *quare clausum fragit* lay for the attorney against the sheriff and his officers as his title related back to the time when it accrued. *Anderson v. Radcliffe*, 29 Law J. Rep. (n.s.) Q.B. 128; *nom. Radcliffe v. Anderson*, E. B. & E. 806.

An agreement between an attorney and his client for the former to be paid a gross sum for business done by him as an attorney is void, to the extent that he cannot recover on such agreement a larger sum than he would be allowed by the Master upon taxation. *Philby v. Hasle*, 29 Law J. Rep. (n.s.) C.P. 370; 8 Com. B. Rep. N.S. 647.

The delivery by an attorney of a signed bill of costs, in which a gross sum is stated to be charged by the attorney as per agreement, without giving the specific items in respect of which such sum is charged, so as to enable the Master to tax it, is not the delivery of a signed bill of costs within the 6 & 7 Vict. c. 73. s. 37. *Ibid.*

A son who was first tenant in tail came of age, and immediately afterwards joined his father in cutting off the entail and then in mortgaging and afterwards selling the estate. The solicitor to the father was first the mortgagee and then the vendee. There was no reason to believe that the sale had been effected at an undervalue, but it appeared that in substance the father's solicitor had really been the only legal adviser of the son:—Held, that under these circumstances the mortgage and sale could not be sustained, but must be set aside,—on the terms, however, that the son should place the solicitor in the same situation, as nearly as possible, as when the mortgage was executed and the sale took place. *Savery v. King*, 25 Law J. Rep. (n.s.) Chanc. 482; 5 H.L. Cas. 627.

A client gave to his solicitor a mortgage for the estimated amount of costs, the bills for which had not been made out, but were subsequently delivered. A memorandum was indorsed on the mortgage that

interest should not be paid for a stated period, and this agreement was acted on by the parties. Three years afterwards the solicitor ceased to act for the client; and two years after that relation had ceased, that is, five years after the delivering of the bills, the client filed a bill to re-open the account and to tax the bills, alleging fraud and undue pressure. These allegations were not proved:—Held, affirming a decision of one of the Vice Chancellors, that the bill must be dismissed. *Blagrove v. Routh*, 26 Law J. Rep. (N.S.) Chanc. 86; 2 Kay & J. 509.

It is well settled that it is not within the ordinary business of a solicitor to receive purchase-money belonging to his client, or money due to him on mortgage, nor to receive money from him for the purpose of investment generally, and one partner is not liable for the misapplication of money so received by another without his privity. *Bourdillon v. Roche*, 27 Law J. Rep. (N.S.) Chanc. 681.

Socus—where the money is received for the purpose of being invested on a particular security. *Ibid.*

A sale of real estate by a client to his solicitor at an undervalue, the client being in embarrassed circumstances, and not having independent professional advice in the transaction, cannot be allowed to stand, although upwards of twenty years have elapsed. *Gresley v. Mowley*, 28 Law J. Rep. (N.S.) Chanc. 620; 4 De Gex & J. 78; 27 Law J. Rep. (N.S.) Chanc. 779; 1 Giff. 450.

A solicitor, who purchases from his client, must take care that the transaction is perfectly fair, and also that evidence of that fairness is preserved, the onus of proof being upon him; and he cannot be heard to complain that the means of proving his fairness is lost by lapse of time. *Ibid.*

A right to sue is a devisable interest. *Ibid.*

A solicitor who obtained possession of a lease from a client, which was claimed by a third party, cannot refuse to answer a bill filed against him upon an allegation that the information respecting the matters inquired into was obtained either in the character of solicitor or as a creditor of his client, neither will his claim to be a purchaser for value without notice, in respect of a lien claimed upon the lease for a debt incurred by his client, prevent his being required to answer the bill. *Thomas v. Rawlings*, 28 Law J. Rep. (N.S.) Chanc. 829; 27 Beav. 140.

The Court will not give effect to a stipulation contained in a mortgage by a client to his solicitor, whereby the client is restricted from paying off the mortgage-money for so long a period as twenty years. *Cowdry v. Day*, 29 Law J. Rep. (N.S.) Chanc. 39; 1 Giff. 316.

If a solicitor obtains information from his client, and also from other sources, it is not privileged; and the solicitor, if made a party to a suit with his client, is bound to answer interrogatories respecting it, though his client made the communications to him confidentially. *Lewis v. Pennington*, 29 Law J. Rep. (N.S.) Chanc. 670.

A solicitor's clerk, consulted confidentially by a mortgagor, cannot purchase the mortgage debt at less than was due upon it, and retain the same for his own benefit. *Hobday v. Peters*, 29 Law J. Rep. (N.S.) Chanc. 780; 28 Beav. 349.

A solicitor purchased a property from his client, who by a codicil, confirmed the sale and devised the property to the solicitor. The Court having on the

evidence, held the sale invalid, also decided that the codicil was inoperative in equity. *Waters v. Thorn*, 22 Beav. 547.

A solicitor who purchases from his client is bound to establish, that the sale was as advantageous to the client as it could have been if the solicitor had used his utmost endeavours to sell the property to a stranger. *Spencer v. Topham*, 22 Beav. 573.

A purchased an estate from his client and afterwards sold it to B. B employed no other solicitor than A:—Held, that B was affected with the knowledge possessed by A of the objectionable nature of the transaction between himself and his client. *Ibid.*

Purchase by a solicitor from his client for 1,820*l.* upheld though he had given about 100*l.* less than the value, and had two years afterwards sold part of the property at a fancy price making a profit of 970*l.* *Ibid.*

A solicitor took up his client's bills,—Held, that these payments could only be treated in the same light as any other ordinary cash advances made by the solicitor for the benefit of his client, and that the solicitor was not entitled to charge interest thereon. *May v. Briggenden*; *Cheeseman v. May*, 24 Beav. 207.

The principle which throws on a solicitor, who has dealt with his clients, the burden of shewing the fairness of the transaction, applies to cases of voluntary agreement, but not to a case where the solicitor is in the hostile attitude of an urgent creditor. *Johnson v. Fesemeyer*, 3 De Gex & J. 13; 25 Beav. 88.

Solicitors employed by the husband to prepare a marriage settlement,—Held, not bound to produce it to the trustees until their bill had been paid. *Re Gregson*, 26 Beav. 87.

A beneficial purchase by a solicitor from his client pending that relation cannot be supported; but the solicitor may insist on and obtain a mortgage from his client for whatever is justly due from him. *Pearson v. Benson*, 28 Beav. 598.

Where an absolute purchase is held, in consequence of the relation between the parties, to be available as a security only, the Court will not import into the transaction a power of sale. *Ibid.*

Delay of seven months in taking proceedings to set aside a sale, during which the purchaser was improving the property:—Held, no bar to the plaintiff's right to relief. *Ibid.*

An agreement between a solicitor and a client, without the intervention of any other solicitor, to allow the solicitor interest on his bill of costs, cannot be maintained independently of subsequent acquiescence, unless it appears that he informed the client that the law allowed no such charge. *Lyddon v. Moss*, 4 De Gex & J. 104.

But where the relation of solicitor and client had ceased after such an agreement had been made, and the client subsequently (having in the mean time had proper advice upon the subject of the agreement) entered into a second agreement with the solicitor, in part founded on the former, which she did not seek to impeach till fourteen years after its date,—Held, that there had been such delay and acquiescence as to preclude any title to relief. *Ibid.*

A mortgage taken by a solicitor from his client to secure monies alleged to be advanced, and also certain costs, ordered to stand as security only for

what, on taking a general account, should be found due, it appearing that the defendant, on taking the security, produced to his client no stated account of the amount due, and had kept no record of the transactions; and the solicitor having, in his answer, made misstatements as to some of the items, was ordered to pay the costs of the suit to the hearing. *Davies v. Parry*, 1 Giff. 174.

Decree to set aside a mortgage taken by a solicitor from his client to secure a sum, consisting partly of a gross sum agreed to be paid for professional services, and as to the rest of the balance recited to be due on a settlement of accounts, where the evidence shewed that the client, from his situation as to ill-health, was unable to take an active part in managing his own affairs, and where there was no evidence of any proper statement or examination of the accounts. The mortgage was declared to stand as a security only for what should be found justly due on a taxation of the bills of costs, and on an account of all dealings and transactions. *Morgan v. Higgins*, 1 Giff. 270.

(G) BILL OF COSTS.

(a) Delivery of.

[See *Philby v. Hayle* (F).]

Under the statute 6 & 7 Vict. c. 73. s. 33, which requires an attorney's bill to be delivered, or sent by post, to the party to be charged therewith, it is sufficient to deliver it to one of several joint contractors. *Mant v. Smith*, 28 Law J. Rep. (N.S.) Exch. 234; 4 Hurl. & N. 324.

The defendants were jointly sued on an attorney's bill as the promoters of a joint-stock company. The bill was headed "The promoters of the L. C. M. Company," and was sent by post to one of the defendants.—Held, that if there was evidence of a joint employment of the attorney there was a sufficient delivery of the bill to all the defendants. *Ibid*.

(b) Heading and Contents.

An attorney's bill of costs, delivered under the 6 & 7 Vict. c. 73. s. 37, is sufficient if it gives such reasonable information to the client as will enable him to take advice as to its taxation, and it need not be so explicit on the face of it as to enable an attorney at once to say, without further inquiry, whether the charges are proper. *Haigh v. Ousey*, 26 Law J. Rep. (N.S.) Q.B. 217; 7 E. & B. 578.

When the bill contains charges for proceedings in actions, the names of the parties to which are given, and it appears from the description of the proceedings that they must have taken place in one of the superior Courts, it is not now necessary that the name of the particular Court should be stated in the bill. *Ibid*.

The insufficiency of one or more items does not disentitle the attorney from recovering for that part of the bill which is unexceptionable. *Ibid*.

Where an attorney blends several claims in one bill, the client is entitled to have the whole bill taxed; if the attorney does not deliver a specific bill as to the whole, it is the same as if he had delivered no bill at all; and it makes no difference that the jury, at the trial of an action to recover the whole amount of the various claims, knew that, in fact, the client is not liable for certain of the claims. For the question as to the sufficiency of a signed bill under the

statute arises prior to and is independent of the question as to liability; since a bill is referred to taxation (save in special and excepted cases) on the assumption of liability, and simply to settle the question of amount. It is doubtful whether an attorney may maintain an action for work as to which he has delivered a bill, although there is other work pending for which he has a distinct claim against his client, and which he has not included in his bill nor in his action. But as a bill bad in part is bad altogether (even as to a claim not maintainable), if it does not contain all the claims included in the particulars in the action it is insufficient. *Pigot v. Cadman*, 26 Law J. Rep. (N.S.) Exch. 134; 1 Hurl. & N. 837.

(c) Taxation of.

(1) In general.

A client applying for the common order to tax a bill of costs ought to disclose the existence of an agreement respecting its payment, although the contents may not be known. *In re Ingle*, 25 Law J. Rep. (N.S.) Chanc. 169; 21 Beav. 275.

A common order obtained by the suppression of the existence of such an agreement was not discharged, the client being ignorant of the contents, and the solicitor having refused information or a copy. *Ibid*.

An agreement executed by a client empowering her solicitor to sell certain railway shares and to apply the proceeds in the discharge of his costs, in consideration of which he agreed not to sue, that his client should not be personally liable for any costs, and that he would confine his claim to the proceeds of the shares, will not preclude taxation. *Ibid*.

The retention and appropriation of money under such an agreement is not such a payment of the bill of costs as, under the 6 & 7 Vict. c. 73, will supersede the taxation, especially when the client is illiterate and without professional assistance. *Ibid*.

Candidates at a general election for members of parliament employed a firm of solicitors as their election agents:—Held, that the employment was professional, and that their bill of costs was subject to taxation, within the provisions of the 6 & 7 Vict. c. 73. *In re Osborne*, 27 Law J. Rep. (N.S.) Chanc. 532; 25 Beav. 353.

A solicitor claimed five bills of costs against his client. The client obtained an order of course to tax two only. It was discharged, with costs. *In re Law and Gould*, 21 Beav. 481.

Bills of costs assumed to be taxable in equity, where the solicitor had retained them in his possession and declined to produce them. *Re Loughborough*, 23 Beav. 439.

Order made for taxation of bills of costs after payment, where the solicitor had produced them on the execution of a mortgage, out of the proceeds of which they had been paid, but had taken them back immediately, and afterwards refused to produce them. *Ibid*.

It is not necessary to specify items of overcharge, upon a petition for taxation after payment, in a case in which the solicitor, by retaining the bill of costs and refusing to produce it, prevents the client pointing out the overcharges. *Ibid*.

A petition of a solicitor to review the Taxing Master's decision as to specified items of charges for conferences, some of which had been reduced, and

others wholly disallowed, was dismissed, with costs, the Court declining to enter into the merits of such matters. *Re Hubbard* (No. 2), 23 Beav. 481.

An order was made for taxation nominally on the petition and undertaking of A B and others. The certificate was made ten years after, and an order was then made on A B to pay. A B applied to discharge the order for payment, shewing that the order had been obtained without his authority, and during his absence from England:—Held, that while the order for taxation stood, the order for payment was regular; but what his remedy might be *quære*. *Re Thompson and Debenham*, 25 Beav. 245.

A solicitor delivered a general estimate of costs due to him without specifying the particulars. The client signed a memorandum agreeing to the statement, and requesting A B (to whom he had given his acceptance) to pay the amount. A bill filed by the client more than three years afterwards, to obtain a delivery and taxation of the bill of costs, was dismissed, with costs. *Turner v. Hand*, 27 Beav. 61.

(2) *Who may Petition.*

Taxation ordered at the instance of *cestui que trust* of a bill incurred in respect of a trust estate by trustees, both being now dead; but any balance due from the solicitor was ordered to be paid into court to a separate account, and not to the petitioners. *In re Hallett*, 21 Beav. 250.

Under the third-party clause (6 & 7 Vict. c. 73. s. 39.) it is not necessary, where a *cestui que trust* applies for taxation of bills paid by trustees or executors, to shew that there are fraudulent overcharges. *In re Drake*, 22 Beav. 488.

Taxation ordered, at the instance of a legatee, of a bill of costs of the executors' solicitor, for the amount of which a mortgage had been given by them. *Ibid*.

Upon an application by one of several persons interested for the taxation of a bill of costs of considerable amount, the Court, in determining the petitioner's right to a taxation, will not regard the amount of the petitioner's interest. *Re Dawson and Bryan*, 28 Beav. 605.

(3) *Special Circumstances.*

Special circumstances must be shewn under the statute 6 & 7 Vict. c. 73. s. 37, to enable a Judge or Court to order taxation of an attorney's bill, where more than a year has elapsed since its delivery, even though an action have been brought for the amount of it. *Cowdell v. Neale*, 26 Law J. Rep. (N.S.) C.P. 37; 1 Com. B. Rep. N.S. 332.

Quære—Whether a Justice of the Peace (not a Police Magistrate), sitting by himself, is a Court of law under the statute. *Ibid*.

A testator's estate was under administration by the executors, who employed a firm of solicitors, and the business being completed, their bill was paid. Within a year a residuary legatee applied for the taxation of the bill, which was ordered by one of the Vice Chancellors:—Held, upon appeal, affirming the decision, that there being charges which would not have been allowed by the Court in taking accounts as between the executors and the estate, there was a sufficient "special circumstance" within the 38th section of 6 & 7 Vict. c. 73. to enable the residuary legatee to obtain taxation after payment. *In re Dixon*, 26 Law J. Rep. (N.S.) Chanc. 89.

Though simple overcharges in a solicitor's bill are not sufficient to justify an order for taxation after payment, yet if the overcharges are such as, in the eye of the Court, to amount to fraud, *semble*, the Court will make the order. *Re Strother*, 26 Law J. Rep. (N.S.) Chanc. 695; 3 Kay & J. 518.

A solicitor, in answer to a letter complaining of his bill, and expressing a desire to have it taxed, wrote as follows: "The reason for your dissatisfaction I can only account for by your not being conversant with that kind of business." No further steps were taken on either side till nearly twelve months had elapsed from the delivery of the bill, when the solicitor again wrote, stating that for the future he should claim interest. A correspondence then took place, during which the twelve months expired, and fifteen months after the delivery of the bill a petition for taxation was presented. Gross overcharges being proved, the Court held that there were sufficient special circumstances to justify an order for taxation, but directed that interest should be paid on what should be found due from the expiration of one month after the delivery of the bill. *Ibid*.

A client indebted to a solicitor for costs and for money lent, executed as security a bill of sale of his farming stock and furniture, with a proviso for the deed to be void on payment of the amount, and of all sums which the solicitor might advance, with interest. A bill of costs and money due for advances was afterwards delivered, and the client employed another solicitor to investigate the matter. The two solicitors corresponded, and an offer was made, on behalf of the client, to pay what was due if the exact amount of the claim was stated and the vouchers were produced. The original solicitor stated his willingness to produce the vouchers, if certain draft deeds were prepared and an appointment made for settlement, and that he would have the bills taxed. After some further delay, the solicitor gave a written notice requiring payment on the following day, and stating that if the money were not paid he should take possession under the deed. The money not being paid, he accordingly caused possession to be taken, whereupon the whole amount claimed for bills of costs, advances and interest was paid by the client under protest. Under these circumstances, the client presented a petition for taxation, alleging various instances of overcharge in the bills of costs, and that they were paid under undue pressure. One of the Vice Chancellors refused to order taxation; but upon appeal it was held (reversing his Honour's decision) that payment under these circumstances did not preclude the client's right to taxation; that the rule was, that to tax a bill after payment the client must shew either undue pressure or overcharge amounting to fraud, and this case falling within the former branch of the rule, the bills must be taxed. *Ex parte Walker, in re Foster*, 29 Law J. Rep. (N.S.) Chanc. 625; 2 De Gex, F. & J. 105.

Taxation ordered of a paid bill of a mortgagee's solicitor in a mixed case of pressure and of improper items. *Re Rance*, 22 Beav. 177.

The mortgagee took legal proceedings against the mortgagor whereby expenses were being incurred. The mortgagee's solicitor delivered his bill on the 25th of December, and the parties met to complete a transfer on the 29th of December. The bill contained a charge for an abstract, which was more than

double what it ought to have been, but the solicitor refused to reduce it, and the bill was paid. It did not appear that any proposal had been made to settle the matter and postpone the question of costs. The Court, considering that there had been both pressure and overcharge, ordered a taxation. *Ibid.*

(4) Upon Terms.

Where there is an agreement by a solicitor with his client to charge only costs out of pocket, the Taxing Master will, under the common order for taxation, have regard to such agreement. *Re Philp, a solicitor*, 29 Law J. Rep. (N.S.) Chanc. 866; 2 Giff. 35.

A solicitor agreed to undertake the defence of another solicitor upon agency charges. On special petition a taxation of his bill was ordered "having regard to the agreement." *Re Gedye*, 23 Beav. 347.

A solicitor agreed to conduct the defence of another solicitor upon agency terms in case of the defence being unsuccessful. On entering into the agreement the latter suppressed from the former the existence of a material correspondence, which was the principal ground of a decree being made against him. But the solicitor, after the discovery, still continued the defence, without objection:—Held, that he was not released from the contract. *Ibid.*

A petition was presented for the taxation of a paid bill of costs, alleging specific items of overcharge. The solicitor thereupon offered to repay the amount of such items and the costs. The petitioner did not accede to this, but brought the petition to a hearing. The Court ordered the taxation of the bill, treating these items as omitted. *Re Catlin* (No. 2), 23 Beav. 412.

(5) Costs of Taxation.

Upon a taxation under the statute, assignees of a bankrupt solicitor are personally liable for the costs of taxation of a bill of costs delivered by them, where more than one-sixth is taken off. *Re Peers*, 21 Beav. 520.

Less than one-sixth was taken off a bill of costs on taxation, but more than one-sixth was taken off in the suit (which was one for a general account between the solicitor and client), on other grounds into which the Taxing Master could not enter. The costs of taxation were allowed to the solicitor. *May v. Bigginden*; *Cheeseman v. May*, 24 Beav. 207.

Assignees in insolvency of solicitors ordered to pay the costs of taxation, more than one-sixth having been taxed off a bill of costs delivered by them. *Shea v. Boschetti*; *In re Peile*, 25 Beav. 561.

(6) Practice.

An order was made upon a solicitor for the delivery of his bill within fourteen days. He was unable to comply, and on a motion for the second order, he asked for further time. It was given, but he was ordered to pay the costs of the motion. *In re Dendy*, 21 Beav. 565.

An order for the taxation of two out of four bills, and the delivery up of the papers, discharged, but without costs, the solicitor having attended the Taxing Master without having objected, and not having applied to discharge the order until six weeks after notice of it. *Re Wavell*, 22 Beav. 634.

The proper mode of enforcing the delivery of a

solicitor's bill is to serve the order with a proper indorsement, under the 12th Amended Order of the 11th of April 1842, and upon default being made an attachment will go as of course. *Ex parte Belton*, 25 Beav. 368.

A client presented a special petition for the taxation of his solicitor's bill, complaining that the solicitor had taken reckless proceedings, and praying that the costs of them might be wholly disallowed on taxation. A special petition was held to be unnecessary, and the petitioner was ordered to pay the costs of it. *Re Atkinson and Pilgrim*, 26 Beav. 151.

In a petition to tax it is not necessary to specify all the items objected to. *Re Dawson and Bryan*, 28 Beav. 605.

Summary order upon a petition, under the 6 & 7 Vict. c. 73. s. 37, against assignees in bankruptcy of a country solicitor, who had employed a London agent, to deliver their bills of costs, and against the agent to deliver his bill of costs and the petitioner's papers in his possession. *In re Walton*, 4 Kay & J. 78.

Such petition should be intitled in the matter of both solicitors, but a petition in the matter of a solicitor need not be intitled in the matter of the act. *Ibid.*

(H) LIEN FOR COSTS.

[*Turner v. Lettis*, 7 Law J. Dig. 59; 7 De Gex, M. & G. 243—*Watson v. Lyon*, 7 Law J. Dig. 59; 7 De Gex, M. & G. 288—*Hope v. Liddell*, 7 Law J. Dig. 59; 7 De Gex, M. & G. 331.]

The attachment of a judgment-debt under the garnishee clauses of the Common Law Procedure Act, 1854, overrides an attorney's lien on or control over the judgment in respect of general costs due to him from the garnishee. *Hough v. Edwards*, 26 Law J. Rep. (N.S.) Exch. 54; 1 Hurl. & N. 171.

Where there are cross-actions, and the plaintiff in each has obtained judgment, it is competent for the parties to come to a *bond fide* settlement of the matter between themselves, although the consequence of such settlement may be, that the attorney for one party may lose his lien for his costs. But if such settlement be come to by collusion and fraud, for the purpose of depriving the attorney of his costs, he has a right to call for the interference of the Court. *Quare*, by *Crompton, J.*, whether, even in a case of collusion, the Court would be bound to interfere. *Brunsdon v. Allard*, 18 Law J. Rep. (N.S.) Q.B. 306.

An order obtained under the 61st section of the Common Law Procedure Act, 1854, attaching a fund in the hands of a garnishee to answer a judgment debt, will not displace the prior lien for costs of a solicitor who has given notice to the garnishee. *Sympton v. Prothero*, 26 Law J. Rep. (N.S.) Chanc. 671.

Quare—If he had not given notice. *Ibid.*

S and W acted as attorneys for P, the plaintiff, in an action for damages, and also as his solicitors in a suit instituted against him in equity to restrain the proceedings in the action. The Court made an order in the suit, directing payment to P of a gross sum for damages and costs:—Held, that S and W had a lien upon the fund for their costs, both in the action and in the suit. *Ibid.*

The lien of a parliamentary agent attaches to books and papers intrusted to him by the law clerk of the trustees of a public road to obtain a renewal of their act of parliament. *Ridgway v. Lees*, 25 Law J. Rep. (N.S.) Chanc. 584.

The parliamentary agent, though nominated by the law clerk, has in the absence of any agreement a right to be paid his bill by the trustees directly, and not through the law clerk who nominated him. *Ibid*.

A claim by a parliamentary agent to participate in the profits of a solicitor's bill was rejected as no such agreement was proved to have been made. *Ibid*.

A cheque having been deposited by H in the hands of a solicitor, to be applied by him in payment of any such amount as might be recovered by F, his client, in an action then pending against H, the action proceeded to trial, and F recovered a sum of money against H, and entered up judgment for the debt and costs. Before the exact amount due on the judgment was ascertained F became bankrupt, and H, having a cross-claim against his estate for a larger amount than was due on the judgment, was admitted to prove for the difference, the rest being set off against the judgment debt under the 171st section of the Bankrupt Law Consolidation Act:—Held, that the solicitor had a lien upon the proceeds of the cheque for his costs, to the extent of the sum found due upon the judgment, and such lien was not displaced by the set-off under the proceedings in F's bankruptcy. *Hanson v. Reece*, 27 Law J. Rep. (N.S.) Chanc. 118.

An attorney has no lien for his costs upon real estate recovered for a client. *Shaw v. Neale*, 27 Law J. Rep. (N.S.) Chanc. 444; 6 H.L. Cas. 581; 24 Law J. Rep. (N.S.) Chanc. 563; 20 Beav. 157.

A solicitor has no lien for his costs upon a fund in court, which is the subject of the suit, as against other parties than his client; but he has a right to prevent his client from receiving any sum recovered by his exertions until his costs are paid. Such right, however, cannot preclude a fair compromise between the parties. *Verity v. Wild*, 28 Law J. Rep. (N.S.) Chanc. 561; 4 Drew. 427.

A solicitor received from his client a sum of money to pay off a mortgage. He did not so apply it, but claimed a lien on it for his costs. He was summarily ordered to repay the amount to his client, but without interest. *Re Cullen*, 27 Beav. 51.

(I) CHARGE ON COSTS.

A solicitor who had a claim for costs in an administration suit borrowed money and made an equitable assignment of his costs. At this time no order for payment of these costs had been made, and the solicitor's remedy was merely personal against his clients. The solicitor served notices on his clients and on the defendants, who represented the estate under administration. Afterwards the Court made an order that a fund should be brought into court, and that after paying certain charges, the same should be applied in payment of the solicitor's costs. The money was paid in, but was not sufficient to pay any part of the costs. The solicitor then became bankrupt, and after the bankruptcy money was paid into court, but the lender of the money did not obtain any stop-order. The Master of the Rolls had upon

the evidence before him, which was materially less than that now before the Court, held that the costs passed to the assignees of the bankrupt; but upon appeal (the new evidence being considered) the Lords Justices decided that there was no negligence on the part of the lender of the money, for that the notices served before the money was paid into court prevented the costs from being in the order and disposition of the bankrupt with the consent of the true owners, and that therefore they did not pass to the assignees in bankruptcy, but belonged to the lender of the money. *Day v. Day*, 26 Law J. Rep. (N.S.) Chanc. 585; 1 De Gex & J. 144; 26 Law J. Rep. (N.S.) Chanc. 288; 23 Beav. 391.

AUCTION AND AUCTIONEER.

[See SALE.]

AUDIT AND AUDITOR.

[See POOR LAW.]

AUDITA QUERELA.

[See COSTS, AT LAW; Security for.]

AUTREFOIS ACQUIT.

[See PLEADING IN CRIMINAL CASES.]

BAIL.

[The Judges enabled to appoint Commissioners within Ten Miles of London, and in the Isle of Man and the Channel Islands, to administer Oaths in Common Law, and to authorize the taking in the Country of Bail in Error, and Recognizances and Bail on the Revenue Side of the Exchequer, by 22 Vict. c. 16. Coroners in England enabled to admit to Bail Persons charged with Manslaughter, by 22 Vict. c. 33.]

(A) AFFIDAVIT AND ORDER TO HOLD TO BAIL.

(B) PROCEEDINGS ON AND CANCELLING THE BAIL BOND.

(A) AFFIDAVIT AND ORDER TO HOLD TO BAIL.

It is no objection to an affidavit in support of a Judge's order to hold a defendant to bail under 1 & 2 Vict. c. 110, sworn before the issuing of the writ in the action, that it is entitled in the cause, nor that the claim of the plaintiff as stated in the affidavit might be in respect of unliquidated damages; neither is it necessary to state the deponent's belief that the defendant is about to go abroad immediately unless apprehended. *Hargreave v. Hayes*, 24 Law J. Rep. (N.S.) Q.B. 281; 5 E. & B. 272.

A defendant was held to bail on an affidavit, stating that he had obtained money at the Cape of Good Hope by means of a forged letter, and, having been charged with such forgery before a magistrate here, had been discharged, on the ground that the offence was

not shewn to have been committed within the jurisdiction of the Courts of this country: that it was believed that evidence would be obtained of offences committed within such jurisdiction; and that the parties therefore believed that it was his intention immediately to quit this country. The defendant applied to the Court to discharge him out of custody. He did not deny the charges, but swore that he did not intend to quit England.—The Court refused to discharge him. *Ross v. Montefiore*, 1 Hurl. & N. 722.

Where the plaintiff has obtained a Judge's order to hold to bail, the Court will not (at least before declaration) rescind such order, upon the ground that the cause of action on which the plaintiff must proceed is different from the cause of action stated in the affidavit to hold to bail, if the Court is satisfied that the plaintiff has a cause of action, and that the process of the Court has not been abused with the view of having the defendant arrested. *Burns v. Chapman*, 28 Law J. Rep. (N.S.) C.P. 6; 5 Com. B. Rep. N.S. 481.

By the Merchant Shipping Act, 1854, s. 189, no proceeding for the recovery of wages under 50*l.* is to be instituted by any seaman in any superior Court of record. Where a seaman of a foreign vessel, which had come into a British port, had obtained an order to hold the owner of such vessel to bail for wages under 50*l.*, the Court refused, on application before declaration, to rescind such order for want of jurisdiction, as the application was premature, and as it was at least doubtful whether the 189th section applied in such case to a foreign vessel. *Ibid.*

(B) PROCEEDINGS ON AND CANCELLING THE BAIL BOND.

Common bail, having made default, and then rendered their principal, are liable, in an action on the bail-bond, for the debt and costs, unless proceedings are stayed, as they may be, by order of a Judge, "on payment of costs"; but if such an order is not taken advantage of until judgment is signed, the bail can have no relief. *Jallicks v. Cootar*, 28 Law J. Rep. (N.S.) Exch. 209.

The meaning of rule 109. of Reg. Gen. Hil. T. 1853 is, that bail are only liable to the amount of the debt mentioned in the order to hold to bail and indorsed on the *capias*, and costs. Where, therefore, in the affidavit to hold to bail, the debt was sworn at 458*l.*, which was the real amount, but by mistake 258*l.* only was inserted in the Judge's order, and indorsed on the *capias* on which the defendant was arrested, and a bail-bond was given to the sheriff in double that sum, the bail were held entitled to have the bond cancelled on payment of 258*l.* and costs. *Jonas v. Zepper*, 28 Law J. Rep. (N.S.) Q.B. 85; 1 E. & E. 327.

BAILMENT.

[See INNKEEPER—INTERPLEADER—LARCENY.]

- (A) JOINT BAILMENT.
- (B) JUS TERTIL.

(A) JOINT BAILMENT.

Where goods had been bailed by several upon the terms that the bailee was not to part with the pos-

session, except upon the joint order or request of the bailors, and the bailee afterwards delivered possession of the goods to one of the bailors upon his sole request,—Held, that the bailors jointly could not maintain an action for the delivery up of the goods without the joint order or request of the bailors. *Brandon v. Scott*, 26 Law J. Rep. (N.S.) Q.B. 163; 7 E. & B. 234.

(B) JUS TERTIL.

In trover, it is competent to a bailee, sued by the bailor, to plead facts shewing that the bailor's title has determined, even although it also appears that the title, by reason of relation, has been defeated *ab initio*. Thus a plea that the goods were the goods of a deceased intestate, whose administrator had claimed them, was held good. *Thorne v. Tillybury*, 27 Law J. Rep. (N.S.) Exch. 407; 3 Hurl. & N. 534.

BANK OF ENGLAND.

[The Governor and Company of the Bank of England indemnified in respect of certain Issues of their Notes, and such Issues confirmed, and further Issues authorized for a Time to be limited, by 21 Vict. c. 1.]

BANK OF IRELAND.

[Enactment for restraining the Governor and Company of the Bank of Ireland from lending Money on Mortgage, repealed by the 23 & 24 Vict. c. 31.]

BANKER AND BANKING COMPANY.

[Power given to Her Majesty to grant Letters Patent of Incorporation to Joint-Stock Banks in Scotland existing before the Act 1846, for a term of years or in perpetuity by 19 & 20 Vict. c. 3.—Certain Compositions payable to Bankers who have ceased to issue Bank Notes, continued by 19 & 20 Vict. c. 20.—The Law with respect to the Election of Directors of Joint-Stock Banks in England, amended by 19 & 20 Vict. c. 100.—The Law relating to Banking Companies amended by 20 & 21 Vict. c. 49.—Joint-Stock Banking Companies enabled to be formed on the Principle of Limited Liability, by 21 & 22 Vict. c. 91.—Bankers' Cheques, see BILLS OF EXCHANGE and PROMISSORY NOTES—Bankers' Notes, see PRINCIPAL AND SURETY: *Lichfield Union v. Green*—Frauds by, see TRUST AND TRUSTEE—Sale of Shares in, see CONTRACT: *Stray v. Russell*. And see INTERROGATORIES: *McKewen v. Robb*.]

- (A) POWERS OF DIRECTORS.
- (B) DEALINGS WITH CUSTOMERS.
- (C) ACTIONS BY AND AGAINST.
- (D) EXECUTION AGAINST SHAREHOLDERS.
- (E) CHARGING LANDS OF SHAREHOLDERS.
- (F) PROVING DEBTS IN CHANCERY.
- (G) WINDING UP.

(A) POWERS OF DIRECTORS.

The deed of settlement of a banking company contained clauses empowering the directors to pay and

allow to the servants of the company *such remuneration, salaries and wages* as the court of directors should think proper, and to confirm any contract and all acts done by persons acting as directors in relation to the formation and establishment of the company. The provisional directors entered into a contract with a manager to pay him a salary, and if the bank should discontinue business before the term agreed upon, to pay him 1,000*l.* a year for three years, each contract to be confirmed by the proprietary or a board duly authorized:—Held, that the directors alone had power to confirm that contract by deed. *Wilkins v. Roebuck*, 4 Drew. 281.

(B) DEALINGS WITH CUSTOMERS.

[See PRINCIPAL AND SURETY: *Alloway v. Harris*.]

The customer of a country bank having a sum of 942*l.* standing to his account paid in a further sum of 707*l.*, with a written direction that 500*l.* of that sum should be forwarded to another bank to meet a bill to become due. A sum of 500*l.* was sent as directed, but before the bill became due the country bank ceased to carry on business:—Held, that the 500*l.* was specifically appropriated, and belonged to the customer of the bank, and not to the general creditors. *Farley v. Turner*, 26 Law J. Rep. (N.S.) Chanc. 710.

Bankers received short bills from their customers, and credited them with the amount as cash, and dealt with the bills at their discretion. The bankers became bankrupt, at which time they held some of such bills which were not then due. The assignees refused to deliver up the bills to the depositing customer, but it was held by one of the Commissioners that there being no evidence of a contract or arrangement between the bankers and customer, the bills should be treated in all respects as cash; the fact of these bankrupts having credited the amount secured by the bills to the customer as cash, did not render the bills the absolute property of the bankers; and the state of the account at the time of the bankruptcy shewing that the customer had a balance in his favour, the assignees must deliver up the bills. Upon appeal, the Lords Justices affirmed the decision. *Ex parte Barkworth, in re Harrison*, 27 Law J. Rep. (N.S.) Bankr. 5; 2 De Gex & J. 194.

A customer kept three accounts with his bankers, the whole of which were overdrawn. Upon their applying for further security he executed a deed-poll, which recited the intention to give security and charge certain estates already mortgaged with the payment of the "three several sums of money which shall or may be found due, on the balance of the several accounts, for principal, interest, commission and other usual and lawful bankers' charges, not exceeding the aggregate sum of 3,000*l.*" He subsequently executed a deed of assignment for the benefit of his creditors. The real estate charged by the deed-poll was sold by the mortgagee, and after paying all incumbrances a balance remained, which was claimed by the bankers and by the trustees of the creditors' deed:—Held, upon a petition of the bankers, that the security did not include the floating balance. *In re Meadows*, 28 Law J. Rep. (N.S.) Chanc. 891; 26 Beav. 588: *nom. Re Medcoe's Trust*.

Where bankers have taken up bills for a customer

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on the security of the produce of consignments, and by a course of dealing with him have permitted him to draw on his account current without reference to the advances on the consignments, they cannot by charging that account with the advances, in the absence of express notice, treat it as overdrawn and dishonour his cheques before the consignments are realized. *Cumming v. Shand*, 29 Law J. Rep. (N.S.) Exch. 129; 5 Hurl. & N. 95.

The defendants, bankers, took up acceptances of the plaintiff, a customer, for 1,900*l.* drawn against and attached to the bills of lading of a consignment of rum, on receiving an undertaking from the plaintiff's brokers to pay over to them 1,900*l.* out of the produce of the sale. The defendants debited the plaintiff with the 1,900*l.* in his pass-book. Before the sale of the rum, 200*l.* having been paid into the bank to the plaintiff's credit, he drew a cheque for the amount, which the defendants dishonoured. Before the advance the plaintiff had received a general notice not to overdraw his account. In an action for not honouring the cheque, evidence being given that the defendants on previous similar transactions, had not treated the advances as brought into the account, and that it was not the usage of bankers to do so,—Held, that it was properly left to the jury to say whether, in the absence of formal notice to the plaintiff, the previous course of dealing did not continue to exist. *Ibid*.

(C) ACTIONS BY AND AGAINST.

In an action against a banking corporation, the declaration stated that the plaintiff had established a bank, called "The Bank of London," at great expense, and caused the name to be published, and affixed to the offices of the bank, and prospectuses to be issued; and that the defendants afterwards fraudulently established another bank, under the style of "The Bank of London," in imitation of the said "Bank of London" of the plaintiff. By reason of which, the plaintiff was prevented from carrying on his business at his bank so fully as he otherwise would, and was deprived of gains and profits:—Held, that the declaration was bad for not shewing that the plaintiff carried on the business of a bank. *Larsson v. the Bank of London*, 25 Law J. Rep. (N.S.) C.P. 188; 18 Com. B. Rep. 84.

Quære—Whether the corporation could have been liable in such an action. *Ibid*.

A banking company formed under the 7 Geo. 4. c. 46. stopped payment, and afterwards registered under the 20 & 21 Vict. c. 49. s. 6. Having sued the defendant on a banking account, for money lent and on accounts stated with the company before their incorporation, and on accounts stated since,—Held, that the defendant could not plead that before registration the said company had lost their reserve fund, and more than one-fourth of their paid-up capital, whereby they ceased to carry on, legally, the business of bankers; but that they might plead *null tiel* corporation, with, first, a traverse of the registration of the banking company; second, a traverse that the said company were carrying on business as bankers until registration; and third, that before registration the said company had stopped payment, and ceased to carry on business as bankers. *The Liverpool Borough Bank v. Mellor*, 28 Law J. Rep. (N.S.) Exch. 78; 3 Hurl. & N. 551.

H

(D) EXECUTION AGAINST SHAREHOLDERS.

Where the name of a person is on the register of shareholders of a joint-stock banking company, it is no answer to an application by a creditor for leave to issue execution against him upon a judgment obtained against the company that he was induced to become a shareholder by fraudulent misrepresentations, he not having repudiated his character of a shareholder until after the bank stopped payment, when he demanded back the money paid by him. *Henderson v. the Royal British Bank*, 26 Law J. Rep. (N.S.) Q.B. 112; 7 E. & B. 356.

The fact of the name of a party appearing on the register of shareholders is *prima facie* evidence of his being a shareholder, although the register may be informal. *Ibid.*

Under the 7 & 8 Vict. c. 113. individual shareholders in a joint-stock banking company are not liable to be sued in their individual capacities. The individual liability preserved by section 7. is upon a judgment first obtained against the company and a failure of assets, according to the provisions contained in sections 9. and 10. *Fell v. Burchett*, 26 Law J. Rep. (N.S.) Q.B. 228; 7 E. & B. 587.

A judgment creditor of a joint-stock bank, who has fulfilled the necessary conditions, is entitled as of right to an order of the Court under the 7 & 8 Vict. c. 113. s. 13. for execution against a shareholder; and the Court has no discretion to withhold such order, even where it appears that the company is being wound up, and that the official manager has large assets in his hands. *Morison v. the Royal British Bank*, 26 Law J. Rep. (N.S.) C.P. 62; 1 Com. B. Rep. N.S. 67.

To an application by a judgment creditor of a banking company, established under the 7 & 8 Vict. c. 113, for leave to issue execution against a shareholder whose name appears on the last-delivered memorial, it is no answer that the latter was induced to become a shareholder by the fraud of the directors, and that he repudiated his contract as soon as he became aware of the fraud. *Powis v. Harding*; *Dossetti v. the Same*; and *Bendy v. the Same*, 26 Law J. Rep. (N.S.) C.P. 107; 1 Com. B. Rep. N.S. 524, 538, 551.

A person, whose name appears on the last-delivered memorial, is liable as a shareholder, notwithstanding that the memorial is headed as a return made in pursuance of the 7 Geo. 4. c. 46, instead of the 7 & 8 Vict. c. 113, and though it is not made within the period of the year directed by section 16. of the 7 & 8 Vict. c. 113, and is verified on oath before a Justice of the Peace, instead of by declaration under the 5 & 6 Will. 4. c. 62, as directed by section 18. *Ibid.*

A notice under section 13. to a shareholder of an intention to apply to the Court or a Judge for leave to issue execution against him, is not bad for being in the alternative. *Ibid.*

A joint notice to two shareholders is good on a motion against one. *Ibid.*

To an application for execution against a shareholder of a joint-stock bank under the 7 & 8 Vict. c. 113. s. 10, it is no answer that he was induced by the fraud of the directors to purchase the shares, and that, as soon as he discovered the fraud, and before the application, he repudiated the shares. *Daniell*

v. the Official Manager of the Royal British Bank, 1 Hurl. & N. 681.

The provisions of the 7 & 8 Vict. c. 113. ss. 16, 17, as to the memorial of shareholders, are merely directory, and therefore a person whose name is on the memorial is liable as a shareholder notwithstanding the memorial is not in the form prescribed by that Act. *Ibid.*

A judgment creditor of a joint-stock banking company may proceed to execution against a shareholder by *scire facias*; the summary remedy given by the 13th section of the 7 & 8 Vict. c. 113, being cumulative. *Cleave v. Harwar*; *Wilde v. Stanner*, 1 Hurl. & N. 873.

The 7 & 8 Vict. c. 111. s. 10. does not render proof of the debt in bankruptcy a condition precedent to the right of the plaintiff to maintain the *scire facias*, but only prohibits the issuing of execution on the judgment in *scire facias* till after such proof. *Ibid.*

(E) CHARGING LANDS OF SHAREHOLDERS.

Semble—That the plaintiff, in an action against the public officer of a joint-stock banking company, cannot charge the lands of a shareholder under the 1 & 2 Vict. c. 110, without leave of the Court under the 7 & 8 Vict. c. 113. s. 13. *Harris v. the Official Manager of the Royal British Bank*, 27 Law J. Rep. (N.S.) Exch. 1; 2 Hurl. & N. 535.

(F) PROVING DEBTS IN CHANCERY.

A judgment creditor of a banking company may prove his debt in the Court of Chancery against the assets of a deceased shareholder, without first obtaining the leave of the Court of law to issue execution against the testator's assets under the 7 & 8 Vict. c. 113. s. 13. *Re Watson's Estate*, 23 Beav. 480.

(G) WINDING UP.

A banking company was established in July 1836, under the 7 Geo. 4. c. 46. It was provided by the deed of settlement that a portion of the profits should form a guarantee fund, and that if the company should lose the whole of the guarantee fund and one-quarter of the paid-up capital, a meeting should be called, which by a majority might declare the company dissolved. On the 26th of November 1857 the company stopped payment, and on the 26th of December following a meeting was held, when it was resolved to register the company under the statute 20 & 21 Vict. c. 49, and this was done on the 30th of the same month. On the 22nd of January 1858, at a meeting, the directors reported that the whole of the guarantee fund was lost, and, as they believed, the whole of the paid-up capital, and the dissolution of the company was agreed to, and liquidators were appointed to wind up the company voluntarily, under the 19 & 20 Vict. c. 47. A petition was presented by creditors of the company, praying that a compulsory winding-up should be ordered, when one of the Vice Chancellors made an order for the continuance of the voluntary winding-up with various restrictions, and decided that, the certificate of registration having been obtained, he had no jurisdiction to interfere:—Held, upon appeal (*Lord Justice Knight Bruce dissenting*), that the registration after suspension of payment was valid, but (both Judges agreeing) that a compulsory winding-up should be ordered, with liberty to adopt any proceed-

ings in the voluntary winding-up. *In re the Northumberland and Durham District Banking Co. and the Joint-Stock Banking Companies Act*, 27 Law J. Rep. (N.S.) Chanc. 356, 354; 2 De Gex & J. 357.

BANKRUPTCY.

[The Laws relating to Bankruptcy in Scotland consolidated and amended by 19 & 20 Vict. c. 79.—Doubts as to the Law of Bankruptcy and Real Securities in Scotland removed by 20 & 21 Vict. c. 19.—The Laws relating to Bankruptcy and Insolvency in Ireland consolidated and amended by 20 & 21 Vict. c. 60.—Certain provisions in the Bankrupt Law of Scotland amended by 23 & 24 Vict. c. 33.—The 7 & 8 Vict. c. 70, amended by 23 & 24 Vict. c. 147.]

(A) JURISDICTION OF THE COURT OF BANKRUPTCY AND COMMISSIONERS.

(B) ACT OF BANKRUPTCY.

- (a) *Assignment of Property.*
- (b) *Departing the Realm.*
- (c) *Beginning to keep House.*
- (d) *Lying in Prison.*
- (e) *Trader Debtor Summons.*

(C) PETITIONING CREDITOR'S DEBT.

(D) ADJUDICATION.

(E) PROOF OF DEBT.

- (a) *Annuity.*
- (b) *Contingent Debts and Liabilities.*
- (c) *Bills of Exchange and Promissory Notes.*
- (d) *By Surety.*
- (e) *Partners.*
- (f) *Breach of Trust.*
- (g) *Set-off.*
- (h) *Amount proveable.*
- (i) *Double Proof.*
- (k) *Effect of Winding-up Acts.*

(F) MORTGAGES AND MUTUAL CREDIT.

(G) ASSIGNEES.

- (a) *Removal of.*
- (b) *Rights and Liabilities.*
- (c) *What Property passes to.*
 - (1) *In general.*
 - (2) *Order and Disposition and reputed Ownership.*
- (d) *Action by, without leave of Commissioner.*

(H) WHAT TRANSACTIONS ARE OR ARE NOT AFFECTED BY BANKRUPTCY.

(I) JUDGE'S ORDER.

(J) OF THE BANKRUPT.

- (a) *Surrender.*
- (b) *Examination.*
- (c) *Allowance of Costs.*
- (d) *Protection from Process.*
- (e) *Declaration of Trust by.*
- (f) *Indictable Offences.*
- (g) *Evidence in Criminal Cases.*

(K) ARRANGEMENT WITH CREDITORS.

- (a) *Under the Control of the Court.*
- (b) *By Deed.*

(L) CERTIFICATE.

- (a) *Grant of, in general.*

(b) *Concealment of Property.*(c) *Gaming.*(d) *Time Bargains.*(e) *Conduct as a Trader.*(f) *Conditional Certificate.*(g) *Effect of, as a Discharge from Debts and Claims.*

(M) PRACTICE.

(N) EVIDENCE—NOTICE TO DISPUTE.

(A) JURISDICTION OF THE COURT OF BANKRUPTCY AND COMMISSIONERS.

The English Bankruptcy Consolidation Act, 12 & 13 Vict. c. 106, does not extend to the colony of New Zealand. *Bunny v. Hart*, 11 Moore's P.C. 189.

Under a warrant issuing out of the Court of Bankruptcy in England, lands and personal property belonging to A in New Zealand (who had been adjudicated a bankrupt in England) were seized. In an action by A in the Supreme Court of New Zealand for trespass, the defendant pleaded the bankruptcy of A, and that he had committed the trespass under the authority of the warrant of the Court of Bankruptcy. In that action A disputed the validity of the adjudication of bankruptcy, which question the Supreme Court refused to entertain. Upon appeal, the Judicial Committee, by consent, directed the appeal to stand over, to enable A, the appellant, to petition the Lords Justices sitting in bankruptcy to annul the adjudication. *Ibid.*

An English trader having gone abroad, and remained there with the intent to defeat or delay his creditors, is, under the 167th section of the Bankruptcy Consolidation Act, 1849, guilty of a continuing act of bankruptcy. *Ibid.*

In consequence of the poverty of the plaintiff, the Supreme Court of New Zealand allowed an appeal to the Queen in Council, without requiring the usual security for costs. *Ibid.*

A Commissioner obtained leave of absence, and the Lord Chancellor, under the powers of "the Bankruptcy Act, 1854," (17 & 18 Vict. c. 119.) appointed the registrar attached to his Court to act in his stead for two months. The Commissioner died before the two months expired:—Held, that an order made by the registrar sitting under this appointment, dated the day after the death of the Commissioner, was void. *Ex parte Corles, in re Palmer*, 28 Law J. Rep. (N.S.) Bankr. 15; 3 De Gex & J. 484.

Where a mortgage submitted the question of the validity of his security to the jurisdiction of the Commissioner, on an application of the petitioning creditor to set it aside,—Held, that the Commissioner, in deciding the question, was acting judicially, and not as an arbitrator, and that his decision was subject to appeal. *Ex parte Bland, in re Murgatroyd*, 6 De Gex, M. & G. 757.

(B) ACT OF BANKRUPTCY.

[FILING PETITION, see (G) (c) (1): *Monk v. Sharp*—CONTINUING ACT OF BANKRUPTCY, see (A): *Bunny v. Hart*.]

(a) *Assignment of Property.*

B, a trader, was in the habit of consigning goods

to the defendants against advances made by them to him, and being indebted to other persons it was agreed that the defendants should advance him between 500*l.* and 800*l.* to meet his payments becoming due, and a sum of 1,000*l.* which might at a future time be required by B for the purpose of utensils of his trade. A bill of sale was executed by B to the defendants to secure these sums. This bill of sale recited that B was indebted to the defendants in 500*l.* and might become further indebted to them, and that it had been agreed that for securing the payment of the said sum then due, and of all further sums thereafter becoming due (such advances not to exceed 1,800*l.*), B should make the assignment. The deed then, in consideration of such sums, assigned to the defendants all his stock-in-trade, subject to a proviso for making the deed void on payment by B to the defendants of the 500*l.* and interest on two specified days, and of all other sums thereafter due to the defendants at the time when they became due. When the bill of sale was executed, B was not indebted to the defendants in any sum, except 500*l.*, due upon a promissory note given for breach of an agreement, but that note formed no part of the money intended to be secured by the deed. The precise sum which B would require to be advanced was not then known, but as it was known that it would exceed 500*l.* that sum was inserted as if it had been already advanced. Immediately after the bill of sale was executed, B received from the defendants about 670*l.* as part of the money agreed to be advanced on the security, which was applied by B in payment of the debts due by him, and subsequently made further advances to him. When the bill of sale was executed, B's trade liabilities amounted to 11,000*l.*, which continued till he became bankrupt, and his property included in the bill of sale was worth 6,000*l.* These amounts were exclusive of B's consignments and the defendants' acceptances against them. B's acceptances for trade debts then current amounted to 9,300*l.* The defendants having some time after reason to believe that B could not go on with his trade took possession of and sold certain parts of the stock on B's premises, and shortly after B became bankrupt. In an action by B's assignees to recover the value of the goods converted by the defendants,—Held, first, the bill of sale was to be looked at as it was really intended to be framed; secondly, that, being to secure future advances only and executed *bond fide*, it was not in point of law an act of bankruptcy, although it transferred all the stock-in-trade; thirdly, that, under the circumstances, no intention to defeat or delay creditors was to be inferred, notwithstanding that the bill of sale operated by way of mortgage, and not as an absolute transfer, and that the property assigned was disproportioned in value to the amount advanced. *Bittleson v. Cooke*, 25 Law J. Rep. (n.s.) Q.B. 281; 6 E. & B. 296.

B, a trader, being indebted to the defendant in 570*l.* upon a balance of accounts for goods sold and delivered, and being pressed for payment, as an inducement for forbearance, executed a deed on the 5th of April 1854, by which he mortgaged to the defendant the public-house in which he carried on business, and assigned to him his trade and other fixtures and moveable property in the house other than his stock-in-trade; with a covenant for payment

of the sum due, with interest, by instalments, the period for payment extending over several months, and a proviso that on due payment of the instalments the deed was to become void, but on default in any such payment the defendant might enter and sell. The value of the property mortgaged was between 300*l.* and 400*l.*, B's assets at the time amounting to 1,200*l.*, and his debts to 4,000*l.* After the execution of the deed, B continued his business, receiving supplies of goods and advances from the defendant, and making various payments to creditors, until the 22nd of July, when he became bankrupt:—Held, that the execution of the deed was not an act of bankruptcy by B, not being an assignment of the whole, or of the whole with a colourable exception, of the trader's property which must necessarily defeat and delay creditors by producing absolute present insolvency and incapacity to carry on trade, and withdrawing the whole of the property from the reach of the creditors. *Hale v. Allnutt*, 25 Law J. Rep. (n.s.) C.P. 267; 18 Com. B. Rep. 505.

Nor was the deed void as a fraudulent preference, for even if made in contemplation of bankruptcy, it was not voluntary, but procured by pressure on the part of the defendant. *Ibid.*

If the deed had been made with a view to give the defendant a fraudulent preference, B being uninfluenced by the pressure, it would have been void notwithstanding the pressure. But as the pressure exercised some influence on B's mind, there was no fraudulent preference. *Ibid.*

Nor was the deed void by the 13 Eliz. c. 5, as being made without valuable consideration, or for a consideration fraudulently inadequate; because it was given to secure a debt of greater amount than the value of the property assigned. *Ibid.*

A retail draper bought on credit, at different times, large quantities of goods. About three months after commencing such purchases he sold the goods to the defendant for money, part at one time and part at another, during the six following months, at about half the cost price of the articles. The sales were real sales, the trader and the defendant each trying to make the best bargain that he could for himself. The trader's object appeared to be to raise money to pay his creditors. He afterwards became bankrupt, in consequence of this reckless course of dealing:—Held, that such sales were not fraudulent transfers, and, consequently, not acts of bankruptcy, within the meaning of the statute 12 & 13 Vict. c. 106. s. 67. *Lee v. Hart* (Exch. Ch.), 25 Law J. Rep. (n.s.) Exch. 135; 11 Exch. Rep. 880.

An assignment, by a trader, of his stock in trade, fixtures, and effects (which in fact constitute his whole property), partly in consideration of an existing debt and partly as security for a further advance, it *bond fide*, is not necessarily, and as a conclusion of law (apart from evidence of fraudulent preference), an act of bankruptcy; it not appearing that there is in the deed any power to take after-acquired property, as in the case of *Graham v. Chapman*; and if there is any fraudulent intent, it is a question of fact for the jury. *Bell v. Simpson*, 26 Law J. Rep. (n.s.) Exch. 363; 2 Hurl. & N. 410.

The facts that the debtor, being pressed for payment by one creditor, and being unable to pay him, went to another creditor, and declaring that he must close his shop unless he could sell his stock, induced

him to accept an assignment of his stock, partly for the debt already due to him and partly for a fresh advance, do not constitute evidence of a fraudulent preference of such creditor, nor of any fraudulent intent, so as to invalidate the assignment, as against the creditors under a subsequent bankruptcy. *Ibid.*

A bankrupt, before his bankruptcy, on receiving an advance of money, gave the lender a promissory note, and a memorandum agreeing to assign some reversionary property and a policy of assurance, by way of further security. He subsequently executed a bill of sale of all his goods and effects, to secure the same sum and any future debts. The bankrupt's assignees having brought an action to recover the goods, on the ground that the bill of sale was an act of bankruptcy and fraudulent,—Held, that it was competent to the defendant to prove that the bill of sale was given in pursuance of a parol undertaking made at the time of the loan, and that on proof of that fact the bill of sale was effectual against the assignees. *Harris v. Ricketts*, 28 Law J. Rep. (N.S.) Exch. 197; 4 Hurl. & N. 1.

One of the Commissioners of Bankruptcy decided that a deed of assignment by a trader of all his property to a trustee for the benefit of his creditors, the deed purporting to be made in conformity with the 224th section of the statute 12 & 13 Vict. c. 106, was not an act of bankruptcy sufficient to sustain a petition for adjudication presented by a dissentient creditor nine days after the execution of the deed; and also decided, that the fact that the trustee took possession under the deed, and proceeded to a sale before the deed was executed by six-sevenths in number and value of the whole body of creditors, as required by the act (there being no suggestion that the trustee did not act *bona fide*), was immaterial. The Court of Appeal held, differing from his Honour, that such deed constituted an act of bankruptcy committed by the trader, and that before its execution by the required majority of creditors any one who had not executed it might on that act of bankruptcy, petition for an adjudication. *Ex parte Alsop, in re Rees*, 29 Law J. Rep. (N.S.) Bankr. 7; 1 De Gex, F. & J. 289.

Held, also (by Lord Justice Turner), that the petitioning creditor (the dissentient creditor) having written to the trader and the trustee of the deed, recommending the latter to proceed to a sale, and to the former requesting a bill of the intended sale in order that he might attend, was such an acquiescence, notwithstanding his refusal to execute the deed, as precluded him from procuring an adjudication on such act of bankruptcy. *Ibid.*

An assignment of an equity of redemption, which left a trader in the possession of the materials for carrying on his trade in the way in which he was at the time carrying it on,—Held, not an act of bankruptcy. *Johnson v. Peemeyer*, 3 De Gex & J. 13; 25 Beav. 88.

Pressure is not necessary to prevent an assignment from being an act of bankruptcy as a fraudulent preference. It is sufficient that the assignment is not the spontaneous act of the bankrupt, and the circumstance of the grantee having been the grantor's solicitor makes no difference in this respect. *Ibid.*

(b) Departing the Realm.

Whether a bankruptcy founded on a petition for

adjudication not in the form set forth in Schedule M. of the Bankrupt Law Consolidation Act is rendered invalid by reason of there not having been a trading or residence within the district of the Court making the adjudication, the Court of Appeal declined to determine without the opinion of a Court of law, and refused to annul on the ground of such an objection. *Ex parte Bunney, in re Bunney*, 26 Law J. Rep. (N.S.) Bankr. 83; 1 De Gex & J. 309.

Where a person has gone to an English colony, and is adjudicated bankrupt in this country and his goods are taken in the colony by the authority of the assignees appointed in England, for which taking the alleged bankrupt institutes proceedings in the colonial court, and subsequently appeals from its decision to the proper Appeal Court in this country, if he petitions this Court to annul the adjudication, his petition is not too late, though presented beyond the time appointed by the 223rd section of the Bankrupt Law Consolidation Act, the proceedings in the colony keeping alive his title to appeal. *Ibid.*

A trader very greatly indebted left England in 1853, and went to reside in New Zealand, where he remained until 1857. In less than three weeks his departure was known to his creditors. Sixteen months after his departure he was adjudicated bankrupt in England, and the assignees executed a power of attorney, under the authority of which the bankrupt's goods in New Zealand were seized. For this seizure and with a view to dispute the adjudication, the bankrupt brought an action there, and on its failure appealed to the Privy Council. Upon a petition of appeal to annul, presented to this Court early in 1857 (the trading and the petitioning creditor's debt being proved),—Held, that the adjudication was valid, inasmuch as the bankrupt, by remaining abroad, must be assumed to have done so with an intention to defeat or delay his creditors, and by so remaining had committed a fresh act of bankruptcy every day, whatever might have been the intention of his departure from this country. *Ibid.*

(c) Beginning to keep House.

A trader bought goods to be paid for by bill. A few days after the goods had been delivered the seller called and demanded a return of his goods, and at the same time threatened to have the trader arrested for swindling in taking in the goods when he knew he was in insolvent circumstances. He requested to see the trader, who refused to see him:—Held, not sufficient to raise a presumption of a "beginning to keep house with intent to delay a creditor" so as to constitute an act of bankruptcy within the 67th section of the Bankrupt Law Consolidation Act. *Clements v. M'Kibben*, 2 Hurl. & N. 62.

(d) Lying in Prison.

A Commissioner refused to adjudicate a trader a bankrupt:—Held, that upon a just exposition of the whole of the statute, 12 & 13 Vict. c. 106, the Court of Appeal has jurisdiction to declare whether there is upon the evidence sufficient to warrant an adjudication, and to remit the matter to the Commissioner. *Ex parte Crabb, in re Palmer*, 25 Law J. Rep. (N.S.) Bankr. 45; 3 De Gex, M. & G. 277.

A trader was arrested at his own house upon a writ of *capias ad satisfaciendum*, and on account of his health remained there in custody of the sheriff's officer;

while so in custody a warrant was issued against him for felony, and upon the writ and the warrant he was removed to the county gaol, where he remained in custody for more than twenty-one days from his admission therein:—Held, that this was an act of bankruptcy within the 69th section of the above-mentioned statute. *Ibid*.

A man carried on the business of a surgeon and apothecary and made up medicines for his patients, but did not make them up from other persons' prescriptions, or sell drugs to the public:—Held, that he was an apothecary within the phrase and meaning of the same statute, and as such liable to be adjudicated bankrupt. *Ibid*.

A B was arrested for debt on the 20th of March 1849, and lay in prison upon such arrest until the 26th of May 1849. A petition in bankruptcy was filed against him on the 20th of May 1850, and he was adjudicated a bankrupt on the 7th of June following. Upon bill filed by the assignees appointed under the bankruptcy to set aside a deed executed by the bankrupt, it was held, that the 69th section of the Bankrupt Law Consolidation Act of 1849 pointed to one act of bankruptcy only, dating from the expiration of the first twenty-one days after the arrest, and that the statute did not contemplate repeated acts of bankruptcy by lying in prison successive periods of twenty-one days; that, consequently, no act of bankruptcy was shewn to have taken place within twelve months prior to the filing of the petition, and, therefore, under the 88th section of the statute, the title of the plaintiffs as assignees was incurably bad. *Wallace v. Blackwell*, 25 Law J. Rep. (N.S.) Chanc. 644; 3 Drew. 538.

(e) *Trader Debtor Summons.*

[*Ex parte Walker, in re Haywood*, 7 Law J. Dig. 67; 6 De Gex, M. & G. 752.]

A creditor, after assigning his debt, filed an affidavit of such debt (under the act 12 & 13 Vict. c. 106, s. 18.), and caused the alleged debtor to be served with a demand of immediate payment, and summoned him before the Court of Bankruptcy to state whether or not he admitted the demand of the creditor. The registrar (before whom the summons was heard) declining to enter into the question whether the debt had been assigned, and requiring the alleged debtor to state whether he admitted the debt, or any part thereof, the debtor filed an admission as to part of the debt and a deposition that he had a good answer to the residue of the creditor's demand:—Held, upon appeal, that the creditor was not justified in making an affidavit of debt after assignment without the concurrence of the assignee, and that the alleged debtor was entitled to have his admission and deposition taken off the file. *In re Taylor*, 28 Law J. Rep. (N.S.) Bankr. 9; 3 De Gex & J. 408.

Bemble—that a proceeding by summons of a trader debtor, if taken by the assignor and assignee of a debt jointly, would not be objectionable. *Ibid*.

Where an inspectorship deed (similar to that set out in *Macnaught v. Russell*, 1 Hurl. & N. 611) had been executed by six-sevenths of the creditors of a firm more than three months before the service of a trader debtor summons,—Held, that there was sufficient probability of it affording a good defence to the demand to induce the Court to abstain from

requiring the debtors to give a bond. *Ex parte Swayne, in re Swayne*, 3 De Gex & J. 53.

(C) PETITIONING CREDITOR'S DEBT.

The defendant, having obtained judgment and execution against D, seized his goods under a *f. fa.*, issued on the 3rd of December 1851. On the morning of the 5th a notice was given to the defendant by the solicitors of some of D's creditors, who afterwards presented a petition in bankruptcy against him. The notice stated that it was given on behalf of several creditors of D; that he had committed an act of bankruptcy, and also that he had on the previous day, the 4th, made a conveyance of all his property to trustees for the benefit of his creditors. The goods seized under the *f. fa.* were sold on the afternoon of the 5th. On the 11th the petition in bankruptcy was presented, and D was adjudicated a bankrupt on the following day. The petitioning creditor was the president of a money club, and the previous president had, in pursuance of the rules of the club, in June 1851, indorsed to him two promissory notes, being part of the property and securities of the club, and which were payable on demand. The shares of the club were 50*l.* each. The bankrupt had subscribed for two shares before May, had become the purchaser of two shares, and had, on becoming such purchaser, executed the notes with two sureties. By the rules of the club D was bound to pay 10*s.* monthly on each share, and interest at the rate of 5*l.* per cent. One of the rules of the club provided, "that in case either of the sureties should die before the subscriber's share be paid up, such subscriber should have immediate notice in writing from the president and stewards to provide a fresh surety, to the satisfaction of the committee, within a reasonable time, as the necessity of the case might require; and in case of neglect the committee should have power to recover the whole amount of such subscriber's share or shares then unpaid by action at law." All the monthly payments and all the interest due up to the time of the bankruptcy had been paid by the bankrupt; but one of the sureties having died in May 1851, notice was given to the bankrupt to find a fresh surety, which he had omitted to do, and more than 50*l.* remained unpaid to the club at the time of the act of bankruptcy, in November 1851. The sum due on the notes was treated as the petitioning creditor's debt. The assignees of the bankrupt having brought an action against the defendant to recover the proceeds of the goods sold,—Held, first, that there was a good petitioning creditor's debt; and, secondly, that the notice of an act of bankruptcy, under the 133rd section of the 12 & 13 Vict., was sufficient. *Hope v. Mook*, 25 Law J. Rep. (N.S.) Exch. 11.

(D) ADJUDICATION.

By section 211. of the 12 & 13 Vict. c. 106. any trader unable to meet his engagements with his creditors, and desirous of laying his affairs before them, under the superintendence and control of the Court of Bankruptcy, may present a petition to the Court, setting forth the true cause of such inability, and praying for protection from process. By section 223. it is lawful for the Court in certain cases to adjudge such petitioner a bankrupt, and to adjourn all further proceedings in the matter into the public court:

—Held, in a case where such an order of adjudication did not shew the existence of any of the circumstances which, under section 223, would empower the Commissioner to adjudge the petitioner a bankrupt, that the adjudication was invalid, and could not be supported. *Lee v. Rowley*, 27 Law J. Rep. (n.s.) Q.B. 193; 8 E. & B. 857.

By the 20th section of the 17 & 18 Vict. c. 119, it is enacted that a trader petitioning for an adjudication of bankruptcy shall forthwith after filing his petition, and before adjudication, make it appear to the satisfaction of the Court that his available estate is sufficient to produce 150*l.* at the least:—Held, that the decision of the Court of Bankruptcy as to value is conclusive. *Pennell v. Butler*, 18 Com. B. Rep. 209.

A creditor took out a trader debtor summons, under the 78th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106). The debtor admitted the debt, and on the same day filed a petition, under the 211th section, for arrangement with his creditors, and obtained protection. The creditor, however, on his debt remaining unpaid, presented a petition for adjudication, founded on the summons, but did not prosecute it in due time. Another creditor was thereupon substituted for the original creditor, and the trader was adjudicated bankrupt:—Held (affirming a decision of one of the Commissioners), that the original creditor had a right to proceed to adjudication, notwithstanding the protection under the 211th section, and that the second creditor was rightly substituted for the first. *Ex parte Dales, in re Dales*, 27 Law J. Rep. (n.s.) Bankr. 13; 2 De Gex & J. 206.

Two separate adjudications had been made against two partners, and subsequently a joint adjudication was made against both. The district Commissioner had annexed the former to the latter. Upon appeal, the decision was reversed. *Ex parte Haines, in re Powell*, 27 Law J. Rep. (n.s.) Bankr. 33; 3 De Gex & J. 58.

An adjudication in bankruptcy had been made in April 1857, on the petition of a gentleman who had been in trade, but had ceased to be so for more than sixteen years, and in October he obtained his certificate. At the date of the bankruptcy there were debts incurred during the trading, though not trade debts, which still remained unpaid. A creditor who was aware of all the proceedings petitioned to annul in April 1858. There was no proof of collusion or fraud:—Held, that the petition to annul was too late. *Ex parte Adams, in re Hawkes*, 27 Law J. Rep. (n.s.) Bankr. 37; 3 De Gex & J. 70.

Whether an outlaw can petition for adjudication against himself, and whether he can have available assets under the 20th section of the Bankrupt Act, 1854 (17 & 18 Vict. c. 119),—*quære*. *Ibid*.

Where a bankrupt, who had executed a trust deed for the benefit of his creditors, had obtained an adjudication against himself, the validity of which was open to doubt, the Court suspended proceedings under it at the instance of a creditor undertaking to apply for an adjudication on his own petition, although creditors' assignees had been appointed and opposed the application. *Ex parte Taylor, in re Weeks*, 6 De Gex, M. & G. 737.

(E) PROOF OF DEBT.

(a) Annuity.

By a deed of separation, a husband covenanted

to pay quarterly to his wife's trustees during the joint lives of himself and his wife, such a sum as, together with the dividends from certain stock or other funds settled, or which might be settled, to her separate use, would make an annuity or yearly sum of 200*l.*; the covenant to cease in the event of their future cohabiting:—Held, that this was not an annuity, or debt or liability to pay money on a contingency, proveable under the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106. ss. 175, 177, 178); and, consequently, that the husband's bankruptcy and certificate afforded no answer to an action on the covenant. *Parker v. Ince*, 28 Law J. Rep. (n.s.) Exch. 189; 4 Hurl. & N. 53.

(b) Contingent Debts and Liabilities.

[*Warburg v. Tucker*, 5 E. & B. 384; 6 Law J. Dig. 71.—*Ex parte Todd, in re Williamson*, 7 Law J. Dig. 71; 6 De Gex, M. & G. 744.—*Ex parte Brook, in re Willis*, 6 Law J. Dig. 75; 6 De Gex, M. & G. 771.—*Ex parte Meyer, in re Meyer*, 6 Law J. Dig. 76; 6 De Gex, M. & G. 775.]

The plaintiff let to the defendant ten years ago premises adjoining some already occupied by the latter. Three years afterwards the defendant applied by parol to the plaintiff for permission to convert the front of the premises into one large shop window, and to make other alterations. The plaintiff consented, upon condition that at the determination of the tenancy the premises should be restored by the defendant to their original state. The defendant made the alterations and continued to occupy the premises for several years afterwards. He then became bankrupt, and, the assignees declining to take the premises, gave notice that he would resign possession to the plaintiff. In an action for not restoring the premises pursuant to the agreement,—Held, that the defendant was not protected by his certificate, since the agreement, being collateral to the demise, was not within section 145. of the Bankrupt Law Consolidation Act, 1849; nor was it within section 178. as imposing a liability to pay money upon a contingency. *Maples v. Pepper*, 25 Law J. Rep. (n.s.) C.P. 245; 28 Com. B. Rep. 177.

The defendant gave the plaintiffs a guarantie to the extent of 200*l.*, but revocable at his option on giving them notice in writing, and afterwards became bankrupt, and obtained his certificate of conformity under the 12 & 13 Vict. c. 106; but did not give notice to determine the guarantie:—Held, that the defendant's liability was a contingent liability within the 178th section, and that the certificate was a bar to all claims under the guarantie. *Boyd v. Robins and Longlands*, 27 Law J. Rep. (n.s.) C.P. 299; 4 Com. B. Rep. N.S. 749.

The plaintiff, a schoolmaster, sued the defendant for a quarter's schooling of defendant's son, the payment of which was contracted to be made quarterly. The defendant became bankrupt during such quarter:—Held, that the defendant's liability to pay on the quarter-day was not a liability on a contingency within the 178th section of the Bankrupt Law Consolidation Act, nor a debt payable after the bankruptcy, within the 172nd section of that act, and that the plaintiff's claim was, therefore, not barred by the defendant's certificate. *Thomas v. Hopkins*, 29 Law J. Rep. (n.s.) C.P. 187; *nom. Hopkins v. Thomps*, 7 Com. B. Rep. N.S. 711.

The liability of one of two makers of a promissory note, who have signed, as surties for a third maker, to contribution upon the contingency of the co-surety paying the note on default of the principal, is, before the note arrives at maturity, a liability to pay money upon a contingency which shall not have happened, within the meaning of the 12 & 13 Vict. c. 106. s. 178, and the demand in respect of such liability is, therefore, proveable, under that section, against the estate of the bankrupt co-surety when the contingency has happened. *Adkins v. Farrington*, 29 Law J. Rep. (N.S.) Exch. 345; 5 Hurl. & N. 586.

Bankruptcy during the currency of a quarter (and subsequent certificate) is no bar to an action by a schoolmaster for board and tuition of the bankrupt's son under a quarterly contract,—the demand not being a debt “not payable at the time of the bankruptcy,” within section 172. of the 12 & 13 Vict. c. 106, or “a liability to pay money upon a contingency,” within section 178. *Hopkins v. Thomas*, 7 Com. B. Rep. N.S. 711.

A joint and several covenant was entered into by a principal debtor and his surety that the principal would pay a sum of money by three instalments, with interest, on three specified days. The first instalment was duly paid, but before the second instalment became payable the surety became bankrupt. The creditor applied to the Commissioner to be admitted to claim against the bankrupt's estate in respect of the amount of the two unpaid instalments and interest, and was allowed:—Held, affirming the decision of the Commissioner, that the claim was properly admitted as upon a contingent liability under the 178th section of the statute 12 & 13 Vict. c. 106. *Ex parte Barwis, in re Strahan*, 25 Law J. Rep. (N.S.) Bankr. 10; 6 De Gex, M. & G. 762.

The bankrupt by his marriage settlement, dated in February 1817, covenanted to pay 10,000*l.* to be settled upon trusts for himself for life, then for the intended wife for life, and then for the children of the marriage who should attain twenty-one; and he agreed to enter into a bond to the trustees to secure 10,000*l.*, and that the trustees should stand possessed of the bond upon trust during the life of the bankrupt, or until he should become bankrupt or insolvent, to permit him to retain the 10,000*l.* in his hands, and, upon payment of the same, to hold the same upon the trusts therein mentioned. The bond was duly executed, securing the principal money and interest, in the month of August 1817. There were several children of the marriage, all of whom attained twenty-one. The money remained in the hands of the bankrupt until 1826, when he was declared bankrupt, and the trustees proved against his estate for the 10,000*l.*, and the bankrupt swore that when he executed the bond he was solvent; but in the year 1827 the Commissioners expunged the proof, declaring that the money was not justly due wholly or in part. The trustees submitted to this decision, and the bankrupt obtained his certificate, and went abroad, and died in 1830. The trustees having all died, new trustees of the settlement were appointed in 1845, and they in 1860 tendered a proof on behalf of the widow and children of the bankrupt. One of the Commissioners rejected the proof, on the ground that the matter had been settled by the decision of the Commissioners in 1827, and could not be re-opened. On appeal,—Held, that the question in 1860 not

being the same as that before the Commissioners in 1827, a proof for the whole 10,000*l.* (which sum was a valid debt due upon the death of the bankrupt, and might during his life have been proved as a contingent debt upon a valuation of the sum payable upon his death) must be allowed; and that, no circumstances producing any alteration in the position of the assignees or in the materials for the decision having been shewn, lapse of time did not affect the case; for a creditor is entitled to come in and prove as long as any property remains distributable. *Ex parte Boddam, in re Taylor*, 29 Law J. Rep. (N.S.) Bankr. 20.

(c) Bills of Exchange and Promissory Notes.

The holder of a bill of exchange received from the drawers payments in respect of it amounting to nearly 15*s.* in the pound. The acceptor afterwards became bankrupt, and upon the holder tendering a proof against the estate for the full amount of the bill and interest in arrear, the proof was cut down to the amount of principal money due at the time of the proof, and the decision was affirmed, with costs. *Ex parte Taylor, in re Houghton*, 26 Law J. Rep. (N.S.) Bankr. 58; 1 De Gex & J. 302.

Money was lent to one, to secure the repayment of which he and two others made a joint and several promissory note. The lender required payment some years after the date of the note; but upon the makers procuring a new name to the note, he forbore payment. The new name was written on the face of the note, but not under the former names, and had its date appended. One of the original makers became bankrupt, and one of the Commissioners refused to allow proof of the debt on account of the alteration of the note:—Held, however, on appeal, reversing that decision, that the creditor was entitled to prove, for that the third name, though on the face of the note, was added as an indorsement, and for the purpose of adding a person with fresh liability, and not as a new maker. *Ex parte Yates, in re Smith*, 27 Law J. Rep. (N.S.) Bankr. 9; 2 De Gex & J. 191.

B was in the habit of drawing bills on H & Co. bankers, and of remitting bills to them to an amount fully sufficient to meet their acceptances. H & Co. became bankrupt. At that time there were in the hands of holders for value undue bills to a large amount drawn by B upon H & Co. and accepted by them, but H & Co. had misappropriated the greater part of the bills remitted to meet them:—Held, that B could not claim to have returned to him such of the remitted bills as remained in the hands of H & Co. at the time of their bankruptcy, but that they must be applied, so far as they would extend, in payment of the bills accepted by H & Co. *Ex parte Carrick, in re Harrison*, 2 De Gex & J. 208.

Proof admitted on an acceptance which had been in blank at the date of the bankruptcy and had been filled up afterwards. *Ex parte Bartlett, in re Henne*, 3 De Gex & J. 378.

(d) By Surety.

A and B became, the former as principal and the latter as surety, liable to pay a stated sum. A became bankrupt, and B on a subsequent day paid the principal money and interest due up to the day of payment, for which amount B proved under the bankruptcy. The surety subsequently made his will and

died four years afterwards, and his executors administered his estate upon the supposition that the proof was good. More than two years later it was discovered that the proof should have been for interest only up to the date of the bankruptcy, and not up to the time of payment:—Held (affirming a decision of one of the Commissioners, but *Lord Justice Turner* not assenting), that an application to reduce the proof came too late. *Ex parte Sanderson, in re Alexander*, 26 Law J. Rep. (N.S.) Bankr. 26.

In 1855 R, and H as his surety, gave to G a bond for 2,000*l*. R gave to H, by way of indemnity, a warrant of attorney. In 1858 G, without the knowledge of R, gave up the bond to H, and received in satisfaction for it the promissory note of H, for the sum remaining due. R, at the same time assigned all his property to H in satisfaction of the liabilities under which H had come for him. In the following month, R became bankrupt, and the warrant of attorney and the assignment became void as against the assignees:—Held, that the dealings between H and G had not taken away the rights of H against R, and that H, having paid the debt, was entitled to prove against R's estate. *Ex parte Allen and Cazemove, in re Roberts*, 3 De Gex & J. 447.

(c) Partners.

A firm of two partners owed a debt to A B. A B brought an action against one of the partners, obtained judgment, and proceeded to execution and sale. Between the time of the execution and sale, the partner sued was adjudicated bankrupt; and the day after the sale the other partner was also adjudicated bankrupt, and both sets of proceedings were consolidated. In proceedings at law the proceeds of the sale were decided to be partnership assets. The partner who had been sued had no separate assets. A B was admitted to prove against the joint estate of the bankrupts; but, upon appeal by the assignees,—Held, overruling this decision, that the joint debt of the two partners was extinguished by the judgment against one of them; and that, therefore, the proof must be rejected. *Ex parte Higgins, in re Tyler*, 27 Law J. Rep. (N.S.) Bankr. 27; 3 De Gex & J. 33.

Where two of a firm of bankers had drawn out a balance standing to the account of customers in the character of executors, and had invested it in the names of themselves and two other trustees upon an unauthorized security,—Held, on the bankruptcy of the bankers, not to be a case for double proof against the joint estate and the separate estates of the two partners. *Ex parte Barnwell, in re Biddulph, Wright's Executors' case*, 6 De Gex, M. & G. 795.

(f) Breach of Trust.

Executors had a balance in that character with bankers, who (with the executors' consent) invested part of it on securities not of a proper description for an investment by executors. The bankers made no inquiry as to the power of the executors to make the investment, but if they had made the inquiry, all the information which they would probably have been able to obtain, would have shown that the executors were residuary legatees, and that the balance was a part of the clear residue. The fact, however, was that the investment was a breach of trust, there being a codicil which the executors had kept back

but afterwards proved, constituting them trustees only:—Held, on the bankers becoming bankrupt, that they had not so participated in the breach of trust as to entitle the *cestuis que trust* to prove against their separate estates. *Ex parte Barnwell, in re Biddulph, De Front's Executors' case*, 6 De Gex, M. & G. 801.

(g) Set-off.

Owners of a factory and machinery let the same from year to year to traders, the lessees to be entitled to a lease, the machinery to be valued at the beginning and end of the tenancy, the difference in value, if any, to be paid by lessors or lessees as the case might be. The first valuation was made. After that, the lessees were adjudicated bankrupt, and then the second valuation took place, and the result was in favour of the tenants. No lease was ever demanded, and the assignees refused to take one. At the time of the adjudication the bankrupts owed rent and money for goods sold by the lessors, who claimed to set off the increased value of the machinery due from them against their debt, and to prove for the balance, but the assignees claimed to be paid the increased value, and that the lessors should prove for the whole amount due for rent, for goods and for the increased value. One of the Commissioners decided in favour of the lessors, and the Lords Justices on the appeal of the assignees confirmed the order, giving costs against the appellants personally. *Ex parte Hope, in re Hanson*, 27 Law J. Rep. (N.S.) Bankr. 40; 3 De Gex & J. 92.

(h) Amount proveable.

Proprietors of saw-mills contracted to saw timber for a merchant, and to insure him against loss as to any timber that might be destroyed by fire. A fire took place, and the timber at the time at the mills was destroyed. The parties to the contract agreed as to the quantity and quality of the timber destroyed, and the merchant brought an action for the alleged value, and the saw-mill proprietors soon afterwards were adjudicated bankrupt. The merchant proceeded with the action, notwithstanding the adjudication, and recovered a verdict for the sum alleged to be the value, and tendered a proof for that sum before the Commissioner, who rejected it, but recommended an appeal:—Held, that the amount of the loss was capable of being ascertained, and that the merchant was entitled to prove, and with that declaration the matter was sent back to the Commissioner. *Ex parte Bateman, in re Routledge*, 25 Law J. Rep. (N.S.) Bankr. 19; 8 De Gex, M. & G. 263.

(i) Double Proof.

D & Y carried on business in Liverpool, in partnership as "D, Y & Co." D & Y and Y also carried on business in Pernambuco in partnership as "D, Y & Co." The two firms were separate and distinct, and the third partner in the Pernambuco trade had not any interest in the Liverpool business. The Pernambuco house drew bills upon and they were accepted by the Liverpool house *bona fide* and in the ordinary course of business, and two of such bills came into the hands of G and K honestly in the due course of trade. The English firm became bankrupt, and afterwards the Pernambuco firm entered into a "concordata" with their creditors, under which

they vested property in trustees for the benefit of their creditors. G and K received a dividend under the "concordata" out of the assets vested in the trustees of the Pernambuco firm, as drawers of the bill. They subsequently attempted to prove against the Liverpool firm as acceptors of the bills, but one of the Commissioners decided, upon the authority of *Ex parte Hinton* (De Gex, 550), that there was no right to double proof; and, upon appeal, the same was affirmed, Lord Justice Turner agreeing with the Commissioner, Lord Justice Knight Bruce dissenting. *Ex parte Goldsmid, in re Deane and Youle*, 25 Law J. Rep. (N.S.) Bankr. 25; 1 De Gex & J. 257.

Such bills having been accepted in England are to be dealt with by the rules of English law. *Ibid.*

Two traders, partners, assigned the partnership property to trustees for the benefit of their creditors, after full payment to whom, the trustees were to hold the residue, upon trust to divide the same between the partners according to the deed of partnership. The partners had previously given their joint and several promissory note to their bankers for 1,500*l.* The bankers, by their public officer, executed the assignment for 2,755*l.*, which included the 1,500*l.* One of the partners afterwards became bankrupt. A suit was instituted in the Court of Chancery to carry into effect the trusts of the deed of assignment, and a decree for that purpose was pronounced. The bankers were admitted, under the bankruptcy, to prove against the separate estate of the bankrupt for the 1,500*l.* due on the promissory note; and the same was affirmed, on appeal. *Ex parte Thornton, in re Johnson*, 28 Law J. Rep. (N.S.) Bankr. 4; 3 De Gex & J. 454.

The technical rule against double proof does not apply where, as here, the partnership estate is being administered in bankruptcy. *Ibid.*

Where there are two firms, one of them consisting of two individuals, and the other of the same two individuals and of a third, and they have mutual dealings and draw bills on each other, if a bankruptcy occurs, the holders of their bills of exchange will not be allowed to prove under both bankruptcies. *Goldsmid v. Casemore*, 29 Law J. Rep. (N.S.) Bankr. 17; 7 H.L. Cas. 785.

This rule applies to cases where one of the firms carries on business in England and the other abroad, and to cases where the firm consists of more than one person. *Ex parte Hinton* (De Gex, 550.) affirmed. *Ibid.*

(k) Effect on Winding-up Acts.

A section of a statute, which merely re-enacts a provision in a previous statute, will not be construed as virtually repealing an inconsistent enactment in an act made subsequently to the first, but before the last act. Therefore, although the 182nd section of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106.) provides that proving a debt shall amount to an election not to bring an action, it does not repeal the Winding-up Act, 7 & 8 Vict. c. 111. s. 10, which saves the right of a judgment creditor to his action. *Morisee v. the Royal British Bank*, 26 Law J. Rep. (N.S.) C.P. 62; 1 Com. B. Rep. N.S. 67.

The Winding-up Acts do not affect creditors of joint-stock companies. *Ibid.*

The case of *Thompson v. the Universal Salvage Company* is in part overruled. *Ibid.*

(F) MORTGAGE AND MUTUAL CREDIT.

In 1852 certain traders mortgaged to the plaintiff their machinery, stock in trade, &c., present and future. In January 1855 they made an invalid assignment of all their effects to trustees for the benefit of creditors. The plaintiff having afterwards sold without notice of an act of bankruptcy all the property of the bankrupts, including that specified in his mortgage-deed as well as after-acquired property, —Held, that he was entitled to that property only which was specified in his own mortgage-deed. *Carr v. Acraman*, 25 Law J. Rep. (N.S.) Exch. 90; 11 Exch. Rep. 566.

In an action by the assignees of a bankrupt underwriter against brokers for premiums due to the bankrupt, the brokers may set off under the Bankrupt Act a loss, which occurred before the bankruptcy, on a policy underwritten by the bankrupt, and effected by them in their own names, "and ^{or} as agents," for a principal for whom they were acting on a *del credere* commission, without the bankrupt's knowledge. *Lee v. Bullen*, 27 Law J. Rep. (N.S.) Q.B. 161.

(G) ASSIGNEES.

(a) Removal of.

Where the solicitor of a trader, declared bankrupt on his own petition, held powers of attorney from friendly creditors to vote at the choice of assignees, and opposed on insufficient grounds a proof which would have turned the choice, and carried it by his powers of attorney, another proof having been also omitted to be placed on the proceedings, —Held a proper case for setting aside the choice, although the proceedings had advanced nearly as far as a declaration of dividend. *Ex parte Carter, in re Robinson*, 3 De Gex & J. 116.

Where circumstances are brought to the attention of the Court, raising a case of grave suspicion as to the conduct of an assignee, it is the duty of the Court to institute a thorough examination into the case, although the complaint may not in the petition be placed on its true ground. *Ex parte Singlehurst, in re Tristram*, 3 De Gex & J. 451.

(b) Rights and Liabilities.

The assignees of a bankrupt are not liable as assignees of the term unless they have done some act which unequivocally indicates to the lessor that they have elected to take the benefit of the lease. *Goodwin v. Noble*, 27 Law J. Rep. (N.S.) Q.B. 204; 8 E. & B. 587.

Where the assignees of a bankrupt, after the bankruptcy, placed a messenger in possession of a certain hotel, paid rent, submitted to distress, occupied by a third party a tap in connexion with the premises, the profits of which were carried to the credit of the bankrupt's estate, the tap being kept open for the purpose of preserving the licence, asked for time for the payment of subsequently-accruing rent, and being threatened with an action of ejectment by the lessor, their attorney told them they would resist the action, —Held, that such acts by the assignees did not amount to an election by them to accept the lease. *Ibid.*

Under such circumstances, the lessor should avail

himself of the power given by the 145th section of the Bankrupt Law Consolidation Act. *Ibid.*

The acquiescence of the assignees under a second bankruptcy in a subsequent trading by the bankrupt does not bar their claim to his future estate and effects under the 127th section of the 6 Geo. 4. c. 16. *Re Bissell's Trust*, 25 Law J. Rep. (N.S.) Chanc. 323; 2 Kay & J. 328.

The Bankrupt Law Consolidation Act does not interfere with rights accruing under any of the acts repealed by the 1st section, notwithstanding such rights may have accrued after the passing of the act. *Ibid.*

A G P, a creditor of H, a bankrupt, sold his dividend up to 8s. in the pound, to W, a solicitor, who had been employed by H before his bankruptcy. A G P having discovered that W was, as to one moiety, a purchaser as trustee for Q, the acting creditors' assignee (who with his partners were employed as accountants under the bankruptcy), filed a bill to set aside the sale, and to have an account taken; but the bill was dismissed by one of the Vice Chancellors, as against W, so far as the purchase was on his own account, but his Honour directed an issue to try whether A G P was aware that the purchase was made partly on behalf of Q, the assignee:—Held, on appeal, reversing this decision, that the sale must be set aside and accounts on both sides be taken. *Pooley v. Quilter*, 27 Law J. Rep. (N.S.) Chanc. 180, 374; 2 De Gex & J. 327; 4 Drew. 184.

Purchases by assignees of bankrupts of claims on the estate are contrary to public policy and to the policy of the Bankrupt Law. *Ibid.*

Even a fair, open, *bond fide* purchase by an assignee cannot be upheld for the benefit of the estate, if the vendor questions it. *Per Lord Justice Turner. Ibid.*

A bankrupt, after obtaining his certificate, contracted with the creditors' assignee for the purchase of his reversionary interest in a legacy to which he was entitled under the will of his father-in-law. Shortly after the agreement had been signed, the reversion fell into possession. On the day named in the contract for the payment of the purchase-money the bankrupt tendered the amount to the official assignee, who refused either to receive it or to recognize the contract. Upon a petition by the purchaser, —Held, in the absence of fraud or proof of insufficient value, that the contract was valid, and ought to be completed. *In re Ward's Legacy*, 28 Law J. Rep. (N.S.) Chanc. 175; 26 Beav. 207.

In bankruptcy and insolvency the assignees are the only persons who can take proceedings in respect of the estate. *Davis v. Snell*, 28 Beav. 321.

A bill alleged that, in 1848, A B executed a fraudulent assignment of his property, to defeat the plaintiff's rights under a decree; that A B took the benefit of the Insolvent Act in 1859; that the assignee had declined to take any proceedings without an indemnity, which the plaintiff, through poverty, was unable to give. To this bill, filed against the assignee and the trustees to set aside the fraudulent deed, a general demurrer was allowed. *Ibid.*

(c) *What Property passes to.*

(1) *In general.*

L, a member of the Stock Exchange, had entered

into contracts with other members of the Stock Exchange for the sale and purchase of consols. These contracts purported to be for the delivery of stock to the buyer, but, in fact, the seller had not the stock to deliver, nor any intention of procuring it; and the contracts were really to be carried out by payment or receipt of differences, as stocks might rise or fall. Upon the balance of these transactions L would have had to pay a large sum on the account day. Previous to the account day L became a defaulter. According to the rules of the Stock Exchange, which are binding upon all its members, the monies due to the defaulter from other members of the Stock Exchange upon dealings there are got in by the official assignees of the Exchange and divided rateably among his creditors on the Exchange. The defendant, who was one of the official assignees, accordingly collected the money due to L from the other members of the Exchange upon the before-mentioned contracts, and on the 8th of December 1853 *bond fide* distributed rateably among L's Exchange creditors the whole of such money, except a sum of 138l., which remained in his hands at the time when L was adjudged bankrupt. On the 23rd of November 1853 L, who had various creditors off the Exchange, petitioned the Court of Bankruptcy for a private arrangement with his creditors under the 211th section of the Bankruptcy Act, 1849, but the necessary proportion of creditors not assenting to the proposals made, the petition was adjourned into court, and L was adjudged bankrupt under the 223rd section on the 31st of December, and the plaintiffs were appointed his assignees. The defendant had no notice of any act of bankruptcy committed by L, until after he was adjudged bankrupt. In an action by the plaintiffs against the defendant for money had and received,—Held, that as to the money distributed by the defendant before L was adjudged bankrupt, the defendant was not liable, as the plaintiffs' title as assignees could not in such a case relate back to any prior act of bankruptcy; and even if the payments of the money were, as between the bankrupt and the Stock Exchange creditors, a fraudulent preference, which the plaintiffs might disaffirm, they had not done so until it had been paid over by the defendant, and therefore that it never became in his hands money received to their use as assignees. *Nicholson v. Gooch*, 25 Law J. Rep. (N.S.) Q.B. 137; 5 E. & B. 999.

Held, also, as to the 138l., that this was not part of L's personal estate which vested in the plaintiffs as assignees, since the contracts out of which the money was received were illegal and void by the 7 Geo. 2. c. 8, and therefore incapable of being enforced by action, and the money was not paid by those who were indebted on such contracts to the defendant as agent of L and for his benefit, but in order that it might be distributed according to the rules of the Exchange, and therefore that the plaintiffs could not recover this money against the defendant. *Ibid.*

Per Crompton, J., that the receiving money for differences being an illegal act, expressly forbidden by the 7 Geo. 2. c. 8. s. 5, no action could arise out of such receiving; and, *semble*, also, that if the contracts only were illegal, and the differences might be legally received for L's use, the money was received by the defendant adversely to L, and not under any

new authority from him, so that the defendant was not estopped from setting up that L had no right to the money. *Ibid.*

R, by deed, assigned to the defendant all the dye-warens and consumable stores on his premises, upon trust to permit R to remain in possession and carry on his trade until a specified event, and, on that happening, to stand possessed of the premises upon trust to enter and take possession of all the premises, including all substituted consumable stores, pursuant to the declaration thereafter contained, and to sell the same. There was also a clause that, when any of the dye-warens, &c. thereby assigned and specified in the schedule should be consumed and others substituted for them in the ordinary way of the business, the substituted dye-warens, &c. should belong to the defendant, upon the trusts before declared, and should be considered as included in the assignment, in like manner as if they were now the property of R, and were included in the schedule, so that the security might at all times be of an adequate value. R continued in possession until the specified event, and, during that time, substituted dye-warens, &c. for others consumed in the way of his business. After the event happened, the defendant took possession of all the dye-warens, &c. then on the premises, including those which had been substituted by R, and several months after sold the same dye-warens, &c. R had become bankrupt after the seizure, and before the sale, and his assignees sued in trover for the substituted dye-warens:—Held, that the property in the substituted dye-warens vested in the defendant when he took possession under the deed, either by a transfer of them made valid by a new act subsequently done by the grantor, or by virtue of the express authority to take possession of them completed by possession being actually taken. *Hope v. Hayley*, 25 Law J. Rep. (n.s.) Q.B. 155; 5 E. & B. 830.

The plaintiff agreed to purchase from K 100 quarters of barley, being part of a larger quantity which the plaintiff saw and approved of, and of which he took away a sample. It was also agreed that the plaintiff should send his own sacks to K; that K should fill the sacks with barley, take them to the railway, and place them on trucks, to be conveyed to the plaintiff. The plaintiff sent 200 sacks, and K filled 155 of them with barley from the larger quantity. The barley was not delivered, though repeatedly demanded by the plaintiff and promised by K. K becoming embarrassed, took the barley out of the sacks, and mixed it with the bulk, without the privy of the plaintiff. K was soon after adjudicated a bankrupt. The assignees thereupon removed the barley, and claimed the whole as the bankrupt's property:—Held, that the property in the barley in the 155 sacks passed to the plaintiff by the appropriation made by K, with the assent of the plaintiff, *a priori* as well as subsequently. *Aldridge v. Johnson*, 26 Law J. Rep. (n.s.) Q.B. 296; 7 E. & B. 885.

Held, also, that notwithstanding the prior conversion by K, the removal of the barley by the assignees was a conversion by them. *Ibid.*

The plaintiffs, traders, on the 26th of June 1850, petitioned the Court of Bankruptcy for an arrangement under section 211. of the Bankrupt Law Consolidation Act, 1849. At an adjourned private meeting,

on the 6th of August, the plaintiffs did not attend, and neither the proposition nor any modification thereof was accepted by the creditors. The petition was not dismissed, but the meeting was adjourned to the public court, and the plaintiffs adjudicated bankrupt under section 223, and assignees appointed. Between the petition for arrangement and the adjudication in bankruptcy the plaintiffs assigned to D a debt due to them from the defendant, of which the defendant had notice, but the defendant subsequently paid the debt to the assignees:—Held, that the debt did not pass to the assignees, an adjudication of bankruptcy, under section 223, not having relation to any prior act of bankruptcy, and, consequently, that D had a right to recover the debt in the name of the plaintiffs. *Monk v. Sharp*, 27 Law J. Rep. (n.s.) Exch. 29; 2 Hurl. & N. 640.

Held, also, that the petition was not, under the circumstances, an act of bankruptcy under section 76. *Ibid.*

The defendant, an attorney, during the conduct of a Chancery suit, received payment from Y, his client, of his bill of costs already incurred, upon an agreement that, if those costs were afterwards ordered to be paid in the suit the defendant should pay back the amount he might receive to Y. Subsequently to this agreement Y became bankrupt, and the defendant, who continued as attorney in the suit after the bankruptcy, received those costs under an order of the Court:—Held, that the payment of the defendant's costs before the termination of the suit, *i. e.*, before he was entitled to receive them, was a good consideration for the defendant's agreement to repay, and that Y's right of action upon it for money had and received passed to his assignees. *Morgan v. Taylor*, 28 Law J. Rep. (n.s.) C.P. 178; 5 Com. B. Rep. N.S. 653.

Previously to the above agreement there had been a change of attorneys in the suit, and the defendant succeeded F, Y's former attorney, upon an understanding with F to repay F such portion of the costs due to F at the time of the change of attorneys as the defendant should receive on a taxation being directed by the Court. The defendant having, upon taxation after Y's bankruptcy, received the costs so due to F,—Held, that Y's assignees were not entitled to recover them, as money had and received to their use, although F made no claim to them. *Ibid.*

Quære—whether Y, at the time of his bankruptcy, had such a right to the costs in the suit, *quæ* costs, as would pass to his assignees. *Ibid.*

M, being owner of certain land and premises, mortgaged them in fee, but still continued in possession of the mortgaged premises, upon which, subsequently to such mortgage, he put up and used for the purposes of his trade a steam-engine and boiler; also a hay-cutter, a corn-crusher, and grinding-stones. All these articles, except the grinding-stones, were screwed or otherwise firmly affixed to the several buildings to which they were attached, but still in such a manner as to be removable without damage to the buildings or to themselves, and the upper millstone lay in the usual way upon the lower grinding-stone. The steam-engine and boiler were used for supplying with water certain baths which were on the premises; the hay-cutter was attached to a building adjoining the stable, to improve its usefulness as a stable, and the malt-mill

and grinding-stones were also intended by M to add to the value of the premises. In an action by the assignees in bankruptcy of M,—Held (*Willes, J. dubitante*), that the articles were fixtures, and that although they were trade fixtures, as well as annexed to the freehold after the mortgage, they enured to the benefit of the mortgagee, and did not pass to the assignees of the mortgagor. *Walmsley v. Milne*, 29 Law J. Rep. (N.S.) C.P. 97; 7 Com. B. Rep. N.S. 115.

A person entitled to a contingent reversionary interest in stock (standing in the name of the Accountant General to the account of himself and others), assigned the same to A B, his solicitor, absolutely, who obtained a stop-order. A B, acting as solicitor of C D, mortgaged the share so assigned to him to C D; but neither C D nor A B obtained any stop-order in respect of the mortgage, nor gave any notice of the mortgage to any person having control over the fund. A B became bankrupt, and afterwards the reversion fell into possession and the fund became distributable, when the share of the party originally entitled was transferred to the account of himself and A B and others, his incumbancers. The mortgagee of A B petitioned for payment of his share; but the assignees in bankruptcy claimed the fund as being in the order and disposition of A B:—Held (overruling a decision of one of the Vice Chancellors), that as the mortgagee had not obtained a stop-order nor given notice, he was not entitled against the assignees in bankruptcy. *Bartlett v. Bartlett*, 26 Law J. Rep. (N.S.) Chanc. 577; 1 De Gex & J. 127; 3 Sm. & G. 533.

A contingent reversionary interest in stock is used in the meaning of the words "goods or chattels," used in the 125th section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. *Ibid*.

An assignment by the Commissioners in Bankruptcy, under the old law, of the choses in action of a bankrupt, is not equivalent to a reduction into possession, and such assignment made without notice given to the trustees is not entitled to priority over a subsequent assignment for value, of which notice is given. *Re Barr's Trusts*, 27 Law J. Rep. (N.S.) Chanc. 548; 4 Kay & J. 219.

The issuing of the commission is not sufficient notice. *Ibid*.

Nor does the mere accidental knowledge of one of the trustees amount to notice—*semble*. *Ibid*.

Under a marriage settlement, the husband was entitled to a life interest in all the wife's after-acquired property. The husband became bankrupt, and obtained his certificate. The wife afterwards became entitled to the residuary estate of her deceased sister as next-of-kin:—Held, that the assignees were not entitled to the husband's life interest in this property. *In re Inkson's Trusts*, 21 Beav. 310.

An assignment of the machinery and effects of a trader necessary for carrying on his trade, and comprising all his property, except his household furniture and book debts, which were of small value, he being at the time in insolvent circumstances,—Held, to be fraudulent and void against the assignees on his becoming bankrupt. *Ex parte Bland, in re Murgatroyd*, 6 De Gex, M. & G. 757.

After the appointment of assignees in bankruptcy, under the act of 1849, an assignment for value by the bankrupt of a reversionary interest cannot pre-

vail against the right of the assignees in bankruptcy. *In re Coombe's Trusts*, 1 Giff. 91.

(2) Order and Disposition and Reputed Ownership.

[*Ex parte Littledale, in re Pearce*, 7 Law J. Dig. 76; 6 De Gex, M. & G. 714.]

Goods, the property of the plaintiff, remained by his consent in the possession, order and disposition of A until his bankruptcy. Prior to the bankruptcy the sheriff seized the goods under a *f. fa.* issued against A, but allowed A to continue in possession of them as before:—Held, that the seizure by the sheriff, being a mere wrongful act, did not affect the possession which A had by the consent of the plaintiff, and that the goods were therefore liable to pass to the assignees of A, under section 125. of the Bankrupt Law Consolidation Act. *Barrow v. Bell*, 25 Law J. Rep. (N.S.) Q.B. 2; 5 E. & B. 540.

Where goods are assigned by a trader, subject only to a condition for redemption on payment of a debt on demand, with a stipulation that he shall retain possession of them until default, the goods so retained by him under such a deed will be deemed to be in his "order and disposition," with "the consent of the true owner," within the meaning of the bankrupt laws, and will pass to the assignees. *Freshney v. Wells or Carrick*, 26 Law J. Rep. (N.S.) Exch. 129; 1 Hurl. & N. 653.

If the goods before such assignment have been previously assigned to another party, and by him allowed to remain in the trader's possession,—the assignees in bankruptcy are not, in an action by the party claiming under the second assignment, precluded from setting up that the goods were in the order and disposition of the bankrupt, with the consent of the first assignee; because in so doing, although they are claiming adversely to, they are also claiming in a certain sense through him; and, on the other hand, they are setting up their own title, not his, and do not come within the rule of law precluding defendants, on the plea of not possessed, from setting up *jus tertii*. *Ibid*.

It is not necessary that an order for sale of goods as in the order and disposition of the bankrupt, should state who was the "true owner," by whose consent they were in such order and disposition. But fixtures cannot come within the provision of the bankrupt law as to goods and chattels in the order and disposition of the bankrupt. *Ibid*.

L, a maker and seller of agricultural implements, being also in the habit of selling on commission, having purchased a portable steam-engine of the plaintiff, assigned it to them by deed, to secure the payment of the balance of the purchase-money, with power to them to take possession of it at any time and sell, and after paying themselves any balance due to them, to pay the residue to L, with a proviso that, until default by L in payment of the balance due after a demand, L might possess and use the engine, and a proviso that, on payment of the balance by L before a sale, the assignment should be void. The engine accordingly was delivered to L, and he was in the habit of letting it out on hire in the ordinary way of his trade. He afterwards, while a balance was still due to the plaintiff, became bankrupt, and at the time of his bankruptcy the engine was in the possession of a farmer, to whom it had been let on hire:—Held, on the authority of

Freakey v. Carrick, that, although the possession of the engine was in accordance with the *bond fide* agreement between the plaintiffs and L, the engine was "in the possession, order and disposition of the bankrupt with the consent of the true owner," within the meaning of the 12 & 13 Vict. c. 106. s. 125. *Horneby v. Miller*, 28 Law J. Rep. (n.s.) Q. B. 99; 1 E. & E. 192.

Held, also, that the temporary possession of the engine by the farmer at the time of the bankruptcy did not make the engine the less in the possession, order and disposition of the bankrupt as reputed owner. *Ibid*.

By a bill of sale, A, a trader, assigned all his personal estate, consisting of furniture, stock in trade, &c. to the defendant by way of mortgage to secure past and future advances. The deed contained a proviso that, until non-payment after a written demand, A should continue in possession. The property, by the consent of A and the defendant, was subsequently offered for sale by public auction at A's house, but no sale was effected, and A continued in possession. On the 22nd of June he executed an assignment of all his property, for the benefit of his creditors, to trustees, who took possession. On the following day the defendant made a written demand of his debt in the terms of the bill of sale. In consequence of this, with the consent of the trustees, the deed of assignment was altered by the introduction of a trust clause for payment of the defendant's claim before the other creditors, and A re-executed the deed. The defendant afterwards took forcible possession of the goods, and on the 27th of June A was adjudicated a bankrupt. In an action by A's assignees to recover the goods,—Held, that the deed of assignment, notwithstanding the alteration, operated as an act of bankruptcy on the 22nd of June, and that at that time the goods were in the order and disposition of the bankrupt, with the consent and permission of the true owner, within section 125. of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. *Reynolds v. Hall*, 28 Law J. Rep. (n.s.) Exch. 257; 4 Hurl. & N. 519.

The Bills of Sale Act (17 & 18 Vict. c. 36. s. 1), which provides for the registration of bills of sale, has no operation upon the 125th section of the 12 & 13 Vict. c. 106, which enables the Court of Bankruptcy to order the sale and disposition of goods which a bankrupt, by consent and permission of the true owner thereof, had in his possession, order and disposition at the time he became bankrupt, and whereof he was reputed owner. *Badger v. Shaw*, 29 Law J. Rep. (n.s.) Q. B. 73.

Therefore, where bankrupts were, by consent and permission of the plaintiffs, at the time of their bankruptcy, in possession of certain goods which they had before mortgaged to the plaintiffs, and the mortgage deed had been duly registered under 17 & 18 Vict. c. 36. s. 1, it was held, that the mere fact of such registration did not entitle the plaintiffs to recover the goods from the defendants, who, as assignees of the bankrupts, had taken possession of the goods. *Ibid*.

A was the owner of a ship which, in March 1857, sailed for the coast of Africa, and in May and July she was supposed by him to be upon that coast, completing her cargo of palm-oil, &c.; and it was also expected that she would be home again about

the month of October. On the 11th of November 1857 the ship had not arrived, and A assigned the cargo to the defendant; and on the 23rd of January 1858 the defendant sent by post to the captain notice of such assignment. This notice never reached the captain. The ship remained on the coast of Africa till the 12th of February 1858, when she set sail and arrived at Bristol on the 14th of April. A had become bankrupt on the 1st of March 1858, and when the ship arrived his assignees claimed the cargo:—Held, that they were not entitled to it, as there had been no default upon the part of the defendant, and as, therefore, the cargo could not be said to be in the possession of A at the time of his bankruptcy, as reputed owner, by the consent and permission of the true owner, within the meaning of section 125. of the Bankrupt Law Consolidation Act, 1849. *Acramas v. Bates*, 29 Law J. Rep. (n.s.) Q. B. 78.

Semble—that, under the circumstances, the defendant was not bound to give any notice at all to the captain. *Ibid*.

A publican deposited a lease of a public-house and other leases with his brewers, with a memorandum stating that the brewers were to be equitable mortgagees of the leases and premises and fixtures and appurtenances. The publican became bankrupt, and the brewers petitioned for a realization of their security. The leases and trade and other fixtures and fittings-up of the public-house were ordered to be sold, and were sold. The Commissioner decided that the proceeds of the trade fixtures belonged to the general creditors, on the ground that these fixtures were in the order and disposition of the bankrupt, within the meaning of the 125th section of the 12 & 13 Vict. c. 106, the Bankrupt Law Consolidation Act; but, upon appeal,—Held, that the mortgagees were entitled to the entire produce of the sale, as the trade fixtures were included in their security, and were not in the order and disposition of the bankrupt. *Ex parte Gawan, in re Barclay*, 25 Law J. Rep. (n.s.) Bankr. 1; 5 De Gex, M. & G. 403.

A firm of two solicitors had a mortgage for 600*l*. upon a share of an estate in Kent. The estate was sold, and, in order to indemnify the purchasers from certain claims on it, the purchase-money was invested in consols in the name of one of the solicitors, and another party upon trust for indemnity, and subject thereto to secure the debt due to the firm. After this, the firm having money of a client in their hands, wrote to her a letter, offering to give her a charge for the amount on a mortgage for 600*l*. on a share of the estate in Kent. Upon the bankruptcy of the firm, one of the Commissioners decided that the letter did not create a valid charge upon the interest of the firm in the consols; but, upon appeal,—Held, first, that the letter did create such a valid charge; and, secondly, that as one of the firm was a trustee of the stock, there was sufficient notice of the transaction to prevent the charge being defeated, on the ground that the stock was in the order and disposition or reputed ownership of the bankrupt. *Ex parte Rogers, in re Selby and Norton*, 25 Law J. Rep. (n.s.) Bankr. 41; 8 De Gex, M. & G. 271.

B, one of the members of a banking firm consisting of A, B and C, was one of the trustees of a marriage settlement of a sum of 17,000*l*., containing a

power of investment in government or real securities. 13,000*l.*, part of this, came to the hands of the firm, and by a deed in which the settlement was recited, the firm, admitting the possession of the 13,000*l.*, assigned to the trustees bonds belonging to the firm as a security for its repayment. Afterwards A was appointed one of the trustees. Upon the assignment of the bonds, no notice was given to the obligors of the appropriation of them to the trust. Some of the bonds were paid off, and the firm appropriated other bonds in their place. In 1855 the firm became bankrupt, and new trustees were thereupon appointed. At the time of the bankruptcy only one original bond remained, and the right to sue thereon vested in B, and the right to sue on the others was vested in the whole firm, the obligees. All the bonds were found labelled in the deed-box of the trust at the banking-house as belonging thereto:—Held, first, that the new trustees of the settlement were entitled to prove against the separate estate of A for the 13,000*l.*, without prejudice to the securities given by the firm; and, secondly, that as to the old bond, B was the reputed and true owner; and that as to the other bonds, the firm were the reputed and true owners, and in both cases the money was subject to the trusts of the settlement, and the bonds did not pass to the assignees, as being in the order and disposition of the bankrupts, under section 125. of the 12 & 13 Vict. c. 106. *Ex parte Geaves, in re Strahan*, 25 Law J. Rep. (N.S.) Bankr. 53; 8 De Gex, M. & G. 291.

A new trustee, under a marriage settlement containing a covenant to settle after-acquired property, is entitled, in the absence of notice, to assume that everything necessary to get in the fund prior to his becoming trustee has been done, and he is not liable for wilful default for neglecting to get in such a fund, unless he had notice of its existence, or reason to believe or suspect its existence. *Ibid*.

R being entitled to a reversionary interest in a legacy became insolvent, but omitted in his schedule all mention of the legacy, and the assignees gave no notice of their title to the trustees. Afterwards R. became bankrupt:—Held, first (following *Bartlett v. Bartlett*, 26 Law J. Rep. (N.S.) Chanc. 577, and overruling *Re Rawbone's Will*, 26 Law J. Rep. (N.S.) Chanc. 509; 3 Kay & J. 300), that the reversionary interest was within the order and disposition of the bankrupt; and, secondly, that it was not within his order and disposition with the consent of the true owner. *Re Rawbone's Will*, 26 Law J. Rep. (N.S.) Chanc. 588; 3 Kay & J. 476.

No consent of the true owner can be implied where such owner is ignorant of the existence of the property, or of his own right to it. *Ibid*.

Owners of a cotton-mill, fixtures and steam-engine, demised the whole together to lessees for a term of years. The lessees covenanted to keep upon the premises, as a security for the rent, machinery for cotton-spinning of the full value of 3,000*l.* at the least; also not to assign or underlet without the leave of the lessors. There was a clause of re-entry if the rent should be in arrear, or on breach or non-performance of the covenants, or if the lessees should become bankrupt or insolvent, or assign their estate and effects for the benefit of creditors. One of the lessees died, and the survivor became bankrupt, and an official assignee was appointed. No rent was due.

The value of the machinery was less than 3,000*l.* The official assignee took possession of the mill, engine and machinery, and was about to remove and sell the latter when the lessors interposed; and it was arranged that a special case should be submitted to this Court, the lessors being plaintiffs and the official assignee defendant:—Held, that the machinery was in the order and disposition of the bankrupt, the surviving lessee, and in his reputed ownership, with the consent of the true owners, the lessors, and that, therefore, the official assignee, the defendant, was entitled to remove it. *In re Wallworth; Shuttleworth v. Hernaman*, 26 Law J. Rep. (N.S.) Bankr. 61; 1 De Gex & J. 322.

A solicitor was a shareholder in and joint-secretary of a railway company. He deposited the certificates of his shares with a client by way of equitable mortgage, with a memorandum accompanying the deposit to secure money lent. No notice of the transaction was given to the company other than might be inferred from the facts of the mortgagor being secretary, and of his being solicitor for the mortgagee:—Held, (reversing a decision of one of the Commissioners) first, that the shares were chattels within the meaning of the 125th section of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106); secondly, that if a valid equitable mortgage can be made of railway shares, notice is necessary in the same way as in the case of other choses in action; thirdly, that the knowledge of the transaction by the mortgagor as secretary was not notice to the company within the meaning of the Companies Clauses Consolidation Act (8 Vict. c. 16); fourthly, that the duty of the mortgagor as solicitor to the mortgagee to give proper notice was immaterial against the assignees, for that the shares were in the order and disposition of the bankrupt. *Ex parte Boulton, in re Sketchley*, 26 Law J. Rep. (N.S.) Bankr. 45; 1 De Gex & J. 163.

Quere—whether there can be an effectual mortgage of railway shares without transfer? *Ibid*.

E B, the registered proprietor under the statute 6 & 7 Will. 4. c. 76. (the Newspaper Act), of three newspapers, mortgaged, on the 1st of February 1853, the copyright of all of them, and the types and plant for printing the same, to E F. He also, on the 2nd of February 1853, mortgaged two of the three papers and the types and plant to C B, subject to the former mortgage. E B, after meetings of his creditors had been held, at which the securities were discussed, continued to carry on his business under inspection, though no deed for the purpose was ever executed. On the 16th of February 1857 the sheriff seized the property comprised in the mortgages under a writ of *f. fa.*, and notice of the mortgages was, on the following day, given, notwithstanding which the sheriff remained in possession until the 19th, E B being adjudicated a bankrupt on a petition presented on the 18th:—Held (reversing a decision of one of the Commissioners), that the types and plant were not in the order and disposition of the bankrupt; but, affirming the same decision, that the copyright was in his order and disposition and reputed ownership, he being the sole registered proprietor of the newspapers. *Ex parte Baldwin, in re Baldwin; Ex parte Foss, in re Baldwin*, 27 Law J. Rep. (N.S.) Bankr. 17; 2 De Gex & J. 230.

A shipbuilder in debt assigned an unfinished ship

to his brother, a creditor, in consideration of his debt due; the ship was afterwards completed by means of money and materials obtained by the agent of the builder from third parties. The ship was launched about six months after the assignment, and the shipbuilder, about a fortnight after the launch, became bankrupt; his assignees claimed the ship. Upon a bill by the purchaser to obtain the benefit of the assignment made to him,—Held, at the Rolls, that the assignment could only be impeached by a cross bill to set aside the purchase for fraud; but that assuming the assignment made by the shipbuilder to be valid, the ship at the time of his bankruptcy was not in his order and disposition, and could not pass to his assignees; which decision was affirmed, on appeal. *Holderness v. Rankin*, 29 Law J. Rep. (n.s.) Chanc. 753; 28 Beav. 180.

A Scotch firm had a branch in London, which was wholly conducted by an agent and manager at a salary, but in their name. By contract he was to have a lien on goods consigned to him for bills accepted by him for the firm. The firm became bankrupt in Scotland:—Held, that the goods under the manager's control at the time were within the "order and disposition" of the bankrupts and passed to their assignees unaffected by his lien. *Hoggard v. Mackenzie*, 25 Beav. 493.

Mortgagees of a cargo on board a ship on the coast of Africa sent no notice of their security to the captain till two months after the date of the mortgage, during all which time, and more, the ship was lying off that coast; nor was any notice received by the captain till after the mortgagor had become bankrupt:—Held, that affidavits of these facts, and of there having been opportunities of earlier communication with the vessel, constituted a sufficient *prima facie* case for an application, *ex parte*, for an order for a sale of the cargo, as being in the reputed ownership of the bankrupt, with the consent of the true owner, according to the practice adopted in *Ex parte Heslop*, 1 De Gex, M. & G. 477. *Ex parte Lucas*, *in re Gwyer*, 3 De Gex & J. 113.

(d) *Action by, without Leave of Commissioner.*

The 12 & 13 Vict. c. 106. s. 153, which enacts that the assignees of a bankrupt, with the leave of the Court of Bankruptcy, but not otherwise, may commence or defend any action which the bankrupt might have commenced or defended, does not enable the Court, in which an action has been brought by the assignees without such leave, to stay the proceedings. *Lee v. Sangster*, 26 Law J. Rep. (n.s.) C.P. 151; 2 Com. B. Rep. N.S. 1.

(H) WHAT TRANSACTIONS ARE OR ARE NOT AFFECTED BY BANKRUPTCY.

[See (B) ACT OF BANKRUPTCY.]

The 133rd section of the Bankrupt Act, 12 & 13 Vict. c. 106, extends the same protection to all contracts, dealings and transactions by and with any bankrupt *bona fide* made and entered into without notice before the date of the fiat or filing of a petition for adjudication of bankruptcy, as they would before have had if made and entered into before an act of bankruptcy. *Brewin v. Short*, 24 Law J. Rep. (n.s.) Q.B. 297; 5 E. & B. 227.

On the trial of an action by the assignees of a bankrupt to recover possession of certain goods and

chattels seized and taken away by the defendants, it appeared that the bankrupt had, on the 27th of February 1854, absolutely assigned to the defendants the said goods and chattels to secure a debt of 200*l*. The deed contained a power of sale, and a proviso that in case of payment of principal and interest before exercise of the power of sale, the deed should be void. The goods were allowed to remain in the possession and disposition of the bankrupt. On the 18th of November 1854, at a meeting of the bankrupt's creditors, one of the defendants being present, an assignment of the bankrupt's property for the benefit of his creditors was proposed, and a day or two afterwards the bankrupt committed an act of bankruptcy by assigning all his effects to M and others as trustees for the benefit of his creditors. At a later hour of the same day one of the defendants sent N to take possession under the defendants' bill of sale. The bankrupt told N he was too late, and that he had better see M; upon which N went to M, produced the bill of sale, and told him he had come to take possession under it. M then said he was in possession under a bill of sale for the benefit of all the creditors; and N replied, if so, he could not help it, and that he must go and tell the defendants who had sent him. N then asked permission to leave another man in possession, and went away, and in a few hours the defendants came with a number of men and took forcible possession under the defendants' bill of sale. A fiat in bankruptcy afterwards issued, and the plaintiffs as assignees under it obtained an order of the Court for the sale of the goods assigned to the defendants:—Held, that what had been done by the defendants before notice of the act of bankruptcy, did not amount to more than an intention to demand the goods and get possession of them under their bill of sale, and was not, therefore, "a dealing or transaction" within the meaning of the 133rd section of 12 & 13 Vict. c. 106, and consequently did not defeat the title of the assignees under the 125th section of the same statute, the goods being at the time of the bankruptcy in the order and disposition of the bankrupt as reputed owner with the consent of the true owners. *Ibid*.

In order to make a payment to a creditor by a bankrupt a fraudulent preference, the bankrupt must be a volunteer; and if he makes a payment or gives a bill of exchange in consequence of pressure, it is immaterial in law that the payment or bill does not correspond in amount or parties with the money or security asked for, or that the creditor had already taken a previous bill not then due, those being merely circumstances for the jury in determining whether the payment or bill were given by way of fraudulent preference. *Strachan v. Barton*, 25 Law J. Rep. (n.s.) Exch. 182; 11 Exch. Rep. 647.

A, a bankrupt, being indebted to the defendant in 167*l*. 5*s*. for goods sold, gave him a bill of exchange at four months for 77*l*. On the following day the defendant brought back the bill stating that it was on a wrong stamp, and his bankers refused to discount it, and pressed the bankrupt to give him cash on account. The bankrupt having in his possession an acceptance of K at four months for 197*l*. 5*s*. gave it to the defendant, who returned him 30*l*. in cash. The bankrupt said that by the course of dealing between himself and the defendant, the latter was only entitled at that time to the bankrupt's own

acceptance at four months for the amount due. The jury having found that K's acceptance was given by the bankrupt voluntarily and in contemplation of bankruptcy, but in consequence of a request for payment.—Held, that as against the assignees the defendant was entitled to retain K's acceptance, there being on these facts no fraudulent preference in law. *Ibid.*

There is nothing illegal or contrary to the policy of the bankrupt laws in a stipulation by the assignor on an assignment of goods, under which they are to remain in his possession, not to do any act by means of which the goods assigned might become charged or alienated, or whereby the assignment might become ineffective, or the assignor might be deprived of them. And it is a breach of such stipulation for the assignor, while the goods are in his possession, to file a declaration of insolvency, upon which a fiat in bankruptcy issues under which the goods are seized by the assignees in bankruptcy as being in the possession and order of the bankrupt as reputed owner, by the consent of the true owner. For there would be nothing illegal or contrary to the policy of the bankrupt laws in an express stipulation by the assignor not to file such a declaration, so as that the goods assigned might be liable to be seized in bankruptcy, or while the goods remained in his possession; and his duty would be to give notice to the assignees of his insolvency, that the latter might remove them, and thus they might no longer remain in the possession and order of the assignor as the owner, by consent of the true owner. And as the effect of the act of bankruptcy while the goods so remained in his order and possession was to vest them in the assignees in bankruptcy, the act of filing the declaration was an "act by means whereof" the assignee was deprived of the goods. *Hill v. Cowdery*, 25 Law J. Rep. (n.s.) Exch. 285; 1 Hurl. & N. 360.

W being tenant by an oral demise to the plaintiff of a mill at the rent of 1,400*l.* payable quarterly, assigned to the defendant the machinery and effects in the mill by way of mortgage to secure 14,000*l.*, with a power of seizing and taking possession of the said machinery and of selling the same in default of payment. The defendant accordingly took possession of the machinery, &c., and afterwards W became bankrupt. At the time of the bankruptcy a sum of 1,900*l.* was due from W to the plaintiff for rent of the mill, including the quarter's rent due on the 16th of July 1856. W was in the habit of paying the income-tax due for the mill and debiting it to the plaintiff, the last payment being 93*l.*, made in January 1856, for the year ending April 1855. After W's bankruptcy, and while the defendant was in possession of the machinery, &c., the plaintiff gave him notice that he intended to distrain for the 1,900*l.* due for rent; and the defendant, to prevent the distress, agreed to pay the sum for which the plaintiff was entitled to distrain, and paid him 1,307*l.* (the difference between one year's rent and the income-tax), which he contended was all that he was liable to pay. Since this payment the defendant paid 46*l.* for half-a-year's income-tax for the year ending April 1857. On the 5th of September 1856 an order was made that W's assignees should elect to accept or decline the lease, and they declined it, but no formal notice of this was given to W. Neither W nor the defendant had ever offered to give up the mill,

and the defendant continued in possession of the mill and machinery, &c. After the 16th of October 1856, when another quarter's rent became due, the plaintiff gave notice that he should distrain for that quarter's rent, but the defendant denied the plaintiff's right to distrain for it:—Held, first, that notwithstanding the 129th section of the 12 & 13 Vict. c. 106, the plaintiff had a right to distrain for more than a year's rent up to the 16th of July 1856, as the goods had ceased to be the bankrupt's goods. *Brocklehurst v. Lane*, 26 Law J. Rep. (n.s.) Q.B. 107; 7 E. & B. 176.

Secondly, that W's tenancy not having been put an end to on the 16th of October 1856, the goods of the defendant which were on the demise premises were liable to be distrained for the quarter's rent then due. *Ibid.*

An execution was put into the premises of W, a trader at Sheffield, on a Monday, in a cause in which B was the plaintiff, and P & S, of Wolverhampton, his attorneys. W left his house on the Tuesday, under circumstances that made it an act of bankruptcy; on Wednesday the goods seized were advertised for sale, and two creditors of W gave formal notice to the officer in possession and to the auctioneer that W had committed an act of bankruptcy. On Wednesday U, an attorney of Sheffield, was informed by the attorney of the creditors that W had committed an act of bankruptcy, and, on the Thursday, U received a letter from P & S headed "B v. W." "The sheriff is in possession herein, and we have expected that bankruptcy would ensue. We saw W yesterday, and as he does not contemplate such a step, we think it desirable to endeavour to get an assignment from the sheriff. We will thank you to see the officer, and if an inventory has been taken the matter could be readily completed. You will be good enough to let this have your immediate attention, as if anything is to be done it must be done quickly." After the receipt of this letter U met the auctioneer, and was informed by him that he had received notice that W had committed an act of bankruptcy; U sent for the sheriff's officer, who said he had also received notice. U nevertheless desired the officer to get an assignment to B, the execution creditor, executed by the sheriff, which was accordingly done. W having been adjudged a bankrupt,—Held, that the letter of P & S gave U such a discretion in the matter as to make notice to him notice to the execution creditor, within the 12 & 13 Vict. c. 106. s. 133, and that the information U had received was sufficient notice of an act of bankruptcy previous to the assignment. *Brewin v. Briscoe*, 28 Law J. Rep. (n.s.) Q.B. 329.

O & S, bankers at B, expecting a run on their bank on a Saturday, some friends signed a guarantie, on the understanding that it should not be used unless O & S could clearly see that it would carry them over the crisis, and the defendants, bankers in London, who were not aware of the arrangement with the sureties, advanced O & S 3,000*l.* on the security of the guarantie. The 3,000*l.* in notes and gold, was placed in a box and handed by the defendants to S on the Friday, and he on his return to B the same evening ascertained from O that it was hopeless to expect to meet the run the next day, and they discussed the propriety of returning the 3,000*l.* While this was under discussion, a letter

was received by S from one of the sureties, saying that as their case was hopeless, O & S could not safely or honourably retain the money, and that it ought to be returned. This, as S said in giving evidence, operated on his mind and strengthened his previous opinion that the money ought to be returned. Accordingly, on the Saturday, O & S returned the box to the defendants unopened, and the same day suspended payment. They were afterwards adjudged bankrupts, and the assignees brought an action to recover the 3,000*l.* from the defendants:—Held, by the Court (who were placed in the position of a jury), that the application of the surety influenced the bankrupts to return the money, and that this was sufficient to prevent the act from being purely voluntary and a fraudulent preference. *Edwards v. Glyn*, 28 Law J. Rep. (N.S.) Q.B. 350.

Held, also (by *Erie, J.* and *Crompton, J.*) that the money having been obtained for a special purpose, and that purpose having failed, the sureties had an equitable right to the return of the money, and that the bankrupts therefore, had not an equitable right as well as legal title to the money, and that the property in it would therefore not pass to the assignees, and that, on this ground also, the plaintiffs could not maintain the action. *Ibid.*

A trader, in consideration of advances in cash and goods, assigned all his stock to the defendants, to secure such advances and also a debt previously due to them. The goods so assigned comprised all his property, except some household furniture and book debts. In an action by the assignees of the trader to recover the value of the goods seized under this bill of sale, the Judge left it to the jury, with very strong observations, to say whether they would infer an intent to defeat and delay creditors. The jury having found for the plaintiffs, the Court, thinking they might have been misled by the observations of the learned Judge, granted a new trial, the costs to abide the event. *Pennell v. Dawson*, 18 Com. B. Rep. 355.

It is a fraud on the bankrupt laws for any creditor secretly to bargain for or obtain a larger dividend than the other creditors; and this principle applies to a secret bargain after the bankruptcy, and before any composition under the arrangement clauses was agreed to. On a bill by the bankrupt, the Court decreed delivery up and cancellation of a bill of exchange to secure a larger dividend than was received by the other creditors under the arrangement clauses, although this private agreement was made before the composition under the arrangement clauses was made. *Mare v. Sandford*, 1 Giff. 288.

(I) JUDGE'S ORDER.

The declaration stated that the plaintiffs, being traders, gave the defendants a Judge's order for debt and costs in an action then pending between them, and paid the amount next day, but that nevertheless the defendants wrongfully and maliciously caused the order to be filed with the clerk of the dockets (under the 137th section of the Bankrupt Law Consolidation Act, 1849,) whereby the plaintiff's credit was injured:—Held, first, that the declaration was bad for not averring the want of reasonable and probable cause; secondly, that the defendants had reasonable and probable cause for filing the order, being entitled to do so under the statute for their

own protection. *Diammock v. Bowley*, 26 Law J. Rep. (N.S.) C.P. 231; *nom. Diammock v. Bowley*, 2 Com. B. Rep. N.S. 542.

Quære—Whether the defendants were not bound by the statute to file the order. *Ibid.*

(J) OF THE BANKRUPT.

(a) Surrender.

[See post, (f) *Indictable Offences*.]

Where it is consistent with public justice and for the interest of the creditors that the bankrupts should surrender, an order will be made for that purpose, although the statutory time has expired, and the assignees object. *Ex parte Skelton, in re Skelton*, 3 De Gex & J. 47.

(b) Examination.

A bankrupt on his last examination stated that he had not the means of verifying the first item in his cash account, dated about a year before the bankruptcy, by an earlier cash account, although he could verify it by other means, and stated that he had not the means of furnishing any better accounts. The Registrar, acting for the Commissioner, adjourned the bankrupt's examination *sine die*, with liberty to apply to the Court again:—Ordered, on appeal, that the bankrupt should be at liberty to go before the Commissioner, and give such further explanation of his accounts as he was able. *Ex parte Riley, in re Riley*, 3 De Gex & J. 469.

(c) Allowance of Costs.

On an application by a defendant, a trader, for his costs under the Bankrupt Law Consolidation Act, 1849, s. 86, in an action brought against him by another trader, on the ground that the plaintiff did not recover the full amount for which he had filed an affidavit of debt in the Court of Bankruptcy, the Court, in ascertaining under that section, whether the plaintiff had reasonable cause for making the affidavit as to the amount, is not concluded by the verdict of the jury. Therefore, where the action was on a *quantum meruit*, and the defendant had tendered 37*l.* 14*s.* before action and affidavit, and the plaintiff made affidavit of a debt of 63*l.*, and the jury gave a verdict for 10*l.* beyond the 37*l.* 14*s.*, and the Judge who tried the cause thought they would have given the full amount, the Court refused to make a rule absolute, under the 86th section of the act, to give the defendant his costs. *Gilbert v. Crosier*, 26 Law Rep. (N.S.) C.P. 110; 1 Com. B. Rep. N.S. 632.

In ascertaining whether a plaintiff, who does not recover the full amount of the sum for which he has filed an affidavit of debt in the Court of Bankruptcy, had, within the meaning of section 86, of the Bankrupt Law Consolidation Act, 1849, reasonable and probable cause for making such affidavit, the Court will consider not merely the belief of the plaintiff that such amount was due to him, but whether the facts and the law of the case justified his belief. *Hope v. Fenner*, 26 Law J. Rep. (N.S.) C.P. 207; 2 Com. B. Rep. N.S. 878.

The 86th section of the Bankruptcy Law Consolidation Act, 12 & 13 Vict. c. 106, providing that if a plaintiff who shall have filed an affidavit of debt in order to make the defendant bankrupt, shall not recover the full amount of the sum for which he

shall have filed the affidavit, the defendant shall be entitled to his costs, provided it shall be made to appear to the Court that the plaintiff had not any reasonable or probable cause for making the affidavit of debt for such an amount, has the same operation, whether the groundless claim be the whole or only part of the debt deposited to, and applies where the claim is barred by the Statute of Limitations, and there is no reasonable ground for believing that the operation of the statute has been prevented; and the case is to be judged by the state of things existing when the affidavit was made. Nor does the section cease to apply because a verdict is taken subject to a reference. Therefore, where 1,000*l.*, a portion of the claim, was barred by the Statute of Limitations, and there was no colour for the supposition that the operation of the statute was prevented, the defendant was held, under the above section, to be entitled to his costs, even although he had not pleaded the statute, and a verdict was taken subject to a reference. But the provision does not apply where no verdict has been taken. *Hill v. Merritt*, 26 Law J. Rep. (N.S.) Exch. 126; 1 Hurl. & N. 758.

(d) *Protection from Process.*

On the 5th of May 1854 an order was made in bankruptcy that the bankrupt's certificate should be suspended for three years, and that protection should be granted to him for six months, to be renewed from time to time. The bankrupt was arrested on the 5th of November 1855, just before the expiration of his protection, and whilst he was on his way to the Bankruptcy Court to solicit its renewal. The debt for which he was arrested was not a debt proveable under the commission:—Held, that the Commissioners had no jurisdiction to grant such protection, and that he was not entitled to be discharged out of custody. *Grave v. Bishop*, 25 Law J. Rep. (N.S.) Exch. 58; *nom. Grace v. Bishop*, 11 Exch. Rep. 424.

Where a Scotch bankrupt has obtained a warrant of protection under the 2 & 3 Vict. c. 41. s. 18, and is afterwards arrested in England for a prior debt, the Court is bound to discharge him out of custody, although it be alleged on affidavit, that the bankruptcy was fraudulent and collusive, and that there was no trading. *O'Brien v. Don*, 26 Law J. Rep. (N.S.) C.P. 96; 1 Com. B. Rep. N.S. 702.

Where a trader, under the arrangement clauses of the Bankrupt Law Consolidation Act, 1849 (sections 211-222), has made a proposal of a composition to his creditors, which has been accepted by a resolution of three-fifths in number and value, and has obtained a certificate under the 221st section of the act, a creditor, to whom he tendered, but who refused the composition before certificate, cannot maintain an action for the original debt. *Tindall v. Hibberd*, 26 Law J. Rep. (N.S.) C.P. 173; 2 Com. B. Rep. N.S. 199.

The Court has an inherent right to prevent its own process from being abused, and therefore to discharge a person taken in execution on a judgment obtained in it, but who has since become bankrupt and got a certificate. *Thompson v. Harding, re Hill*, 27 Law J. Rep. (N.S.) C.P. 38; 3 Com. B. Rep. N.S. 254.

Where on a judgment of this Court against the official manager of a joint-stock bank, an order for execution had been obtained against H, a shareholder, and H had become bankrupt, and the plaintiff offer-

ing to prove his debt against H's separate estate was not allowed by the Commissioner to do so, but only to prove his claim, and H got his certificate, but was afterwards arrested at the suit of the plaintiff,—Held, whether the Commissioner decided rightly or not, that H was entitled to be discharged, and that this Court had power to discharge him, even without the aid of 12 & 13 Vict. c. 106. s. 205, and was the proper Court to apply to for his discharge. *Ibid.*

An order having been made in bankruptcy protecting the defendant from process until a certain day, on which day the plaintiffs levied under writs of *f. fa.* issued after the order; the money levied was ordered to be paid to the assignees. *Backhouse or Bellhouse v. Mellor; Proudhon v. Mellor*, 28 Law J. Rep. (N.S.) Exch. 141; 4 Hurl. & N. 116.

The defendant, having petitioned the Court of Bankruptcy, under section 211. of the Bankrupt Law Consolidation Act, 1849, obtained an order for protection of his person and property until the day appointed for his private sitting, when it was renewed until the day of the second private sitting. On that day the proposal made by the defendant was duly approved and confirmed by his creditors; and under section 216. the Commissioner granted the defendant a certificate, and indorsed on it a protection from arrest for a period of six months:—Held, that the defendant's property, as well as his person, was protected under the certificate and indorsement; and that a *ca. sa.* subsequently issued by the plaintiff might be set aside. *Jones v. Simpson*, 28 Law J. Rep. (N.S.) Exch. 180; 3 Hurl. & N. 836.

Semble—that the protection was not affected either by the circumstance that the defendant, in the statement of debts filed, had only inserted the plaintiff for the amount of the debt as on a bill of exchange accepted by the defendant, and without reference to the fact that the plaintiff had at that time obtained a judgment, with costs; or by the fact that it was not disclosed in such statement that the defendant was an accommodation acceptor. *Ibid.*

An action was brought against overseers of the poor for maliciously, and without reasonable or probable cause, obtaining a warrant for arresting the plaintiff for poor-rates, they knowing that he was privileged from arrest pending his examination under the Bankruptcy Law Consolidation Act, 12 & 13 Vict. c. 106. s. 111. There was a count for false imprisonment. The plaintiff owed for two poor-rates before his bankruptcy, and for one allowed and published after it. The plaintiff obtained protection from arrest under the Bankrupt Law. The rates were then demanded of him, and not paid. The defendants applied to a Justice. A summons was issued, calling on him to appear before the Justices to shew cause why he had not paid the rates. He indorsed on the summons that his goods were under the protection of the Court of Bankruptcy; but did not appear to shew cause. The Justices issued a distress warrant against the plaintiff. His goods having been seized under the bankruptcy, a return of *nulla bona* was made to the warrant. On that return the Justices issued a warrant for the plaintiff's imprisonment, in default of payment, and the plaintiff was arrested and imprisoned under it by direction of the defendants, who knew all the facts:—Held (affirming the judgment below, 27 Law J. Rep. (N.S.) Exch. 222; 3 Hurl. & N. 14), that there was no evidence

of malice, or want of reasonable or probable cause for obtaining the warrant; and that there was no ground for maintaining an action against the defendants on either count. *Philips v. Naylor* (Ex. Ch.), 28 Law J. Rep. (N.S.) Exch. 225; 4 Hurl. & N. 565.

An execution on a trader's goods, after a protection order has been granted on his petition under the 211th section of the Bankrupt Act, 12 & 13 Vict. c. 106, is void, and the execution creditor is not entitled to the proceeds, whatever is the result of the proceedings in bankruptcy.—So held on the authority of *Backhouse* or *Bellhouse v. Mellor*. *Williams v. Dray*, 29 Law J. Rep. (N.S.) Q.B. 86.

The process from which a trader is to be protected by a protecting order made under section 211, of 12 & 13 Vict. c. 106, is process by way of execution. *Flueter v. M'Lennan*, 29 Law J. Rep. (N.S.) C.P. 237; 8 Com. B. Rep. N.S. 357.

The Court will not decide on motion a novel point, where, by such decision, a party will be prevented from bringing a writ of error. *Ibid*.

The defendants, traders, carrying on business in co-partnership, on the 19th of December 1859 petitioned the Court of Bankruptcy, and on the same day an order was made protecting their persons and property from all process; which order, having been confirmed on the 14th of March, was duly extended till the 15th of July. All the requirements of the arrangement clauses having been duly observed, it was agreed that the defendants should retain possession of their property, in order to realize it and pay their creditors by instalments a per-centage of their claims. Part of the defendants' property consisted of leasehold houses, which since the date of the order had been sold, but the purchase of which the purchaser refused to complete in consequence of the plaintiff having, on the 2nd of January, recovered and registered judgment against the defendants in this court:—Held, that such registered judgment was not "process" from which protection was to be given within the meaning of section 211; and that the point being new, the Court would not decide it summarily, by making the rule absolute as prayed, when by so doing the defendant would be deprived of his writ of error. *Nicholls v. Rosewarne* approved. *Ibid*.

M was adjudicated bankrupt, but did not surrender. Afterwards he petitioned the Bankruptcy Court to be allowed to surrender; but, he not having appeared to support his petition, it was dismissed, with costs, for which, by virtue of an order of the Bankruptcy Court, he was taken under a *ca. sa.* Afterwards, he petitioned the Bankruptcy Court again to be allowed to surrender: but that Court refused to hear him till the costs should be paid. He then renewed an application for his discharge under the Insolvency Acts which he had previously made to the County Court, and which had been adjourned; when the Judge adjourned the application *sine die*, with leave to him to come up upon giving ten days' notice. On an application to this Court for an order to the county court Judge to hear the application,—Held, that the Judge had heard and decided that the adjournment was warranted by the statute 1 & 2 Vict. c. 110. s. 72; but, even if it was not so warranted, that the Judge would have only decided wrongly, but would not have declined jurisdiction. Application refused. *Ex parte Monroe*, 8 E. & B. 822.

Semble—that the proceedings in bankruptcy would have justified the county court Judge in dismissing the petition absolutely. *Ibid*.

(c) Declaration of Trust by.

A sole trustee, who had appropriated 4,000*l.*, part of the trust property, deposited in the box in which he kept the trust-deed and the securities for other portions of the trust funds, two policies of assurance, one on his own life for 2,000*l.*, the other on the life of his father for 3,000*l.*, inclosing them in an envelope with a memorandum that "in the event of his (the trustee's) death," the amount of the inclosed policies was to be applied to the repayment of 4,000*l.* borrowed by him of the *cestui que trust*. Six years afterwards the trustee became bankrupt. The policy for 2,000*l.* was found by the officer of the Court of Bankruptcy inclosed with the memorandum in the box, the other policy having been paid to the bankrupt upon his father's death:—Held, as between the *cestui que trust* and the assignees in bankruptcy, first, that notwithstanding the words importing contingency, the memorandum was a valid declaration that the policy was, in any event, subject to the trusts of the settlement; secondly, that there being a valid declaration of trust by the sole trustee, he was the proper person to be in possession of the policy, in other words, "the true owner," within the meaning of the 12 & 13 Vict. c. 106; and he being also in the reputed possession of the property when the bankruptcy took place, there was no separation of interests, the true owner and the reputed owner were the same person, and the 125th section of the act did not apply; and an order was made, under the 180th section, for an assignment of the policy to the new trustees of the settlement. *In re Bankhead's Trust*, 2 Kay & J. 560.

(f) Indictable Offences.

On an indictment against a bankrupt for fraudulently obtaining goods on credit, under section 253, of the 12 & 13 Vict. c. 106, it is necessary for the prosecution to prove the act of bankruptcy and other ingredients of the bankruptcy. Proof of the adjudication alone is insufficient. *The Queen v. Lands*, 25 Law J. Rep. (N.S.) M.C. 14; Dears. C.C. 567.

Where the act of bankruptcy relied on was the bankrupt filing a petition in the Insolvent Court, a copy of the petition certified to be correct by the proper officer of the court, and made evidence of the petition under section 239, was held to be no evidence of the filing of the petition, although there was on the back of the copy of the petition an indorsement purporting to state when the petition was filed. *Ibid*.

An indictment was framed on section 251. of the 12 & 13 Vict. c. 106. against one of two bankrupts and partners for not surrendering himself. Before any proceedings in bankruptcy had been taken against them, the bankrupts absconded and went abroad with intent to defraud their creditors, by depriving the latter of the right of examining them and making them responsible. After they were gone, and after they were adjudged to be bankrupts, and after the messenger of the Court of Bankruptcy had taken possession of their last place of business, there was left in the counting-house there a single duplicate of the adjudication, and subsequently there

was also served and left in the same place, on the 27th of July, a single copy of a summons or notice to surrender. The summons was signed by Commissioner H, and addressed to both the bankrupts, and gave them notice to surrender on the 7th of June, and on the 19th of August (the day limited for their surrender) before Commissioner G at the Court of Bankruptcy (to whom the petition for adjudication had originally been allotted). On the 19th of August, Commissioner F sat in the place of Commissioner G in the Court of Bankruptcy. The bankrupts did not surrender. Notice to produce the duplicate adjudication, and copy of the notice to surrender was given to the party indicted before the trial; and on the trial it was proved that search had been made for the documents at the counting-house, but that they could not be found. On the trial also the proceedings in bankruptcy were put in, and it appeared that there were erasures and interlineations in the affidavit verifying the petition for adjudication, and no proof was given when they were made:—Held, that the affidavit was admissible, for the Court would presume it was in the same state as when it was sworn; as to alter an affidavit after it was sworn was an act of fraud and misconduct, and the presumption was against fraud or misconduct having been committed. *The Queen v. Gordon*, 25 Law J. Rep. (n.s.) M.C. 19; Dears. C.C. 586.

In the adjudication and proceedings the bankrupts were described as of C. Lane, in the City, colonial brokers, and of W. Lane, in the county of Middlesex, distillers. In the advertisement of the bankruptcy in the *Gazette* the description was identical, except that W. Lane was said to be in the county of Essex:—Held, that the misdescription was immaterial. *Ibid.*

Held, further, that though the petition was allotted to Commissioner G, yet that any other Commissioner might sit and act for him; consequently, that the notice to surrender, though signed by Commissioner H, was good, and that it was the bankrupt's duty to surrender before Commissioner F, who was sitting for Commissioner G, on the day appointed; that it was no objection to the notice that it was to surrender on one of two days, one of which was past at the time of the service of the notice, as the last of the two days was the day limited according to the statute for the surrender. *Ibid.*

Held, also, that searching at the counting-house and giving the bankrupt notice to produce were sufficient to allow of the production of secondary evidence of the documents left at the counting-house. *Ibid.*

Held, likewise, that if the notice to surrender was duly served, and the bankrupt did not surrender pursuant to it, he would be guilty of the offence of not surrendering, though he had no actual knowledge that he had been made a bankrupt; and also that assuming the words in the 251st section, "with intent to defraud his creditors," applied to the case of a bankrupt not surrendering, yet that the absconding with the intent proved was sufficient. *Ibid.*

Held, lastly, by a majority of the Judges, that the conviction was bad, as a separate notice to surrender had not been left for each of the bankrupts at their last place of business. *Ibid.*

On an indictment framed under section 255. of the Bankruptcy Law Consolidation Act, the 12 & 13 Vict. c. 106, for making a false and fraudulent entry in a

book of accounts, with intent to defraud his creditors, the jury found specially that the bankrupt made a false book, in which he entered false amounts of many items of receipt and payment with intent to deceive his creditors as to the state of his accounts, and to prevent the examination and investigation of them in the due course of bankruptcy, and to save him from having to account for the deficiency appearing in the genuine account; but they also found that it was not done to defraud the creditors of any money or property, or to conceal any money or property, or in any way to prevent them from recovering or receiving any part of his estate, or to conceal any misappropriation or preference by him:—Held, that the conviction could not be sustained; as the bankrupt was not found by the verdict to have had any intent to defraud his creditors within the meaning of the statute. *The Queen v. Ingham*, 29 Law J. Rep. (n.s.) M.C. 18; Bell, C.C. 181.

(g) Evidence in Criminal Cases.

Though a Court of Bankruptcy is empowered, by section 117. of the Bankruptcy Law Consolidation Act, 1849, to examine a bankrupt as to certain matters specified in the section, the bankrupt cannot be compelled to answer any questions, beyond these matters, that may tend to criminate himself. If, therefore, without claiming the privilege of refusing to answer, the bankrupt, on his examination by the Commissioner, answer questions as to matter not within the section, his answers may be read in evidence by the prosecution on any criminal proceeding against him. *The Queen v. Sloggett*, 25 Law J. Rep. (n.s.) M.C. 98; Dears. C.C. 656.

An agent intrusted with a bill of lading, without authority of his principals, and in violation of good faith, deposited it with bankers for his own benefit, as a security for advances. He was charged with this offence before a magistrate. The depositions which were taken in support of the charge contained ample evidence to support it. Having become bankrupt, he was taken by his creditors and examined respecting the subject-matter of the charge before a Commissioner in Bankruptcy, and then made a statement in every respect in accordance with the evidence in the depositions. He was afterwards indicted on the same charge. On the trial, his examination in bankruptcy was offered by him as a defence, as shewing that he had disclosed the act before a Commissioner in Bankruptcy previous to being indicted for the offence, and that therefore he was not liable to the offence, by virtue of the statute 5 & 6 Vict. c. 39. s. 6:—Held, that the evidence of a disclosure was admissible under the plea of not guilty. The majority of the Court (*Lord Campbell, C.J., Pollock, C.B., Wightman, J., Martin, B., Willes, J., Bramwell, B., Watson, B., Channell, B. and Hill, J.*) were, however, of opinion, that as the agent only stated before the Commissioner matter which had been previously known and previously proved by evidence before the magistrate, he had not made any disclosure within the meaning of the act, and consequently was not entitled to protection. The minority (*Cockburn, C.J., Williams, J., Crompton, J., Crowder, J. and Byles, J.*) held, that as the statement of the agent was obtained on a compulsory examination, instituted *bond fide* by the creditors for their own interest, it was a disclosure before a Commissioner within the

act, notwithstanding the previous publicity of the matter there inquired into. *The Queen v. Steen*, 28 Law J. Rep. (N.S.) M.C. 91; Bell, C.C. 97.

(K) ARRANGEMENT WITH CREDITORS.

(a) *Under the Control of the Court.*

The Court of Appeal will not interfere with the discretion of a Commissioner, who has decided that a proposed arrangement is not a proper one to force upon a dissentient minority of creditors, unless it is satisfied that such discretion has not been prudently and reasonably exercised, and that the evidence is clear and strong that the arrangement is such as ought to be agreed to. *Ex parte Syers, in re Syers*, 26 Law J. Rep. (N.S.) Bankr. 24.

A trader entered into a contract to deliver goods at a stated time at a specified price. He performed part of the contract, but before the time or times for the performance of the remainder he petitioned under the 211th and subsequent sections of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), but no arrangement being effected, he was adjudicated bankrupt on that petition. In the account of debts filed, he inserted a sum as due from him for loss on the unfulfilled parts of the contract. A proof was tendered by the purchaser of the goods, for the amount (less than that specified by the bankrupt) of the loss by reason of the non-delivery of the goods. One of the Commissioners allowed the proof for the sum claimed. Upon appeal,—Held, that the original petition for arrangement created a valid act of bankruptcy under the 76th section of the statute; that the bankruptcy did not relate back to the presentation of that petition; and that the admission of the debt by the bankrupt in his account was evidence of a debt as against the assignee, and the purchaser was entitled to prove for the amount he claimed. *Ex parte Harrison, in re Lawford*, 26 Law J. Rep. (N.S.) Bankr. 30.

A proposal for a composition was filed by a petitioning debtor under the arrangement clauses of the Bankrupt Law Consolidation Act, 1849, and in this proposal was inserted at the suggestion of the Court a clause providing that the debtor's estate should be vested in the official assignee until payment of the composition. The debtor continued in possession of the estate, and at the time appointed paid the composition:—Held, that the per-centage required by the 54th section to be paid to the chief registrar's fund was, under these circumstances, payable by the debtor. *Ex parte Vero, in re Vero*, 28 Law J. Rep. (N.S.) Bankr. 3; 3 De Gex & J. 379.

A creditor on a bill of exchange accepted by traders issued a writ for recovery of the amount on the 21st of October. On the 28th of October the debtor served him with notice that a petition for private arrangement had been filed on the 26th. The creditor then discontinued his action, but on the 30th he caused notice to be served requiring immediate payment and proceeded on a trader-debtor summons for the same amount. The traders admitted the debt, but as they failed to pay at the expiration of the time limited, they were adjudicated bankrupts. One of the Commissioners confirmed the adjudication; but, upon appeal,—Held, that his decision must be reversed. *Ex parte Arnold, in re Arnold*, 28 Law J. Rep. (N.S.) Bankr. 11; 3 De Gex & J. 473.

Costs, under the particular circumstances, were not given against the petitioning creditor. *Ibid.*

An iron-merchant proposed to pay down 2s. 6d. in the pound, and to give his promissory notes for another 2s. 6d. in the pound in four months. Two creditors appeared at the second sitting, and opposed the proposal on various grounds; some of a personal nature. The Commissioner considered that the proposal was not reasonable to be carried into effect, though he thought that the grounds of opposition founded on personal conduct were not established—the objection to the reasonableness of the offer being sufficient—and refused to confirm the proposal. Since the decision of the Commissioner, evidence had been adduced, which was not contradicted, that the proposal was the best which the appellant could make, and that the result of the bankruptcy, which the Commissioner had adjudicated on disallowing the proposal, would be that only 2s. in the pound would be paid. The Lords Justices affirmed the order of the Commissioner and dismissed the appeal, giving the opposing creditors the deposit paid into court by the appellant towards their costs. *Ex parte Perrins, in re Perrins*, 29 Law J. Rep. (N.S.) Bankr. 12; 1 De Gex, F. & J. 299.

(b) *By Deed.*

[See DEBTOR AND CREDITOR; Composition Deed.]

A deed of arrangement entered into between a trader and his creditors, and signed by six-sevenths in number and value of the latter, in order to be binding on the creditors not signing it (under the 12 & 13 Vict. c. 106. s. 224), must provide for the distribution of the whole of the trader's estate among his creditors generally, and the benefit of the trusts must not be confined to the creditors signing the deed. *March v. Warwick*, 25 Law J. Rep. (N.S.) Exch. 334; 1 Hurl. & N. 158.

Semble—a reservation of the trader's wearing apparel will also operate to prevent the deed binding creditors not signing it, although the trader in fact had no other wearing apparel than was necessary for himself, his wife and children. *Ibid.*

A plea founded upon an arrangement by deed under the Bankrupt Law Consolidation Act, 1849, ss. 224, &c., is bad, unless it shews that the deed provided not only for the distribution of *all* the debtor's estate and effects, but also for its distribution among *all* the creditors, and not only those who should execute the deed. *Bloomer v. Darks*, 26 Law J. Rep. (N.S.) C.P. 214; 2 Com. B. Rep. N.S. 165.

By a deed of arrangement, dated the 1st of February 1856, (declared by the deed to be an arrangement within section 224. of the Bankrupt Law Consolidation Act, 1849,) between the defendant, a trader, of the first part, S B, T G and J J of the second part, and the other persons whose names should be thereunto affixed, being creditors of the defendant, of the third part, reciting an agreement at a meeting of the defendant's creditors that his affairs should be liquidated under the inspection of the said S B, &c.; the defendant covenanted to devote his attention to carrying on certain works for the benefit of his creditors, and it was agreed that the defendant's estate should be distributable amongst the creditors in the same manner as if the defendant had been adjudicated a bankrupt on the 12th of February 1856, and as if the debts of the creditors,

parties thereto, had been the debts proved under the said bankruptcy on the 12th of February 1856. The creditors covenanted not to sue the defendant, and that the debts of creditors breaking such covenant should be forfeited and irrecoverable, and the covenant pleaded as a release. No person becoming a creditor between the 1st and 12th of February, and the deed being executed by six-sevenths in number and value of the creditors,—Held, that it was a valid deed of arrangement under the Bankrupt Act, and binding on the plaintiff, a creditor who had not executed it, it being averred that three months had elapsed since he had notice from the defendant of his suspension of payment and of the deed. *Macnaught v. Russell*, 26 Law J. Rep. (N.S.) Exch. 192; 1 Hurl. & N. 611.

A deed of inspectorship and arrangement, under the Bankrupt Law Consolidation Act (13 & 13 Vict. c. 106, s. 223), may be valid, although it does not contain any assignment by the debtor of his estate, provided it does in effect provide for the distribution of all the estate and effects among all his creditors, and does not by its terms or necessary implication exclude any part of the property from its operation, nor exclude any creditor from participation in the division, and provided it secures the inspectors the power of dealing with and disposing of, with or without the aid of the debtor, all his property. It is not invalid because it is made with the creditors who execute it, the covenant of the debtor being to assist in dividing the money among such of his creditors as would be creditors upon the day of the meeting; nor is it any objection that possibly there might be creditors between that day and the date of the execution, there being no evidence that in fact there were. Neither will the deed be invalid merely because it provides for deductions on account of charges, costs of management, &c., not authorized by the letter of the Bankrupt Act, the rules and practice of bankruptcy not being strictly applicable in such cases, the object being to enable creditors to effect a distribution without bankruptcy, so that precisely analogous rules as to charges and allowances cannot prevail; and the question will be, whether, on the whole, the provisions of the deed, as to such matters, are reasonable, and fairly carry out that object. *Irving v. Gray*, 27 Law J. Rep. (N.S.) Exch. 273; 3 Hurl. & N. 34.

On this principle the deed may provide for remuneration to the debtor, or other persons employed by them (under the direction of the inspectors), for assisting in winding up the estate. And it may authorize the inspectors to make advances in respect of mercantile or other operations which may have been commenced by the traders, and which they may think for the benefit of the creditors and in furtherance of the objects of the deed. Such a deed is not necessarily invalid by reason that it contains a provision that it may be avoided within three months (in a given event), with an exception that the avoidance shall not affect things done under it, because this exception would not apply to a certificate given to the debtor before the avoidance of the deed, provided the certificate is only to be given in case either of a distribution or an assignment of all the estate and effects. *Ibid*.

The production of the deed, executed by inspectors and creditors, and of a certificate of the execution—although filed after action—will be sufficient proof

of the execution, if there is any evidence that the deed was in the same state before the action as when it was produced at the trial. *Ibid*.

To an action on a bill of exchange the defendants pleaded a plea of a deed of arrangement under the 224th section of the Bankrupt Law Consolidation Act, 1849, made between the defendants of the first part, certain persons, who were appointed inspectors, of the second part, and the creditors of the defendants of the third part, but which had not been signed by the plaintiff. The deed contained a clause, by which each of the creditors, parties to or bound by the deed, covenanted not to sue, impede or molest the defendants, and also a clause to the effect that if any creditor, "by whom or on whose behalf the deed should have been *actually executed*," should act contrary to that covenant, the defendants should be absolutely discharged from all claims and demands whatsoever, both at law and in equity, but such creditor:—Held, that this last clause did not apply to the plaintiff, as he had not signed the deed, and therefore the plea, which furnished no defence apart from such clause (which was the only one rendering the deed operative as a defence pleadable in bar) was no answer to the action. *Legg v. Chessbrough*, 28 Law J. Rep. (N.S.) C.P. 209; 5 Com. B. Rep. N.S. 741.

By a deed of arrangement by a trader with five-sixths of his creditors, all such personal estate, debts, monies, goods and effects, and other interests or assets belonging or owing to the trader, as would vest in or become subject to the disposition, management, control or administration of the Commissioner in bankruptcy, or of his assignees in bankruptcy if he had become bankrupt, were to be converted into money and paid to his creditors under the inspection of certain persons:—Held, (*Pollock, C.B. dissentiente*), that as under the bankruptcy some of the trader's wearing apparel would be reserved to him, the deed in effect reserved part of the trader's personal estate; and was, therefore, void under section 224, and the subsequent sections of the Bankrupt Law Consolidation Act, 1849. *Smodin v. Boyce*, 28 Law J. Rep. (N.S.) Exch. 245; 4 Hurl. & N. 391.

A composition deed for the distribution of the debtor's property, under the direction of inspectors, contained a clause, making it lawful for any creditor, with the consent of the inspectors, to institute any action for the recovery of any debts claimed by such creditor, and making the amount recovered in such action the amount on which dividends should be payable under the deed; and also a clause by which the creditors, parties to the deed, or who should become bound thereby, covenanted not to sue the debtors; and in case of breach of such covenant, that the debt of the creditor by whom the covenant should become broken should become absolutely forfeited; and that the covenant should operate and might be pleaded as a release of such debt:—Held, that the conjoint effect of these clauses was, to establish such an inequality in the distribution of the debtors' assets as to prevent the deed from being within section 224, of the Bankrupt Law Consolidation Act, 1849; consequently that the deed was not binding on a non-signing creditor. *Gardner v. Chapman*, 29 Law J. Rep. (N.S.) C.P. 281; 7 Com. B. Rep. N.S. 317.

A deed of arrangement, though executed by six-sevenths in number and value of the creditors of an insolvent estate, will not be binding on the rest, if

executed so as to be capable of being carried into effect before the passing of the act 12 & 13 Vict. c. 106. *Larpent v. Bibby*, 5 H.L. Cas. 481.

Quare—Whether such a deed to be valid within the statute must provide for the complete distribution of the insolvent's estate and effects without any reservation whatever? *Ibid*.

It seems that it is void if it only provides for such distribution among those creditors who are parties to it. *Ibid*.

A trading firm executed a deed of arrangement and inspection, made between the partners of the first part, inspectors of the second part, and several persons creditors of the partners, or some or one of them, of the third part. The deed did not contain an assignment of the property of the firm for the benefit of the creditors, but it contained covenants to carry on the business and wind up the affairs under inspection and to assign the property if called on so to do by the inspectors. The inspectors certified under the 226th section of the 12 & 13 Vict. c. 106. that it was signed by six-sevenths in number and value of the creditors whose debts were 10*l*. and upwards. It did not, however, appear from the deed or the certificate whether six-sevenths in number and value of the separate as well as of the joint creditors or of each class of creditors, had executed:—Held, affirming a decision of one of the Commissioners, that the deed was not shown to have been properly signed, and therefore that the certificate under section 225. of the same statute must be refused. *Ex parte Calvert, in re Calvert*, 27 Law J. Rep. (N.S.) Bankr. 42; 3 De Gex & J. 95.

The deed contained a grant of power to the traders to carry on the business, to wind it up, and collect and get in the debts for the benefit of the creditors; the creditors covenanted not to sue or molest the traders, and if any of the creditors did so his debt was to be forfeited. The traders were to carry on the business under inspectors, the creditors were to be paid out of the assets and profits, and if the inspectors required it the traders were to assign the property of the firm for the benefit of the creditors, after which the traders were to be released from liability, and if the inspectors certified that the affairs had been wound up within two years, the traders were wholly released. Whether such a deed, even if sufficiently signed by creditors, is a good deed of arrangement under the 224th section of the same statute, *quære*. *Ibid*.

(L) CERTIFICATE.

(a) Grant of, in general.

T S and G S were partners as solicitors. G S received from Mr. H a sum of 4,000*l*. for the purpose of being invested on good mortgage security. T S was mortgagee of the reversion of a large sum of stock, of which he was one of the trustees, and upon which he had lent 4,000*l*. The 4,000*l*. belonging to H, was lent by the firm to T S, upon the security of a transfer of his mortgage, and applied to the purposes of the partnership business. With the consent of the tenant for life, the stock was sold upon the death of the reversioner, and the proceeds were applied in payment of the reversioner's debts, and among them the 4,000*l*., and the balance was placed to the credit of T S in the books of the firm. No fresh security was ever given to Mr. H for his 4,000*l*., but for

twenty years the firm and T S paid him interest as if on the original security, and representing that it was so. In 1850 Mr. H discovered the fraud, but for four years he continued to receive his interest, when T S became bankrupt, and the 4,000*l*. was lost. The Commissioner refused to grant T S any certificate; and, upon appeal, that decision was affirmed, the Court holding that the transaction was a gross breach of duty by T S, as a solicitor, towards his client, and one which the interests of society required should be severely visited; and that the acquiescence of the client in receiving interest after the discovery of the misconduct, could not be looked upon as a condonation by reason that the interests of society were involved. *Ex parte Selby, in re Selby*, 25 Law J. Rep. (N.S.) Bankr. 18; 6 De Gex, M. & G. 783.

Where a bankrupt is proved to have been guilty of falsehood or dishonesty with reference to his creditors or his affairs, he is not entitled to his certificate. The Court in the case of certificate has regard not only to the bankrupt and his affairs, but to the interests of society. *Ex parte Dobson, in re Strong*, 25 Law J. Rep. (N.S.) Bankr. 17; 6 De Gex, M. & G. 781.

A trader, in insolvent circumstances, being pressed for the payment of debts, applied to a banking firm for assistance, which firm agreed to advance money upon the security of a judgment covering the advance and a debt already due. The trader, acting under the advice of his solicitor, who was also solicitor of the bankers, gave the judgment. In three months the trader was again pressed by other creditors, and not being able to satisfy them, his solicitor refused to act any longer for him; and, under the advice of that solicitor, the bankers obtained an order from a Court of common law under the judgment, and attached certain debts owing to the trader, and out of the proceeds satisfied the judgment. Soon afterwards, the trader was adjudicated bankrupt, and one of the Commissioners granted him a second-class certificate with a condition that the same should not be available to protect his future-acquired estate until he should have paid 5*s*. in the pound to all his creditors. But, upon appeal,—Held, that the order of the Commissioner must be discharged, the certificate be suspended, and the bankrupt have liberty to apply to the Appeal Court. *Ex parte Cuthane, in re Cuthane*, 25 Law J. Rep. (N.S.) Bankr. 60.

This Court considers it inexpedient, as a general rule, to grant certificates with a declaration either wholly or to a limited extent that they shall not protect the future property of the bankrupt. *Ibid*.

A broker who was a director of and broker to a company which had been ordered to be wound up, received at a time when he was insolvent an order from a customer directed to him and to a partner whom he knew or believed to be dead, to buy a sum of Sardinian stock. The broker contracted with L for the stock, and received the price from the customer as for himself and his deceased partner. He did not pay L for the stock, but allowed him interest for three months, and applied the money to his own purposes. Immediately before his adjudication of bankruptcy he sold a debenture of the company to A for the amount due upon it, without requiring any money for the four years' interest which was also due, and with the money paid L part of the

money the price of the stock, and gave him a bill for the remainder, and L then transferred the stock to the customer. The broker had previously privately appropriated this debenture to the safety of the customer, and when he sold it had no authority from the customer for so doing. The broker became bankrupt upon a trader debtor summons, issued by the official manager of the company, and received from one of the Commissioners a first-class certificate, with protection; but, upon appeal, the Lords Justices, for the above and other misconduct, discharged the order and suspended the certificate for five years, without protection for seven weeks, both from the date of the judgment. *Ex parte Wryghte, in re Mark Boyd*, 26 Law J. Rep. (N.S.) Bankr. 38.

A trader bought, on the 12th of February, 2,000l. worth of foreign bills. On the 14th he stopped payment; and on the 18th he became bankrupt on his own petition. In January preceding, this trader had drawn bills on a correspondent in Paris, in respect of oil to be shipped to him. The bills were accepted, but the oil was not shipped. The bills were negotiated. One of the Commissioners refused the bankrupt any certificate or protection:—Held, on appeal, affirming that decision, that the purchase of the bills must be looked upon as made upon an implied representation that the purchaser had ready money to pay for them; and as to the oil, the bankrupt having written to say that the oil had been paid for, but that the shipping was delayed, and asking instructions on that head, was told to ship in a particular manner, which he neglected, and the oil had not been paid for, the bankrupt was not entitled either to his certificate or protection. *Ex parte Simond, in re Simond*, 26 Law J. Rep. (N.S.) Bankr. 49.

One of the Commissioners had refused a bankrupt any certificate or protection on three grounds: reckless trading, fraudulent incurring of debts, and falsification of books. On appeal, the Court confirmed the refusal of the certificate, upon the latter ground alone, without giving any judgment on the other two; but granted protection, if the unconditional consent of the opposing creditors were given. *Ex parte Knight, in re Knight*, 26 Law J. Rep. (N.S.) Bankr. 57.

Where a bankrupt had made misrepresentations and false entries in his books for the purpose of concealment and fraud, one of the Commissioners, considering that the case fell within the offences enumerated in the 256th section of the 12 & 13 Vict. c. 106, suspended his certificate for twelve months, and refused him protection; and, upon appeal, the Lords Justices refused to alter the order, but did not express their opinion whether or not the case came within the section above mentioned. *Ex parte Stephanoff, in re Stephanoff*, 26 Law J. Rep. (N.S.) Bankr. 88.

Where a bankrupt had committed the offence of fraudulent preference enumerated in the 4th clause of offences appended to section 256. of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), one of the Commissioners refused him any certificate; but, upon appeal, the Lords Justices granted him a certificate of the second class, with a suspension of six months, and, with the consent of the assignees, granted protection in the mean time. *Ex parte King, in re King*, 27 Law J. Rep. (N.S.) Bankr. 11.

Where an adjudication of bankruptcy was made under such circumstances as, upon the evidence, satisfied the Court that the adjudication was substantially that of the bankrupt himself, and it appeared that there were no assets to divide among the creditors, the Court (*Lord Justice Turner not assenting*) affirmed a decision of one of the Commissioners, refusing the bankrupt his certificate. *Ex parte Sellers, in re Sellers*, 27 Law J. Rep. (N.S.) Bankr. 14; 2 De Gex & J. 218.

A solicitor received money on behalf of a client, and on the client bringing an action for the amount, he pleaded never indebted, and alleged that this amount was agreed, when recovered, to be left in his hands in part discharge of costs in proceedings against the client, and for which he, the solicitor, was responsible. The action against the solicitor was originally brought in the County Court of Lancashire, when it was removed by him to the Common Pleas of the Duchy of Lancaster. The trial ended in a reference, on which an award was made shewing that the solicitor was debtor to the client. Thereupon a brother of the solicitor obtained an adjudication in bankruptcy; and on the application of the bankrupt for his certificate, the Commissioner suspended it for twelve months, then to be of the second class, and refused protection for three months; and, on appeal, the order was affirmed. *Ex parte Blackhurst, in re Blackhurst*, 27 Law J. Rep. (N.S.) Bankr. 24; 3 De Gex & J. 39.

Traders petitioned, under the 20th section of the Bankrupt Act of 1854, 17 & 18 Vict. c. 119, for adjudication against themselves, and satisfied the Commissioner that their available assets exceeded in value the sum of 150l. They were accordingly adjudicated bankrupts; but it appearing at the certificate meeting that the assignees had not at that time actually realized that sum in cash out of the estate, the Commissioner postponed the grant of the certificate, adjourning the meeting for six months, with liberty for the bankrupts to apply when 150l. should be realized:—Held, upon appeal, that if it should appear, as alleged, that the assets were sufficient to satisfy the requisitions of the statute, but that the realization was only postponed for the benefit of the creditors, the bankrupts were entitled to an immediate certificate of the first class. *Ex parte Slater, in re Slater*, 28 Law J. Rep. (N.S.) Bankr. 7; 3 De Gex & J. 461.

A trader who had made an equitable mortgage of ships to his brother was pressed by his bankers to give them security for his overdrawn account with them. The bankers produced an agreement, already drawn, to mortgage the ships, which he executed without informing them of the equitable charge. In less than six weeks he was adjudicated bankrupt. One of the Commissioners held, that he had been guilty of "obtaining the forbearance of a debt by fraud or false pretence," within the meaning of the statute, and suspended his certificate for three years without protection, and then to be of the third class. On appeal, the Lords Justices ordered the certificate to be of the second class; but as there had been a departure from truth on the bankrupt's part, the decision was otherwise confirmed. *Ex parte Holderness, in re Holderness*, 28 Law J. Rep. (N.S.) Bankr. 20; 1 De Gex, F. & J. 260.

Traders were agents for a banking company, and

as such were intrusted with notes of the bank for the purpose of circulation. One of the partners had, without the knowledge or privity of the other, made false returns to the bank of the amount of its notes in the possession of the partnership, and had misstated the agency account. One of the Commissioners refused both the partners their certificates, on the ground that they had been guilty of an offence under the 256th section of the 12 & 13 Vict. c. 106, from which decision the innocent partner appealed:—Held, that no offence had been committed by the appellant, but that he had been guilty of negligence and of undue confidence in his partner, and the Lords Justices granted him an immediate certificate of the second class. *Ex parte Dance, in re Dance*, 29 Law J. Rep. (N.S.) Bankr. 16; 1 De Gex, F. & J. 286.

A bankrupt who had been found guilty by one of the Commissioners of keeping false books, under the 256th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), and of other offences under the same section, was refused his certificate without protection. He appealed to the full Court, who affirmed the judgment of the Commissioner refusing the certificate. But, without expressing any opinion as to whether the law, as it stands at present, does or does not confer authority upon the Court to grant protection, the Court varied the order by granting protection, leaving the question of the validity of the order for protection to be tried at law, if contested. *Ex parte Nicholson, in re Nicholson*, 29 Law J. Rep. (N.S.) Bankr. 1; 1 De Gex, F. & J. 270.

One of the Commissioners had suspended the bankrupt's certificates for one year, and refused to grant them protection. One creditor only opposed. The bankrupts appealed, and satisfactorily explained the contracting of the debt with the opposing creditor; and the Lords Justices so far varied the order (the creditor and the assignees not objecting) as to grant protection. *Ex parte Prior, in re Prior*, 29 Law J. Rep. (N.S.) Bankr. 15.

Where a bankrupt had been in the habit of accepting accommodation bills for a Scotch firm which failed, receiving a commission of 1l. per cent. on such acceptances:—Held, that a suspension of the certificate for two years was not too severe a sentence. *Ex parte White, in re White*, 3 De Gex & J. 75.

On questions of bankrupts' certificates, cases tainted with fraud or dishonesty are to be carefully distinguished from those which are affected merely by extravagance, carelessness or wildness of speculation. *Ex parte Brown, in re Brown*, 3 De Gex & J. 369.

But where a bankrupt had contracted liabilities when hopelessly insolvent, and dealt largely in accommodation bills, and had obtained a bill of exchange under circumstances amounting to an engagement not to negotiate it, which he had nevertheless done, and had, moreover, after a meeting of his creditors, at which it was understood that he was not to deal with his estate, given to one of them a security without the privity of the others:—Held, that the Commissioner's sentence suspending the certificate for three years without protection, could not be mitigated further than by giving protection after an imprisonment of two months. *Ibid.*

(b) Concealment of Property.

[*Ex parte Warwick, in re Warwick*, 7 Law J. Dig. 83; 6 De Gex, M. & G. 749.]

(c) Gaming.

A trader, who became bankrupt, had had dealings in consols and in Turkish scrip, but which he had purchased for the account, no intention existing, on his part, that either stock should be transferred to him. On account day he paid the differences, and so carried the transactions forward to the next account day. He had thus, several times, lost more than 20l. in one day. One of the Commissioners decided that this was "gaming or wagering" within the 201st section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, and refused the bankrupt his certificate:—Held, upon appeal, that it was not so, though it might be taken into consideration with other conduct on the question of certificate, and the Lords Justices suspended the certificate for two years from the adjudication, and then to be of the second class, and refused protection for upwards of two months from the date of their decision. *Ex parte Ryder, in re Ryder*, 26 Law J. Rep. (N.S.) Bankr. 69; 1 De Gex & J. 317.

Quare—Whether time-bargains in mining shares constitute gaming or wagering, or buying or selling stock, within the 201st section of the Bankrupt Law Consolidation Act. *Ex parte Mellor, in re Mellor*, 8 De Gex, M. & G. 245.

Where a bankrupt had lost more than 200l. in the year immediately before his bankruptcy in such transactions,—Held, that a certificate might nevertheless be granted for what it was worth, where neither the assignees nor any creditor opposed. *Ibid.*

(d) Time-Bargains.

A trader had purchased Turkish scrip, to be paid for on the account day, and lost by the speculation upwards of 400l., in consideration of which one of the Commissioners had, relying on the 201st section of the Consolidation Act, refused him his certificate; but, upon appeal, the Lords Justices granted a certificate after a suspension of more than twelve months from the Commissioner's decision, although it was doubtful how far the certificate would be valid at law, and might as to its validity be disputed. *Ex parte Wade, in re Wade*, 25 Law J. Rep. (N.S.) Bankr. 6; 8 De Gex, M. & G. 241.

A bankrupt had granted to him by one of the Commissioners a second-class certificate, suspended for ten months, but with protection, for having within twelve months preceding the adjudication, lost over 200l. by the purchase and sale of stock, within the meaning of the 201st section of the statute 12 & 13 Vict. c. 106. Part of the losses were on stock, and part on shares not converted into stock, and the former did not amount to 200l. The assignees appealed against the decision, but the Lords Justices refused to make any variation in the order. *Ex parte Turner, in re Wood and Tarrant*, 27 Law J. Rep. (N.S.) Bankr. 30; 3 De Gex & J. 46.

Where a bankrupt's certificate is in question the bankrupt ought himself to be present. *Ibid.*

(e) Conduct as a Trader.

A man, not a trader, fraudulently contracted a

debt, representing himself to the creditor to be a trader; he subsequently became a trader, and the debt was proved under his bankruptcy. One of the Commissioners refused him a certificate. Upon appeal,—Held, first, that the bankrupt had committed an offence under the 256th section of the 13 & 14 Vict. c. 106, disentitling him to a certificate; and, secondly, that having represented himself as a trader in the transaction, he could not be heard to say that he was not so for the purpose of protecting himself from the consequences; and, *semble*, thirdly, that the offence need not be committed during the trading to render a bankrupt amenable to the 256th section, nor was his "conduct as a trader" (section 198.) to be considered only as to his conduct in his trade. *Ex parte Leslie, in re Leslie*, 25 Law J. Rep. (n.s.) Bankr. 37.

Where a bankrupt had sold, under cost price, goods purchased on credit, and this course of dealing had been, to a considerable extent, in time and amount,—Held, that it was sufficient evidence of the debts being contracted by fraud, and that the certificate had been properly refused. *Ex parte Coleman, re Coleman*, 3 De Gex & J. 43.

(f) Conditional Certificate.

[*Ex parte Hammond, in re Hammond*, 7 Law J. Dig. 85; 6 De Gex, M. & G. 699.]

For very gross misconduct of a bankrupt towards a co-adventurer or partner in a purchase, and in an insurance of the same adventure against sea risk, by raising money for his own use on the policy, one of the Commissioners suspended the certificate for three years without protection for six months, and added as a condition that, as to the debt due to the partner, the certificate, when granted, should not protect the bankrupt from arrest or in respect to his property. On appeal, the Lords Justices ordered the condition to be struck out as being in contravention of the policy of the Bankrupt Law, but prolonged the time for which the certificate should be suspended. *Ex parte Anderton, in re Anderton*, 26 Law J. Rep. (n.s.) Bankr. 54; 1 De Gex & J. 298.

A timber measurer in a dockyard carried on the business of an eating-house keeper, which was managed by his wife. The latter business not thriving, he petitioned for an adjudication, which he obtained. He then sold the business, and handed the proceeds to the official assignee. One of the Commissioners granted him a second-class certificate, with the condition that he paid a certain part of his salary while he continued timber-measurer until he had paid 7s. 6d. in the pound on the debts proved. On appeal, the Lords Justices granted an immediate unconditional certificate of the third class. *Ex parte Hardden, in re Hardden*, 28 Law J. Rep. (n.s.) Bankr. 18; 3 De Gex & J. 489.

It is against public policy that the salary of a public servant should be reduced by the application of any part for the payment of debts. *Ibid*.

(g) Effect of, as a Discharge from Debts and Claims.

[See (E) PROOF OF DEBT.]

By deed the defendants covenanted to pay a sum of 3,002l. 7s. 8d., with interest, by instalments, and also to pay the annual premiums which might become due on a policy of insurance effected on the life of J B, so that his life might be continually insured in the

sum of 1,000l., and on request to produce and shew to the plaintiff the receipt for the premiums for the current year. In an action on this covenant the declaration alleged two breaches: first, non-payment of the premiums; secondly, non-production of the receipt for the premium for the current year. The defendants' reply pleaded in bar their certificate of conformity under an adjudication of bankruptcy. The plaintiff newassigned that the action was brought for the non-payment of a premium which became due after the filing of the declaration of insolvency and after the allowance of the certificate, and for the non-production of the receipt for the said premium. The defendants pleaded to the new assignment an equitable plea, that after the filing of the petition for adjudication the plaintiff proved a great part of the debt under the petition, and elected to take the benefit of the said petition with respect to the whole debt:—Held, that the plea to the new assignment was a good equitable answer. *Elder v. Beaumont*, 27 Law J. Rep. (n.s.) Q.B. 25; 8 E. & B. 353.

Held, also, that the mere fact of the plaintiff's proof for a part of the debt, was not sufficient evidence to support the plea. *Ibid*.

A security given to induce a creditor to forbear opposing a bankrupt's certificate, is absolutely void under the 12 & 13 Vict. c. 106. s. 202, and a *bond fide* holder for value of a bill given for such purpose cannot recover. But an agreement to pay a debt discharged by the certificate is not absolutely void under the 204th section. A bill accepted by a bankrupt in blank before the granting of his certificate, and drawn and indorsed afterwards, is not a security within the meaning of the 202nd section; and, therefore, a *bond fide* holder for value may sue the bankrupt on such a bill. *Goldemid v. Hampton*, 27 Law J. Rep. (n.s.) C.P. 286; 5 Com. B. Rep. N.S. 94.

Section 204. of the Bankruptcy Law Consolidation Act (12 & 13 Vict. c. 106), which enacts that no bankrupt shall be liable to pay any debt from which he shall have been discharged by his certificate, upon any contract, promise, or agreement made after the petition, applies, not only to a contract, promise or agreement requiring a consideration to support the promise, but to contracts under seal; and it therefore extends to bonds. *Kidson v. Turner*, 27 Law J. Rep. (n.s.) Exch. 492; 3 Hurl. & N. 581.

The section applies as well to cases of a certificate given before, as to certificates given after the passing of the act. *Ibid*.

The defendant assigned life policies to the plaintiff as security for a debt, and covenanted with the plaintiff to pay the premiums, and also, if he failed to do so, that it should be lawful for the plaintiff to pay thereon such sum as might be necessary for keeping on foot the policies or effecting any new policies; and that the defendant would repay the plaintiff all such sums paid by him. The defendant afterwards became bankrupt:—Held, that the certificate of discharge in bankruptcy was no bar to an action by the plaintiff on the covenant to pay the premiums which had become due after the bankruptcy. *Warbury v. Tucker* (Ex. Ch.), 28 Law J. Rep. (n.s.) Q.B. 56; E. B. & E. 914.

Semble, also, by a majority of the Court, that the certificate was no bar to an action on the second

covenant to repay the plaintiff the amounts he had paid to keep the policies alive on the defendant's default in paying the premiums. *Ibid.*

Where it appears on the face of a bond to secure an annuity, that one of the joint and several obligors is, in fact, a surety only for the other, he is to be looked upon as a surety, and not as a principal, in all questions under the Bankrupt Laws; consequently, his bankruptcy and certificate will not discharge him from liability to pay arrears of the annuity accruing due since his bankruptcy, and unpaid by the principal. *White v. Corbett* (Ex. Ch.), 28 Law J. Rep. (N.S.) Q.B. 288; 1 E. & E. 692.

The defendants guaranteed the plaintiff in respect of any goods supplied by him to A until they should give notice to determine their liability under the guarantee. One of the defendants became bankrupt, and obtained his certificate of conformity. After this the plaintiff supplied other goods to A, for which the latter did not pay. No notice to determine the guarantee had been given:—Held, by the Court of Exchequer Chamber, overruling the judgment of the Court of Common Pleas, that the bankrupt defendant was not protected by his certificate against an action on the guarantee for the price. *Boyd v. Robins* (Ex. Ch.), 28 Law J. Rep. (N.S.) C.P. 73; 5 Com. B. Rep. N.S. 597.

Where a special case is stated by agreement between the plaintiff and some only of the defendants, and where final judgment has not been entered up against one defendant, who had suffered judgment by default—*Quere*, whether error lies. *Ibid.*

At the date of his bankruptcy, L was the sole surviving object of a power of appointment vested in his father, and he was also entitled to a vested but defeasible interest in a moiety of the fund in default of appointment. Two days after the date of his certificate his father made an appointment under the power of the whole fund in his favour:—Held, that the bankrupt as appointee was entitled to the whole fund as against his assignees in bankruptcy. *Lee v. Olding*, 25 Law J. Rep. (N.S.) Chanc. 580.

(M) PRACTICE.

[*Ex parte Tindal*, in *re Tindal*, 7 Law J. Dig. 85; 6 De Gex, M. & G. 741.]

When this Court has made a decision, upon the strength of which assignees in bankruptcy have done various acts, such as collecting and dividing assets, and selling part of a bankrupt's estate, it will not permit an appeal to the House of Lords under the 18th section of the statute 12 & 13 Vict. c. 106, unless the application for leave be made within a reasonable time. *Ex parte Marcus*, in *re the Royal British Bank*, 26 Law J. Rep. (N.S.) Bankr. 15.

Where a bankrupt has been taken in execution under a certificate B. a., under section 257. of the act 12 & 13 Vict. c. 106, he is not entitled to his discharge except by payment of the debt, or until he has been in prison for a year from the date of the writ of *capias ad satisfaciendum* under which he was arrested. Where his protection is refused under section 256, any creditor who has proved may obtain a writ of *capias ad satisfaciendum* under a certificate B. a., and detain him in prison on such writ for a year, under section 259. *Ex parte Crole*, in *re Crole*, 26 Law J. Rep. (N.S.) Bankr. 90.

A firm at Buenos Ayres drew five bills on a firm

at Liverpool, who accepted them, and they were indorsed for value by the Buenos Ayres firm there; the drawers agreeing, at the same time, to remit to the Liverpool firm to meet the bills when due, and their broker asserting that the drawing and accepting firms were distinct. Bills were remitted to the Liverpool firm to meet the five bills; and that firm became bankrupt on the petition of the partners. The firm to whom the bills were indorsed applied under the bankruptcy for a declaration that they were entitled to a specific lien on the bills remitted; but one of the Commissioners dismissed their petition. After the dismissal fresh evidence was discovered; but as the twenty-one days, allowed by the 12th section of the 12 & 13 Vict. c. 106, had expired; the Commissioner said that the re-hearing was an indulgence, which indulgence he refused to grant on account of delay. On appeal from both decisions,—Held, that although the twenty-one days had expired, the Court was not precluded from hearing the case upon its merits on the whole evidence, considering the domicile of the parties; secondly (overruling the judgment of the Commissioner), that the remitted bills were specifically applicable to cover the five bills; and, thirdly, that the question involved the law of England only; and the fact of the Buenos Ayres drawing firm and the Liverpool accepting firm being identical or not, was immaterial. *Ex parte Imbert*, in *re Latham*, 26 Law J. Rep. (N.S.) Bankr. 65; 1 De Gex & J. 152.

Where an appeal by a bankrupt against the Commissioner's refusal of his certificate was, through accident, not presented at the proper office until after the office was closed on the last day allowed for appeal, but was in the evening of the same day tendered to the officer at his private residence, the Court permitted the petition of appeal to be entered as of that day. *In re the Hull Bank*, 27 Law J. Rep. (N.S.) Bankr. 16; 2 De Gex & J. 229; *nom. Ex parte Harrison*, in *re Harrison*.

Where a contributory did not present a petition of appeal against an order of a Commissioner acting in the winding up of a company in bankruptcy under the Joint-Stock Companies Act, 1856 (19 & 20 Vict. c. 47), until after the expiration of the twenty-one days limited for appeals under the 12 & 13 Vict. c. 106:—Held, that this petition was too late, and could not be considered on its merits. *Ex parte Clark*, in *re the Welsh Potosi Lead and Copper Mining Co. (limited)*, 27 Law J. Rep. (N.S.) Bankr. 25; 2 De Gex & J. 245.

A Commissioner had annexed a joint adjudication against two partners to an earlier one against one of them, under the 98th section of the statute 12 & 13 Vict. c. 106, and, on appeal, the Lords Justices refused to interfere. *Ex parte Green*, in *re Dales*, 27 Law J. Rep. (N.S.) Bankr. 32; 3 De Gex & J. 50.

One of the Commissioners having refused to order office copies of proceedings in an adjudication which had been annulled to be furnished, in aid of a defence to an action in a foreign court, the Lords Justices, without deciding whether the Commissioner was wrong or right in his refusal, ordered the office copies to be furnished on the usual terms. *Ex parte Sybrandt*, in *re Nevins*, 28 Law J. Rep. (N.S.) Bankr. 14; 3 De Gex & J. 487.

A person, before leaving this country, gave a general authority (but it was not proved whether verbal or written) to his uncle to act for him in the arrangement and settlement of his affairs. Soon after his departure he was adjudicated bankrupt, and the uncle instructed the solicitor to dispute the adjudication. One of the Commissioners refused to hear the solicitor on the ground that, under the 104th section of the 12 & 13 Vict. c. 106, express agency was necessary. On appeal, the Lords Justices reversed the decision, and ordered "that the uncle should be allowed to appear before the Commissioner to dispute the adjudication by such solicitor as he should think fit." "Such person," mentioned in the section, does not apply only to the bankrupt himself. *Ex parte Frampton, in re Frampton*, 28 Law J. Rep. (n.s.) Bankr. 21; 1 De Gex, F. & J. 263.

(N) EVIDENCE—NOTICE TO DISPUTE.

Upon a bill filed by the assignees of a bankrupt against one of the creditors to have certain deeds declared void, the defendant, by his answer, disputed the legality of the bankruptcy.—Held, that the statements in the answer did not constitute a notice to dispute the bankruptcy, in accordance with the 235th section of the 12 & 13 Vict. c. 106, and that notice must be given within ten days after the suit was put in issue. *Pennell v. Hume*, 25 Law J. Rep. (n.s.) Chanc. 80.

BARON AND FEME.

[Married women enabled to dispose of reversionary interests in personal estate by 20 & 21 Vict. c. 56.—Conveyance, and acknowledgment by married women, see FINE AND RECOVERY. And see DIVORCE—DOMICIL—EJECTMENT—EXECUTOR AND ADMINISTRATOR—LANDLORD AND TENANT—NEGLECT.]

(A) CONTRACTS BETWEEN.

(B) HUSBAND.

(a) *Rights of, in respect of Wife's Property.*

(b) *Liability for Necessaries supplied to Wife.*

(c) *Liability for Necessaries supplied for Children to Wife's Order.*

(C) WIFE.

(a) *Rights and Powers.*

(b) *Property and Settlement thereof.*

(D) SEPARATE ESTATE.

(a) *Power over and Disposition of.*

(b) *Liability in respect of.*

(E) SEPARATION DEEDS.

(F) PROTORTED PROPERTY OF WIFE DESERTED BY HER HUSBAND.

(G) SUITS; PLEADING AND EVIDENCE IN.

(H) CRIMINAL MATTERS.

(a) *Coercion of Wife by Husband.*

(b) *Apprehending Husband for not supporting his Wife.*

(A) CONTRACTS BETWEEN.

A husband and wife (he being English and she French) entered into a contract in the French language, without the intervention of a trustee, by which

it was agreed that the youngest of their five children was to remain in her custody; that she should abandon an English suit of divorce she had instituted against him; that she should not oppose his English suit for a divorce against her; and that he should allow her an annual sum of 75,000 francs. The wife performed her part of the agreement, but the husband refused to perform his; whereupon she filed a bill in the Court of Chancery for specific performance, but it was (upon the demurrer of the husband for want of equity,) held, that the contract was English, and that, as it contained provisions contrary to the policy of the English law, it could not be enforced in an English court of justice. *Hope v. Hope*, 26 Law J. Rep. (n.s.) Chanc. 417; 22 Beav. 351.

(B) HUSBAND.

(a) *Rights of, in respect of Wife's Property.*

A fund in court, belonging to a married woman, who was a lunatic, will not be paid to her husband unconditionally. *Symes v. Lee, ex parte Bone*, 26 Law J. Rep. (n.s.) Chanc. 665.

The Court will, however, make an order for payment of the dividends to the husband; and it will also order a transfer of the stock to him upon his giving a security, approved by the chief clerk, either upon property or personally with sureties, to replace the stock when so directed by the Court. *Ibid.*

A husband having laid out money in repairs and improvements upon his wife's property is not entitled, after a divorce by reason of the wife's adultery, to any charge upon the estate for the money so laid out. *Hamer v. Tisley*, 29 Law J. Rep. (n.s.) Chanc. 32; John. 486.

A Scotch marriage settlement gave to the husband a life interest in all property belonging to the wife, or that might be acquired by her during the marriage, and the corpus to the wife herself. Afterwards the wife became entitled for life to a legacy of 2,000*l.* for her separate use without power of anticipation, with remainder to her children.—Held, that the husband and his assignees took no interest in the fund, notwithstanding the settlement, and that the result would have been the same, if the clause against anticipation had been omitted. *Duncan v. Canaan*, 21 Beav. 307.

(b) *Liability for Necessaries supplied to Wife.*

The costs of a proctor employed by a wife in the ecclesiastical court to prosecute a suit against her husband for a divorce *à mensa et thoro* on the ground of cruelty, may be recovered against the husband as a necessary, if it appears that there were reasonable grounds for instituting such a suit. *Brown v. Ackroyd*, 25 Law J. Rep. (n.s.) Q.B. 198; 5 E. & B. 819.

Where no evidence of any actual personal violence was given, but the husband was stated to have threatened to place his wife in a lunatic asylum, upon an occasion when an altercation took place between them, but no step to carry the threat into effect was taken by him, this was held not to shew such a reasonable ground for apprehending personal violence as justified the institution of the suit. *Ibid.*

Where goods for which a wife has ordinarily authority to contract on the part of her husband, such as articles of dress, are ordered by her and delivered at his residence, where she also resides, *prima facie* the

husband is liable, there being a presumption in law in favour of the plaintiff. And any evidence to rebut the presumption, as that the articles are unnecessarily costly in their character, or that the credit was given exclusively to the wife, must be submitted to the jury. *Jewsbury v. Newbold*, 26 Law J. Rep. (n.s.) Exch. 247.

The question whether the party who ordered the goods was the wife of the defendant must be raised at the trial; and the point is not raised, but rather waived, by an objection that the credit was given to the wife alone; and, *semble*, that if the parties live together and the woman represents herself as the wife of the defendant, that is *prima facie* evidence that they were married. *Ibid*.

The objection that credit was given to the wife alone, means that it was given to her to the exclusion of her husband's liability, and the circumstance that the goods were booked to her alone, but in her marriage name as the defendant's wife, is not sufficient to shew this; on the contrary, the fact that she was known by the plaintiff to be a married woman, and supposed to be the defendant's wife, is rather *prima facie* evidence that credit was given to the husband. *Ibid*.

A Court of law will only assist a person who has actually supplied a wife with necessaries, to recover the amount, and will not interfere in the case of a person who has advanced money to the wife for the purpose of providing such necessaries. A Court of equity, however, considers that the person advancing money is entitled to stand in the place of the party who actually supplied the necessaries. *Jenner v. Morris*, 29 Law J. Rep. (n.s.) Chanc. 923; 1 Dr. & Sm. 218.

A married woman, by her will, in exercise of her power of appointment over trust monies, made several bequests, and, "after payment of her just debts, funeral and testamentary expenses, and the expenses attending the execution of her will, appointed" the residue of the trust monies among her nieces:—Held, that the charge of funeral expenses was not contingent upon her surviving her husband, and that her husband surviving was entitled to repayment out of the trust monies of money paid by him in respect of such expenses. *Willetts v. Dobie*, 2 Kay & J. 647.

(c) *Liability for Necessaries supplied for Children to Wife's Order.*

Where the defendant went abroad, but provided his wife with a sufficient allowance for the support of their children, and the wife afterwards lived in adultery with another man, and the plaintiff was called in as a medical man to attend the children,—Held, that he could not recover against the defendant; and that the wife had no general authority, either as wife or agent, to bind the defendant for necessaries for the children. *Atkyns v. Pearce*, 26 Law J. Rep. (n.s.) C.P. 252; 2 Com. B. Rep. N.S. 763.

(C) WIFE.

(a) *Rights and Powers.*

The plaintiff and D, since deceased, holders of stock as trustees, had given a power of attorney to the defendants, who were bankers, to receive the dividends and pay them to the *cestui que trust*, a married woman. She had given the defendants

directions to pay the dividends, when received, to S, who had lent money to her and her husband. Subsequently, however, she wrote to the defendants that in consequence of the death of one of the trustees she had been obliged to have a new power of attorney made to receive her own dividends, and that she would not trouble the defendants any longer to receive them. No new power of attorney was in fact made. After this letter the defendants received a dividend, and paid it over to S:—Held (reversing the judgment below, 26 Law J. Rep. (n.s.) Exch. 36; 1 Hurl. & N. 452), that an action by the plaintiff against the defendants for not paying the dividend to the *cestui que trust* could not be sustained, as her letter did not amount to a revocation of the direction to pay S. *Clark v. Laurie* (Ex. Ch.), 26 Law J. Rep. (n.s.) Exch. 317; 2 Hurl. & N. 199.

(b) *Property and Settlement thereof.*

The goodwill of a business, carried on by a wife before marriage, and afterwards by the husband and wife, survives to her: she may dispose of it and receive the purchase-money for her own benefit, even though it is carried on upon leasehold premises forming a part of the estate of the testator, which were disposed of by his will. *Morris v. Moss*, 25 Law J. Rep. (n.s.) Chanc. 194.

Gross misconduct of a husband (adultery and desertion) will not of itself disentitle him to any share of the subsequently-acquired property of his wife. *Aubrey v. Brown*, 25 Law J. Rep. (n.s.) Chanc. 446.

In determining the amount to be settled upon a married woman out of after-acquired property, the Court will take into consideration, not only any previous settlement of property emanating from the wife or the husband, but also any bequest for her separate use under the will of a third person. *Ibid*.

An infant was entitled, under a will, to a reversionary interest in residuary personality expectant on the death of a life annuitant. The infant executed marriage articles, agreeing, when of age, to settle all her interest under the will on the trusts of the articles. She married, and attained her majority. She did no act to confirm the articles, but always refused so to do. The trustee of the articles was also an executor of the will. As executor he retained in his hands the surplus interest arising from the expectant share of the infant in the personality. As trustee of the articles he lent some of the trust monies to the husband, on the security of a mortgage from him. During the life of the husband, he and his wife jointly petitioned the Court in respect of the trust accounts; and the wife signed a receipt for interest on the mortgage money. The husband died; and after his death, the wife gave the trustee of the articles a receipt for other supposed arrears of interest on the mortgage money, assuming it to be her trust monies under the articles. The mortgage was called in. The annuitant died, and the residuary personality then became divisible. On a petition by the wife praying, *inter alia*, payment to her of the above-mentioned sum of surplus interest, and of the mortgage money,—Held, as to these, that there had been a reduction into possession during the husband's life, and that they were subject to the articles. *Rawlins v. Birkett*, 25 Law J. Rep. (n.s.) Chanc. 337.

Part of the infant's reversionary interest consisted of the purchase-money of real estate which had been sold, and of real estate ordered to be sold but not sold. The purchase-money was in court:—Held, as to these, that she was entitled to the purchase-money absolutely, and to an equitable fee in the unsold realty, independent of the articles. *Ibid.*

A testator bequeathed 300*l.* to a married lady. The executor having the verbal authority of the lady and her husband, appropriated in satisfaction of the legacy a debt of like amount due to the testator's estate on the security of a warrant of attorney. After the appropriation, the debtor regularly paid to the lady and her husband interest on the debt. The debtor, with their consent, paid 50*l.*, part of the 300*l.*, to the husband's daughter, who gave to the husband and wife a promissory note for the amount. The wife had no separate estate. Upon the bankruptcy of the husband, one of the Commissioners decided that the chose in action of the wife had by these means been reduced into possession, and that the wife had no equity for a settlement either out of the 250*l.* or the 50*l.*; but,—Held, reversing the order of the Commissioner, that the 250*l.* still remained a chose in action, and was liable to the wife's equity for a settlement; but as to the 50*l.*, *quære*. Ultimately, the whole 300*l.* was, by arrangement, settled upon the wife. *Ex parte Norton, in re Selby and Norton*, 25 Law J. Rep. (N.S.) Bankr. 43; 8 De Gex, M. & G. 258.

An estate was devised to A B for life, with remainder to C D in tail, charged with 200*l.* payable to E F, a married woman, on the death of A B. During the life of A B, E F and her husband assigned this legacy to her father as a security for 200*l.* then advanced by him to the husband; but the assignment contained no covenant to pay or proviso for redemption. The father died, leaving C D his executor and sole residuary legatee, and he paid, on account of the father's debts, a larger amount than the personal estate he received. A B died, leaving the husband surviving, and thereupon C D came into possession of the estate. E F instituted a suit to have the legacy settled upon her and her children; but it was held (reversing the decision of one of the Vice Chancellors), that the legacy had been reduced into possession, and, therefore, that she was not entitled to a settlement. *Allday v. Fletcher*, 26 Law J. Rep. (N.S.) Chanc. 519; 1 De Gex & J. 82.

A sum of money having been left by will to a married woman, it was agreed by the husband and wife that a settlement should be made. Difficulties subsequently arose, and the parties altered their views, and called upon the trustee of the will to hand over the money to the husband. The trustee declined to do so, and paid the fund into court under the Trustees' Relief Act. Upon a petition by the husband and wife, that the money might be paid out to the husband, and that the trustee might pay the costs occasioned by his conduct, it was held, that no binding agreement for a settlement had been shewn, but that the trustee was justified in the course he had pursued, and his costs must be paid. *In re Bendyshe*, 26 Law J. Rep. (N.S.) Chanc. 814.

Upon taking the separate consent of a married woman, no person connected with the husband ought to be present. *Ibid.*

A father by his will settled stock upon his daughter

for life, remainder to her issue, subject to a life interest in any husband who might survive her. She married and had one only child, a son, and her husband died. When she had attained eighty years of age she married a gentleman, a member of the Irish and English bar, of about fifty-four years of age. She had accumulated much personal property, the savings of her income. Before the marriage (which it was agreed should be kept secret from the son) a very voluminous and long-continued correspondence took place between the lady and gentleman, in which she insisted that her property should be settled so that she should have the command of it "as if still unmarried," he being entitled, as husband, to a life interest, if surviving, in the stock bequeathed by the father's will. The intended husband drew two documents, in very obscure language, in one of which he bound himself to consent to her "disposition of a sum of 2,000*l.* out of whatever funds or dividends she" should be "entitled to, be possessed of, or have legally acquired at the time of her decease." The marriage took place, and was kept secret from the son until the wife's decease (she continuing the use of her virginal name), which took place in about six months, without her having made any disposition of her savings, leaving her son sole next-of-kin. After her decease the husband filed a bill against the trustee of the fund settled by the father of the lady for payment of the life interest, and the son filed a bill against the husband praying (amongst other things) a declaration that, as next-of-kin, he was entitled to the savings of his mother's income. The validity of the marriage was conclusively established, before the final hearing of the two suits, by a Court of competent jurisdiction:—Held, that the correspondence shewed that the lady implicitly relied upon the skill and integrity of the intended husband to prepare instruments to carry her wishes into effect; that those wishes were proved to be that her property should be so settled as that she should dispose of it as if unmarried; that the Court would have given her a life estate, with power of appointment, and in default for her next-of-kin (to the exclusion of the husband), and that no such settlement having been prepared (as it was the duty of the husband to have prepared), the husband could take no more than the life interest under his wife's father's will, and the son was entitled to the whole of his mother's savings; and, lastly, that the whole costs of the son's suit (with a small exception) must be paid by the husband. *Corley v. Stafford; Campbell v. Corley*, 26 Law J. Rep. (N.S.) Chanc. 865; 1 De Gex & J. 238.

In the suit against the trustee, the trustee was allowed his costs out of the fund; and the plaintiff and defendant had to bear their own costs. *Ibid.*

A married woman, whose earnings and property were protected against her husband and his creditors, by an order made under the 20 & 21 Vict. c. 85, s. 21, on account of his desertion of her, will be ordered the payment of a legacy given to her in general terms. *In re Kingsley's Trusts*, 28 Law J. Rep. (N.S.) Chanc. 80; 26 Beav. 84.

A married woman entitled to a legacy in reversion was deserted by her husband in the year 1845. The legacy fell into possession and was paid into court under the Trustees' Relief Act. The married woman then obtained a protection order under the Divorce and Matrimonial Causes Act, and upon her petition

the Court ordered the money to be paid out to her. *In re Raisdon's Trust*, 28 Law J. Rep. (N.S.) Chanc. 334; 4 Drew. 446.

The whole of a fund in court belonging to a married woman was settled (under the circumstances) upon herself and children, in exclusion of the assignee, for value, of her husband; though she was in the receipt of a further income for life of 26l. a year, and was living with her husband. *In re Welchman*, and *in re the Trustees' Relief Act*, 28 Law J. Rep. (N.S.) Chanc. 647; 1 Giff. 31.

A married woman having instituted a suit and obtained a decree for specific performance of a contract entered into by her husband, for the settlement of her estate, cannot afterwards repudiate the contract; for, by instituting the suit, she gives the Court jurisdiction to bind her interests, and it is no objection that this has not been done by deed acknowledged under the Fines and Recoveries Act. *Barrow v. Barrow*, 27 Law J. Rep. (N.S.) Chanc. 678; 4 Kay & J. 409.

Divorce does not give the Court jurisdiction to set aside a marriage settlement. *Evans v. Carrington*, 29 Law J. Rep. (N.S.) Chanc. 330.

After the dissolution of a marriage by the Divorce and Matrimonial Causes Court, the husband filed a bill for the purpose of setting aside the marriage settlement, and also a deed of separation. It alleged that C, the plaintiff's late wife, had previous to her marriage, and unknown to the plaintiff, committed fornication with R; that the connexion was renewed after marriage; that the marriage as well as the settlement was procured by fraud and collusion of C with R, and that C had fraudulently procured the plaintiff to execute the deed of separation for the purpose of more securely carrying on her intercourse with R. Upon demurrer, it was held, that the allegation of fraud and collusion, without any more precise statement of facts, was not sufficient to give the Court jurisdiction to set aside the settlement; and also that, in the absence of any allegation of adultery committed between the date of the marriage and the execution of the deed of separation, there was nothing in the bill on which relief in respect of that deed could be founded. *Ibid.*

The mere deposit, by way of equitable mortgage, by a husband, of the title-deeds of property upon which his wife has a security for the repayment of money, will not bar her right by survivorship to such security. *Michelmores v. Mudge*, 29 Law J. Rep. (N.S.) Chanc. 609; 2 Giff. 183.

A B, a married woman, who was absolutely entitled to stock in court, being separately examined, desired it to be transferred into the names of trustees, "upon trust for her absolutely, and that the dividends should be held and applied for her separate use for her life." This was accordingly done:—Held, that, during coverture she could dispose of her life interest, held for her separate use, but not of her reversionary interest; and the trustee having at her request advanced the fund to her husband, whereby it was lost, was held liable to replace it, but her life interest was made answerable for the trustee's indemnity. *Hanchett v. Briscoe*, 22 Beav. 496.

The whole of a life interest in a fund belonging to a *feme covert* was given (under the circumstances) to her in exclusion of all right of the assignee in insolvency of the husband, though the husband and wife

were living together. *Koerber v. Sturgis*, 22 Beav. 588.

A husband covenanted to settle the share of his wife and of himself "in her right" in the stocks comprised in her great-uncle's will. Under the will the fund was limited to the husband in case of his surviving his wife and her father, and of there being no issue:—Held, that the husband's interest was not comprised in his covenant. *Ibbetson v. Grote*, 25 Beav. 17.

A wife was deserted by her husband. Afterwards her father bequeathed a fund for her separate use, without power of anticipation, and she subsequently obtained a protecting order under the 20 & 21 Vict. c. 85. s. 21:—Held, that she was entitled to payment. *Cooke v. Fuller*, 26 Beav. 99.

A wife has no equity to a settlement out of her life interest as against the husband's assignee for value. *Re Duffy's Trust*, 28 Beav. 386.

Settlement in contemplation of marriage of annuity secured by bond to N, (the intended wife) together with arrears then due, upon trust for her separate use, the receipts of N, her appointees or assigns, to be good discharges for the annuity and all arrears, and all future and growing payments, and after her decease upon trust to pay all and singular the said trust monies, or such of them as should be unpaid or undisposed of at the time of her decease (in the events which happened) to her children (*nominatim*), with provisions for their maintenance, education and advancement. Subsequently, the annuity being in arrear to an amount exceeding 3,000l., N and her trustees released the annuity and all arrears and future payments, and in consideration of such release, the obligor conveyed certain hereditaments to trustees upon trust to sell, and out of the proceeds to pay 3,000l. to N, her executors or administrators, and the surplus to himself, N being a party to such conveyance:—Held, that upon N's death the 3,000l. passed to her husband, and was not impressed with any trust for the benefit of her children. *Calvert v. Johnston*, 3 Kay & J. 556.

Where a person entitled to a share in a fund in court, and her incumbrancer or assignee are before the Court, and one set of costs only is allowed in respect of that share, those costs are given to the incumbrancer or assignee. *Ward v. Yates*, 1 Dr. & Sm. 80.

In giving effect to the wife's equity for a settlement of a fund in court, the rule of settling half on the wife is departed from, either where the fund is very small, and the husband is not in a position to maintain his wife, or where the husband has received a much larger amount in right of his wife without appropriation for her maintenance. *Ibid.*

Where the fund settled by the Court has been assigned, the Court, after providing for the wife and her children, declares an ultimate trust in case of the wife dying in the husband's lifetime without issue in favour of the assignee. *Ibid.*

Although, according to the law of Scotland, a wife has no equity to a settlement, still, if she be a ward of this Court, the Court is bound before parting with her funds to her husband, to take care that proper provision is made for her. *In re Tweedale's Settlement*, John. 109.

A promise to a woman about to marry of a sum

of money "to be settled for her benefit previous to the marriage," if communicated to her intended husband, entitles her to call for a settlement for the benefit of her children, but if she dies without exercising that right, her husband as her administrator is entitled absolutely, to the exclusion of the issue of the marriage. *Lovett v. Lovett*, John. 118.

(D) SEPARATE ESTATE.

(a) Power over and Disposition of.

In 1817 a husband and wife verbally agreed that they would divide their furniture and effects, and live separate, that the wife should maintain herself, and that the husband should allow her to enjoy her earnings for her separate use, and that neither should interfere with the other. In pursuance of this agreement, they divided their effects and separated; the wife engaged in business and died in 1856, leaving a will, bequeathing money which she had acquired in her business since the separation. In a suit instituted for a grant of administration against the executor named in the wife's will, an allegation was given in by the latter pleading the above facts. The admission of this allegation being opposed,—Held, that it was admissible, inasmuch as under the circumstances stated in it, the property acquired by the wife after the separation became her separate property, and as such, might be bequeathed by her. *Haddon v. Fladgate*, 27 Law J. Rep. (N.S.) Prob. & M. 21; 1 Sw. & Tr. 48.

In a suit instituted by a married woman by her next friend against the trustees of a will for an account, it was held that a married woman having property to her separate use, without power of anticipation, had power to bind the corpus of the estate by a compromise entered into by her. *Wilton v. Hill*, 25 Law J. Rep. (N.S.) Chanc. 156.

A wife who lives with her husband and has separate property, over which she has a power of appointment by deed or will, is entitled to dispose not only of the capital, but also of the savings out of income, and that by a general residuary clause in her will. *Humphery v. Richards*, 25 Law J. Rep. (N.S.) Chanc. 442.

The income of property settled to the separate use of a wife is not converted into general personalty, nor is the right of control over it abandoned by its being transmitted by the halves of notes of the Bank of England, one half of which only had been received and acknowledged by her before her death;—or by being invested in the names of trustees in the purchase of long annuities, without any reference to her settlement or to the source whence the purchase-money arose;—or by its being secreted in the house of her husband; but a sum of money found after her death secreted in the house of her husband, without any evidence of the source whence it was derived, was held to be the property of the husband. *Ibid.*

§ N having paid off a debt secured by mortgage upon real estates, in the equity of redemption of which his wife was, at the date of their marriage, entitled to a life interest to her separate use, afterwards, without her privity, assigned the mortgage to the solicitor of himself and wife, as security for a debt due to such solicitor for costs principally incurred in a suit in which he acted, first for the wife before her marriage, and afterwards for both the husband and wife:—Held, that such assignment was a valid security as against

the wife's life interest in the hereditaments assigned. *Nelson v. Booth*, 27 Law J. Rep. (N.S.) Chanc. 110.

The solicitor, having subsequently purchased from the original mortgagee, for 40*l.*, a debt, for costs, of 175*l.*, which the latter would have been entitled to have added to his mortgage debt, was held entitled, as against the wife, to the benefit of such purchase, but to the extent only of securing himself in respect of the debt due to him from the husband. *Ibid.*

A bill of exchange was drawn in favour of a married woman, and sent by her trustees in a letter to her. Her husband surreptitiously obtained possession of the bill, and signed her name to it without her knowledge or concurrence, and having indorsed and discounted it through one P, who also indorsed it, he absconded. The wife, before the bill became due, discovered the fraud, and gave notice to the acceptors, who refused to pay at maturity. The discounters recovered at law against P, who sued the acceptors. The wife, by her next friend, filed her bill to restrain this action, and prayed that the acceptors might be ordered to pay the money to her on her separate receipt. The Master of the Rolls decided that no rights could be gained under the forged signature; that the payee being a married woman affected the party taking the bill with notice that it was the separate property of the wife; that the holder had a right to retain it, though he must not sue upon it, and that the acceptors must pay the money to the married woman. Upon appeal, the Lords Justices held, that P. was a *bond fide* holder for value, and as such legally entitled to the bill; that the Court would not interfere to defeat his title; and that no blame was attributable to him for not making inquiries other than of the husband, as to the wife's signature; and they dismissed the bill, with costs. *Dawson v. Prince*, 27 Law J. Rep. (N.S.) Chanc. 169; 2 De Gex & J. 41; 26 Law J. Rep. (N.S.) Chanc. 849.

Whether the fact of the payee being a married woman being known was constructive notice that the money formed part of her separate estate—*quære*. *Ibid.*

A husband and wife joined in mortgaging the wife's separate estate, and the husband covenanted to secure the repayment of the debt,—Held, that parol evidence might be admitted to shew that the money so borrowed was for the benefit of the wife; that the husband's joining in the mortgage deed was only by way of suretyship; and that his estate would be indemnified by the separate estate of his wife. *Gray v. Downman*, 27 Law J. Rep. (N.S.) Chanc. 702.

Property settled to the separate use of a married woman, without power of anticipation, cannot be applied to make good a breach of trust committed by her; and the circumstance that she herself was the settlor makes no difference. *Clive v. Caruso*, 28 Law J. Rep. (N.S.) Chanc. 685; 1 Jo. & H. 199.

A legacy of 1,000*l.* bequeathed to the separate use of a married woman was paid to her, she and her husband both joining in a release to the executors. The money was then allowed to get into the hands of the husband, who paid it to his own bankers, and mixed it with his own money, and employed it in his own business and in the family expenditure. This continued nearly twenty years, when the husband died. There was no evidence to shew the circumstances under which the money was paid to the

husband's bankers, nor any proof of any formal assent on the part of the wife to the mode of dealing with the fund by the husband, or of any gift of the fund by her to him:—Held, notwithstanding, upon special case, that the wife's assent to the employment and expenditure of the money by the husband must be presumed, and that she could not be allowed to claim it back from the husband's estate, as if still affected by the trust for her separate use. *Gardner v. Gardner*, 28 Law J. Rep. (N.S.) Chanc. 903; 1 Giff. 126.

Upon a marriage an estate was vested in trustees for the wife for life, for her separate use, and, after the decease of her husband, for such persons as she should by deed or will appoint. She appointed the reversion expectant on her decease to secure money lent to her husband, and, subsequently, she executed another deed and appointed the estate to her son:—Held, that a mortgagee contracting with a married woman must be taken to have known that she could only bind that which was settled to her separate use. *Hobday v. Peters*, 29 Law J. Rep. (N.S.) Chanc. 780; 28 Beav. 354.

Held, also, in the absence of fraud or misrepresentation, that the reversion expectant on her decease was not subject to the mortgage debt, and that the son, as appointee, took the estate discharged of the mortgage. *Ibid*.

Property was settled to the separate and inalienable use of a married woman for life, and the trustees were authorized out of the monies which should come to their hands, to reimburse themselves all expenses to be incurred in or about the execution of the trusts, or any matter relating to the settlement. A bill filed by her by her next friend, complaining of a breach of trust, and to remove the trustees, was dismissed with costs; but, by consent, new trustees were to be appointed, and a receiver to get in the income. Before new trustees had been appointed and the costs paid by the next friend, he became insolvent:—Held, that the income in the hands of the receiver was applicable to the payment of the trustees' costs. *D'Oechmer v. Scott*, 24 Beav. 239.

A testator bequeathed personal estate in trust for the separate use of a feme covert, and without power of anticipation. The legatee was at the date of the will domiciled abroad, and had continued so ever since. By the law of her domicile the restraint against anticipation was disregarded; but this Court nevertheless refused to give effect to a beneficial arrangement made by her anticipating her income. *Peillon v. Brooking*, 25 Beav. 218.

A wife was entitled to an annuity for her separate use, which was payable out of a mortgage on her husband's estate. The wife lived with her husband, and was maintained by him. The wife's trustee neglected to enforce payment of the mortgage and interest, and was held liable for the breach of trust:—Held, that as between the husband and wife, the interest applied to their mutual benefit must be taken in discharge of her annuity, and that the trustee, as against the wife, was entitled to the same equity. But held, also, that the accruing payment of the annuity could not be set off against a prior existing claim of the husband. *Payne v. Little*, 26 Beav. 1.

The wife's separate estate was invested in shares in the joint names of herself and her husband. The husband induced his wife to join in selling them, upon his promise to re-invest the produce in their

joint names. The husband alone received the produce, and, unknown to his wife, he employed it in part payment for the purchase of a real estate conveyed to him alone. The wife survived her husband:—Held, that she was entitled to a lien on the real estate for the amount. *Scales v. Baker*, 28 Beav. 91.

A married woman entitled to the income of a legacy for her separate use, continued for fifteen years, with full notice of the circumstances affecting her rights, to receive income on the footing that the legacy was liable to contribute in favour of the residuary legatees to a loss occurring on the re-investment of part of the estate. It was afterwards decided that the legacy was not liable so to contribute, but must be paid in full:—Held, that she was not entitled to recover from the residuary legatees the difference between the income of the full amount of the legacy and the reduced income she had actually received. *Stafford v. Stafford*, 1 De Gex & J. 193.

Whether her claim, apart from acquiescence, was not to a great extent barred by the Statute of Limitations—*quære*. *Ibid*.

Wife entitled for life to income of settled property for her separate use, without power of anticipation. The trustees allowed the husband to use 1,000*l.* part of the trust funds, for four years; shortly after which period the wife separated from her husband, and then for the first time claimed interest on the 1,000*l.* for the four years. She admitted she had allowed her husband to receive her income, so long as he behaved to her as a husband ought to do:—Held, that the wife was not entitled to the interest claimed. *Rowley v. Unwin*, 2 Kay & J. 138.

Real estate devised to A, the wife of B, her heirs and assigns for ever, independent of B, for her separate use and benefit, with power to appoint, and in default remainder over. Personal estate to A for her sole and separate use, independent of her husband B, and her receipts alone to be sufficient discharges:—Held, that the limitations to the separate use of A did not extend beyond the husband specifically named. *Moore v. Morris*, 4 Drew. 38.

(b) Liability in respect of.

A married woman taken in execution for a debt is, as a matter of right, entitled to be discharged out of custody, unless it be shewn that she has at her command separate property, which she can at the time apply to the payment of the debt. *Ivens v. Butler*, 26 Law J. Rep. (N.S.) Q.B. 145; 7 E. & B. 159.

A provision in an assignment in trust of the wife's property, made before marriage, for a conditional pecuniary allowance to her, at the discretion of the trustees, the Court will not regard. *Ibid*.

Declaration upon a covenant in a deed by the defendant and wife to pay money. Equitable plea, that the defendant and his wife, by the said deed, mortgaged certain land, of which they were seized in fee in right of the wife, to the plaintiff in fee, as a security for the money mentioned in the declaration, which the plaintiff had lent at the request of the wife, in order to pay off a bond given by the defendant, at the request of the wife, for a debt contracted by the wife before marriage. That the wife died, leaving the plaintiff her heir-at-law, on which he became entitled to the equity of redemption, as well as the legal estate, in fee, in the lands. That the lands were of more value than the money sought to be recovered,

and were, at the wife's death, the primary fund for paying off the debt, which had therefore been satisfied, in equity, before suit, by the value of the land:—Held, that the plea raised a good equitable defence, and such as might be pleaded under the Common Law Procedure Act, 1854, s. 83, as it disclosed facts that would entitle the defendant to an absolute and perpetual injunction. *Gee v. Smart*, 26 Law J. Rep. (n.s.) Q.B. 305; 8 E. & B. 318.

(E) SEPARATION DEEDS.

By a deed of separation, the husband covenanted "that, as and by way of a provision for the wife, he and his executors would pay to the trustee or the wife, during her life, 10s. weekly." Proviso: "that in case the husband and wife should at any time thereafter consent, by any writing under their hands, duly attested, to live and cohabit and should accordingly live and cohabit together, as man and wife, for the space of one month next thereafter, the deed should thenceforth be void".—Held, that the deed was not avoided by subsequent cohabitation without any writing. *Randle v. Gould*, 27 Law J. Rep. (n.s.) Q.B. 57; 8 E. & B. 457.

Where husband and wife separate by mutual consent, and an agreed allowance is paid to her, the husband will not be liable even for necessities supplied to her without his knowledge, and the question of the adequacy of the allowance is not for the jury. *Johnson v. Sumner*, 27 Law J. Rep. (n.s.) Exch. 341; 3 Hurl. & N. 261.

It may be otherwise where the husband has turned his wife away or deserted her without just cause, and left her destitute; in such cases there may be an authority implied from necessity, and so if an allowance, not agreed upon, is made and is inadequate, or is not paid. But in all cases where the wife is living apart from the husband, it is for the plaintiff to shew facts whence an authority to pledge his credit is to be inferred. *Ibid*.

Upon the separation of husband and wife the husband covenanted with a trustee for the wife to pay her an annuity for her life. Shortly before the death of the husband, and at his solicitation, a reconciliation and re-cohabitation took place in consideration of a parol promise by him to the wife and to her trustee to continue the payment of the annuity to her, and to charge it upon his real estate. The husband died without having carried into effect the parol promise:—Held, that such promise was effectual to charge the land with the annuity as against the devisees of the real estate under the husband's will. *Webster v. Webster*, 27 Law J. Rep. (n.s.) Chanc. 115.

A wife sued her husband in the ecclesiastical court for a divorce, on the ground of adultery and cruelty. A compromise of the suit was negotiated, and an agreement was signed by them as instructions for a deed of separation. The agreement contained stipulations as to the maintenance, custody, and education of the children, and as to the property, present and future, of the husband and wife. Among the stipulations as to the children, it was provided that the wife was to have the custody of two of them, and that in the event of the death of either or both, the husband was to be at liberty to place one or both of the surviving children in their stead under her charge; and that none of the chil-

dren should be sent to any school in B, but that neither of the children left in the husband's care should be sent to any school without the written consent of both father and mother. A bill was filed, by the wife, for the specific performance of the agreement, and the execution by the husband of a deed of separation in accordance therewith; and to this bill a demurrer by the husband was allowed on the ground of the provisions as to the children being contrary to public policy. *Vansittart v. Vansittart*, 27 Law J. Rep. (n.s.) Chanc. 289; 2 De Gex & J. 249; 27 Law J. Rep. (n.s.) Chanc. 222; 4 Kay & J. 62.

By an agreement for a separation under seal B W, in consideration of the agreements therein contained on the part of his wife J W, covenanted with a trustee to pay for her separate use an annuity, in addition to the income to which she was entitled under her marriage settlement, and also to permit his daughter H W to reside with her; and J W, who was entitled under her marriage settlement to an annuity of 400l. to her separate use, without power of anticipation, covenanted with the same trustee, that so long as B W should perform his part of the agreement, she would maintain, &c. H W, and would not allow B W to be sued for her debts. Upon demurrer to a bill filed by J W for specific performance of the agreement, and for the appointment of a new trustee,—Held, that such a bill could not be sustained, first, because there was no consideration for the agreement on the part of B W; secondly, because the stipulation as to the custody of the daughter was illegal; and, thirdly, because there was no trust property of which a new trustee could be appointed; and that to appoint a new trustee would be in effect to order fresh covenants to be entered into with a new covenantee. *Walrond v. Walrond*, 28 Law J. Rep. (n.s.) Chanc. 97; John. 18.

A covenant by a married woman having property settled to her separate use, without power of anticipation, is not a sufficient consideration to support an agreement otherwise voluntary. *Ibid*.

After a separation between a husband and wife, an action was brought by the wife's mother against the husband for necessities supplied to the wife, and was settled by arbitration. Under the award two deeds were executed, by one of which a previous post-nuptial agreement and warrant of attorney were recited, and in pursuance of them an annuity was made payable to the wife, for her separate use, out of trust property, to which the husband was beneficially entitled. By the other deed covenants were entered into by trustees, on behalf of the wife, that she would not molest the husband, and from indemnifying him against her debts, and that out of the annuity granted by the other deed the wife would support the children whom the husband covenanted to leave under her charge, and there was a proviso in the latter deed making it void on the husband and wife again cohabiting. The wife's conduct rendered her unfit to have the care of the children:—Held, first, that the annuity deed was not merely voluntary or incomplete, but created an effectual trust not affected by the wife's conduct. Secondly, that the two deeds were not so connected as to render the validity of the annuity deed dependent on that of the other. Thirdly, that after subsequent

cohabitation the children had no title to maintenance out of the annuity. *Crouch v. Waller*, 4 De Gex & J. 302.

An agreement made before or after marriage, which contemplates a voluntary separation of husband and wife, is void, as contrary to the policy of the law. *H. v. W.*, 3 Kay & J. 382.

By an ante-nuptial settlement property of the husband was limited, during the joint lives of himself and his wife, "if she should so long continue to live with him, and should not live separate and apart from him through any fault of her own," in trust for the use of the wife, without power of anticipation; and after the decease of either, "or in the event of the wife living separate and apart from her husband through any such fault" for the survivor, or for the husband, as the case might be; and after the death of the survivor, "or in the event of the wife living separate and apart from her husband through any such fault as aforesaid," for the children of the marriage:—Held, that the limitation over upon the separation of the wife and husband was void, as contrary to the policy of the law; for such a limitation in favour of the husband, if valid, would be a direct inducement to permit a state of separation, capriciously commenced by the wife, to continue. *Ibid.*

(F) PROTECTED PROPERTY OF WIFE DESERTED BY HER HUSBAND.

The order for the protection of property acquired by a wife, after she has been deserted by her husband, should, in terms, be for the protection of her property generally, and not of specific property, so as to leave open any question as to her title. *Ex parte Mullineux*, 27 Law J. Rep. (n.s.) Prob. & M. 19; 1 Sw. & Tr. 77.

Service of a citation on the husband is not necessary in the case of an application by a deserted wife, under section 21. of the 20 & 21 Vict. c. 85, for an order for the protection of property acquired by her since the desertion. Such order may be made on the affidavits of the applicant. *Ex parte Hall*, 27 Law J. Rep. (n.s.) Prob. & M. 19.

The affidavit in support of an application for an order, under section 21. of the 20 & 21 Vict. c. 85, for the protection of the wife's earnings, should state sufficient facts to satisfy the Court of the fact of desertion. *Ex parte Sewell*, 28 Law J. Rep. (n.s.) Prob. & M. 8.

Where such an affidavit merely stated that, on the 6th of March 1854, the husband deserted his wife and went to Australia, but did not state in what capacity he went there, whether as a mariner, or emigrant, or how otherwise; whether, since his departure, he had failed to contribute to her support; whether he had neglected to write to her, or if he had written, what was the nature of the communication, it was held to be insufficient. *Ibid.*

Quære—whether, under the words of 20 & 21 Vict. c. 85. s. 21, a woman resident within the city of London can obtain an order for the protection of her property. *Ex parte Aldridge*, 1 Sw. & Tr. 88.

The absence of a husband in his ordinary occupation as mariner does not constitute desertion; and the Court cannot take into consideration an actual desertion in past years, which has been terminated by a return to cohabitation. *Ibid.*

(G) SUITS; PLEADING AND EVIDENCE IN.

A husband, on his return from India, filed his bill asking the Court to secure and settle a sum of money which his wife had saved out of remittances made by him for her maintenance and support:—Held, upon a demurrer of the wife, who persisted in living separate from her husband, that no case was made either for discovery or relief, and that the demurrer must be allowed. *Brooke v. Brooke*, 27 Law J. Rep. (n.s.) Chanc. 639; 25 Beav. 342.

A married woman living apart from her husband must, as between herself and her husband or those claiming under him, disclose all correspondence with her solicitor which relates to business in which she and her husband were mutually interested, and in which there was nothing adverse to him. *Ford v. De Pontès*, 29 Law J. Rep. (n.s.) Chanc. 883.

But where her interest is adverse to her husband, and where rightly or wrongly she acts as a feme sole, her communications and correspondence will be privileged. *Ibid.*

(H) CRIMINAL MATTERS.

(a) Coercion of Wife by Husband.

A man and his wife were found guilty of wounding a person with intent to disfigure him and do him grievous bodily harm. But the jury also found that the wife acted under the coercion of the husband and did not personally inflict any violence on the prosecutor:—Held, that the conviction against the wife could not be supported. *The Queen v. Smith*, 27 Law J. Rep. (n.s.) M.C. 204; Deane & B. 553.

Where a husband and wife are jointly indicted as receivers of stolen property, and it is consistent with the facts that he may have received the stolen property at his house, and that it may thus have come into the possession of the wife; and the evidence shews that she, after the robbery, wore part of it, and offered other parts of it for sale, under circumstances that indicated that she knew that it had been wrongfully acquired; the question with reference to her liability to conviction ought to be left to the jury, whether she received the property from her husband, and if not from him, whether she received it in his absence. *The Queen v. Wardroper*, 29 Law J. Rep. (n.s.) M.C. 116; Bell, C.C. 243.

(b) Apprehending Husband for not supporting his Wife.

The 5 Geo. 4. c. 83. makes various acts offences; *inter alia*, by section 3, the not maintaining, having means, those members of a man's family whom he is bound to maintain; and section 6. enables any person to apprehend and take before a Justice, or give into the custody of a constable (who is bound under penalties to take him), any person "found offending against the act":—Held, that a constable was not bound to take into his custody, without a warrant, a man who does not support his wife, as he could not be said to be "found offending," the offence depending on a variety of circumstances not visible to the eye. *Horley v. Rogers*, 29 Law J. Rep. (n.s.) M.C. 140.

BARRISTER.

[See ACTION (A) (b). And see COUNSEL AND CLIENT—DAMAGES.]

BASTARDY.

- (A) PROOF OF ILLEGITIMACY.
- (B) ORDER OF AFFILIATION.
 - (a) *Jurisdiction to make the Order.*
 - (b) *Amendment of the Order.*
 - (c) *Service of Summons for.*

(A) PROOF OF ILLEGITIMACY.

In ejectment by a person claiming as heir-at-law, the question in dispute was his legitimacy, and his mother being called on his behalf to prove her marriage with his father before his birth, she on cross-examination denied that she had previously applied to affiliate the child, or had ever been before the magistrates at all:—Held, that a bastardy order against the father, made on the complaint of a female whose name answered to that of the witness, and in regard to a child of the same name as the plaintiff, was admissible in evidence (there being some circumstances to shew the identity of the parties), if not as bearing directly on the question of legitimacy, or as evidence of all the facts set forth on the order, at all events for the purpose of contradiction, and to shew the fact that she had been before the magistrates to affiliate the child. *Watson v. Little*, 29 Law J. Rep. (N.S.) Exch. 267; 5 Hurl. & N. 472.

The presumption of law arising from the fact of husband and wife sleeping together is irresistible as to the legitimacy of a child of the wife, unless there is clear and satisfactory evidence that some physical incapacity existed. *Legge v. Edmonds*, 25 Law J. Rep. (N.S.) Chanc. 126.

Where such physical incapacity is satisfactorily made out according to the opinions of the medical witnesses, evidence of the adultery of the wife is still an important ingredient in determining the legitimacy of the child, because, if the wife were of irreproachable character, it would go far to modify the opinion as to the husband's incapacity. *Ibid.*

The declaration of a mother is not admissible to prove non-access on the part of her husband; but where non-access has been established *aliunde*, the declaration of the wife is admissible to prove the paternity of the child. *Ibid.*

The mother of a child wrote a letter to the alleged father, declaring that he was the father of her child, which was born three months after the death of her husband. It did not appear that this letter was ever received by the person to whom it was addressed, nor even that she had ever voluntarily parted with the possession of it:—Held, that the letter was not admissible as evidence of the conduct of the mother. *Ibid.*

A declaration made by a person who afterwards assumes and is sued in the character of administratrix cannot be used as an admission made by a party in the cause; and this although she may combine the character of *cestui que trust* with that of administratrix. *Ibid.*

The legitimacy of a child is determined by the law of a country where its parents are domiciled at the time of the conception and birth of the child, and not by the law of the country where the child was born. *Re Wright's Trusts*, 25 Law J. Rep. (N.S.) Chanc. 621; 2 Kay & J. 595.

A child who is born illegitimate cannot afterwards be made legitimate by the parents domiciling themselves and intermarrying in a country where, if they had been domiciled there at the time of the birth, such child would have been legitimate. *Ibid.*

Accordingly, where a domiciled Englishman became the father of a child by a French woman, and afterwards, having gained a domicile in France (where the subsequent marriage of the parents, with acknowledgment of their children born previously to the marriage, renders those children legitimate), married the mother and acknowledged the child:—Held, that the child was not legitimate. *Ibid.*

(B) ORDER OF AFFILIATION.

(a) *Jurisdiction to make the Order.*

On the 30th of October, upon application made by the mother of a bastard child to a Justice acting for the petty sessional division in which she resided, a summons was issued to J L, the alleged father of the bastard, requiring him to appear at a petty sessions to be holden at P for the said division on the 17th of November to answer the complaint. J L was a British subject, recently residing within the said division, but then living in Scotland, and having no place of abode in England. He was personally served with the summons in Scotland on the 1st of November, in time to have attended at P on the 17th. He did not so appear, and the Justices being of opinion that the summons had been duly served, and on the evidence of the mother, corroborated in a material particular, made an order adjudging J L to be the putative father:—Held (*disentente Lord Campbell, C.J.*) that they had no jurisdiction to make the order, as the service of the summons beyond the limits of England and Wales was not due service. *Regina v. Lightfoot*, 25 Law J. Rep. (N.S.) M.C. 115; 6 E. & B. 822.

The application by the mother of a bastard child for a summons against the alleged father, under the 7 & 8 Vict. c. 101. s. 2, must be made within the time mentioned in that section, but it is not necessary that the summons should issue immediately, if the Justice thinks it would be useless in consequence of the mother not knowing the residence of the father. *Potts v. Cambridge*, 27 Law J. Rep. (N.S.) M.C. 62; 8 E. & B. 847.

On the 22nd of March 1856 C was delivered of a bastard child, and on the 30th of April applied to a Justice for a summons against P, whom she alleged to be the father of the child; but no summons was issued in consequence of her being unable to ascertain where P was living, he having left his home. The Justice told her to apply to the Bench for a summons as soon as she could ascertain P's residence. On the 30th of November 1857 she did apply, having shortly before ascertained that he was living at Cambridge. A summons was issued reciting the former application and the renewal of it, and the case was heard on the 14th of December 1857, when P did not dispute the facts, but insisted that the summons was issued upon the second appli-

cation, and therefore that the proceedings were bad. An order of maintenance was made, and a case granted by the magistrates for the opinion of the Court of Queen's Bench:—Held, that the proceedings were regular. *Ibid.*

The mother of a bastard child, more than twelve months old, applied to a Justice for a summons against the prisoner, the putative father, alleging (but not proving on oath) that he had paid money for the maintenance of the child within twelve months from the birth. The summons issued in the form given by the schedule to the statute 8 & 9 Vict. c. 10, except that it stated that the woman alleged that the man had paid money within the twelve months, instead of saying that she had given proof of the fact. The prisoner appeared and took no objection to the summons or the proceedings on which it was founded, but denied the paternity, and falsely swore he had not paid any money as alleged. The prisoner was on this indicted for perjury and convicted. On the trial, it was objected, that the Magistrate had no jurisdiction, as proof on oath that the money had been paid as alleged was necessary, under the statutes 7 & 8 Vict. c. 101. s. 2, and the 8 & 9 Vict. c. 10, to give the Justices authority to issue the summons, and that it was immaterial at the hearing whether the money had been paid, as proof of that fact was only necessary prior to the issuing of the summons:—Held, that had the objection of the want of proof on oath of payment of the money, and of the variation of the summons from the form given by the statute, been taken before the Magistrates, it probably ought to have prevailed, but that this was a mere irregularity in process to bring a defendant into court in a proceeding in the nature of a civil suit, and that the prisoner waived it by not taking any objection at the hearing, and by then going into the merits of the case (*dissentiente Martin, B.*). *The Queen v. Berry*, 28 Law J. Rep. (N.S.) M.C. 86; Bell, C.C. 46.

Held, secondly, that it was necessary at the hearing to make proof of the alleged payment; and, further, that such proof was also material as corroborative evidence of the paternity. *Ibid.*

Where, on the application of the mother of a bastard child more than twelve months old, a Justice issued a summons to the putative father, without any proof having been given to him that the party charged had, within the twelve months after the birth of the child, paid money for its maintenance, and the summons, on the face of it, was regular, and the Justices at petty sessions heard and adjudicated on the case on its merits, the defendant appearing and making no objection to the Court of the want of proof of such payment,—Held, that the want of such proof was not fatal to the authority of the petty sessions; that the proof was matter of process only, and that the Justices had jurisdiction to inquire into the matter charged in the summons; and, consequently, that the defendant might be indicted for perjury, for false evidence given on oath before them at the hearing. *The Queen v. Simmons*, 28 Law J. Rep. (N.S.) M.C. 188; Bell, C.C. 168.

The father of a bastard child contracted to pay to the mother 5s. per week for the support of the child. He paid her in this way for some time, and then paid her in advance for two years to come. In addition to this, he paid her 10*l.*, in consideration of

which she agreed to release him from all further payment in respect of the said child, but notwithstanding this, she afterwards applied to a Justice for an order for the payment of money for the support of the child, under 7 & 8 Vict. c. 101:—Held, that the above contract was no bar to the jurisdiction of the Justice to make the order; but that he ought to take it into consideration with the other circumstances, and then exercise his discretion as to making the order. *Folliot v. Koetzow*, 29 Law J. Rep. (N.S.) M.C. 128.

For the purpose of making an order on the putative father of a bastard child, after the expiration of a year from its birth, under the 7 & 8 Vict. c. 101. ss. 2, 3, it is not necessary that the evidence of the mother of payment of money by the alleged father should be corroborated by other testimony, either on the application for or on the hearing of the summons. *Hodges v. Bennett*, 29 Law J. Rep. (N.S.) M.C. 224.

(b) Amendment of the Order.

An order of affiliation omitted to state that the mother's residence was within the petty sessional division; but the summons, a copy of which was in evidence before the Justices, alleged this fact, which was not otherwise proved:—Held, that the Justices had sufficient grounds before them to have drawn up the order without the omission, and that on a *certiorari* to quash the order, the Court might, therefore, amend it under the 12 & 13 Vict. c. 45. s. 7. *The Queen v. Higham*, 26 Law J. Rep. (N.S.) M.C. 116; 7 E. & B. 557.

(c) Service of Summons for.

[See *R. v. Lightfoot* and *Potts v. Cumbridge*, ante (B) (a).]

A man having reason to anticipate proceedings against him as the putative father of a bastard child, born in the previous November, on the 17th of July left his father's house, where he had hitherto lived, and went to reside with a farmer in another part of the country, whom he assisted in the farm, having no intention, when he left, to return to his father's house. A bastardy summons was left at the father's house on the 29th of July:—Held, a good service "at the last place of abode." *The Queen v. Higham*, 26 Law J. Rep. (N.S.) M.C. 116; 7 E. & B. 557.

BEDFORD LEVEL ACT.

The Bedford Level Act provides that none shall be capable to be or continue governor or bailiff that "hath" not 400 acres or more of land in the level:—Held, that a mere legal estate is, upon the true construction of the word "hath" in the 15th section, a sufficient qualification, and that the practice and usage of the corporation was in conformity with such construction. *Childers v. Childers*, 26 Law J. Rep. (N.S.) Chanc. 743, 643; 1 De Gex & J. 432; 3 Kay & J. 310.

A voluntary conveyance, for the purpose of conferring a qualification under the above act, was executed by a father in favour of his son and registered, but never communicated to the son, who died soon afterwards. The legal estate was outstanding

in a mortgagee:—Held, that the father was entitled to have the property comprised in the deed reconveyed to him. *Ibid*.

BENEFIT SOCIETIES.

[See FRIENDLY AND OTHER SOCIETIES.]

BIGAMY.

[See DIVORCE.]

A British subject resident in England, who has married a second wife in the lifetime of the first (both marriages taking place in Scotland) may be indicted, and convicted of bigamy in England under the statute 9 Geo. 4. c. 31. *The Queen v. Topping*, 25 Law J. Rep. (n.s.) M.C. 72; Dears. C.C. 647.

On the trial of a woman for bigamy, whose first husband had been absent from her for more than seven years, the jury found that they had no evidence that, at the time of her second marriage, she knew that he was alive, but that she had the means of acquiring knowledge of that fact, had she chosen to make use of them:—Held, that on this finding the conviction could not be supported. *The Queen v. Briggs*, 26 Law J. Rep. (n.s.) M.C. 7; 1 Dears. & B. 98.

Quere—Is the onus cast on the prosecution of proving that the prisoner knew her husband was alive, or on the prisoner of proving that she did not know it. *Ibid*.

Proof was given on a trial for bigamy, by a witness who was present, that the prisoner married his first wife at the Wesleyan chapel at D, in the presence of the registrar, and that the entry of the marriage in the registrar's book was signed by the witness as a witness to the marriage, and that the parties lived afterwards together as man and wife for some years. To prove the due registration of the chapel for solemnizing marriages a certificate in these words was put in: "I, the undersigned, T E A, superintendent registrar of the district of L, in the counties of B and H, do hereby certify that the Wesleyan chapel, situate at D, in the county of B, was duly registered for the solemnization of marriages therein pursuant to the act 6 & 7 Will. 4. c. 85, on the 28th day of November in the year 1845. Given under my hand, this 26th day of March 1856.—T E A, Superintendent Registrar." A witness stated that he received this certificate from the superintendent registrar; that it was signed by the superintendent registrar in his presence; that he examined it, with the superintendent registrar's book, at his office, and that it was correctly extracted:—Held, that the fact of marriage was sufficiently proved by the parol testimony of the witness. *The Queen v. Mainwaring*, 26 Law J. Rep. (n.s.) M.C. 10; Dears. & B. 132.

Held, per *Pollock, C.B.* and *Willes, J.*, that the certificate put in was good evidence of the due registration of the chapel for marriages, as an examined extract from the superintendent registrar's book proved by the witness. *Ibid*.

Held, per *Wightman, J.*, *Williams, J.*, *Willes, J.* and *Watson, B.*, that without reference to the certificate, the fact of the solemnization of the marriage

in a chapel in the presence of the registrar, who could not lawfully have been present had the chapel not been registered, and the entry of the marriage in his book, raised a *prima facie* presumption that the chapel was duly registered. *Ibid*.

In order to establish an allegation of bigamy, it is necessary to prove such a marriage as, but for the former marriage, would be valid. The Divorce Court, therefore, declined to proceed upon the ground of bigamy, where evidence was given of a second *de facto* marriage in Australia, and subsequent cohabitation as man and wife, but it was not proved that the marriage was a good one, according to the law of the colony. *Burt v. Burt*, 29 Law J. Rep. (n.s.) Prob. M. & A. 133.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

[Alteration of, see *Gardner v. Walsh*, 6 E. & B. 83; 6 Law J. Dig. 100.—See 19 & 20 Vict. c. 60, the act for amending the laws of Scotland affecting trade and commerce.—Acceptance of inland or foreign bills to be in writing on the bill: what are to be deemed inland bills, see 19 & 20 Vict. c. 97. ss. 6, 7. And see CONTRACT—COSTS—FRAUDS, STATUTE OF—GOODS SOLD AND DELIVERED—INSOLVENT—INTEREST—MONEY HAD AND RECEIVED—PRACTICE, AT LAW; Interrogatories—TROYER—USURY.]

(A) PARTIES.

- (a) *Partners.*
- (b) *Trustees of Building Society.*
- (c) *Joint and several.*

(B) FORM AND OPERATION OF.

- (a) *In general.*
- (b) *Payee.*
- (c) *Imperfect Instrument—Ratification.*
- (d) *Qualified Promise.*

(C) STAMP.

(D) ACCEPTANCE.

- (a) *In blank.*
- (b) *Qualified Acceptance.*

(E) TRANSFER.

- (a) *In general.*
- (b) *Indorsement in blank.*
- (c) *After Maturity.*

(F) DISCHARGE FROM LIABILITY ON.

- (a) *By Payment.*
- (b) *Cancellation.*
- (c) *By giving Time.*
- (d) *By Discounting by Acceptor.*
- (e) *By accepting Composition.*

(G) CONSIDERATION.

(H) PRESENTMENT.

(I) NOTICE OF DISHONOUR.

(K) ACTIONS AND SUITS.

- (a) *When Bill or Note lost.*
- (b) *Pleading and Practice.*

(L) SUMMARY PROCEDURE ON BILLS OF EXCHANGE ACT, 1855.

- (a) *When applicable.*
- (b) *Writ of Summons.*
- (c) *Leave to Appear and Defend.*

(M) CHEQUES.

(A) PARTIES.

[See COMPANY.]

(a) Partners.

Where the defendant had written an acceptance on a bill, at the desire of A his father, in the name of A & Son, the bill being drawn in that name, and the goods for which it was drawn being also invoiced in the same way, and although they were supplied, in fact, only to the father, who carried on business alone, and in his own name, and there was no partnership in fact, yet as there was some evidence, though slight, that the defendant, the son, had so conducted himself as to lead the plaintiff to believe that he was a partner.—Held, that the question should have been left to the jury. *Gurney v. Evans*, 27 Law J. Rep. (N.S.) Exch. 166; 3 Hurl. & N. 122.

Two partners carried on business together as brokers, under an agreement that they were to get orders on commission and divide the expenses. One of them travelled for orders, and, having incurred expenses, drew a bill, for the first time, in the partnership name, to raise funds to execute an order. The other partner accepted it, but before it was issued, countermanded the authority to negotiate it, and it was negotiated without his knowledge.—Held, that the mere partnership did not render him liable upon it. *Yates v. Dalton*, 28 Law J. Rep. (N.S.) Exch. 69.

V S & Co., carrying on business as merchants in Buenos Ayres, under the firm of "V S & Co.," agreed with the defendants, merchants in London, under the firm of "R, B & Co.," to carry on a joint exchange operation, by which V S & Co. were to draw bills periodically on the defendants at ninety days' sight, and sell them at Buenos Ayres, keeping the defendants out of cash advance by periodically remitting to them bills to the same amount on other firms; the profit and loss to be shared between them. Accordingly V S & Co., in that name, drew bills on the defendants, and the plaintiffs became purchasers of the bills. The defendants having refused to accept the bills on presentation, the plaintiffs sued them as drawers of the bills.—Held, that the defendants were not liable. *Nicholson v. Ricketts*, 29 Law J. Rep. (N.S.) Q.B. 55.

V S & Co. having become bankrupts, the plaintiffs as holders of the bills proved against the estate, and received 40 per cent. on the amount.—Held, that the plaintiffs, therefore, could not recover against the defendants for money had and received. *Ibid.*

A broker employed at Buenos Ayres by V S & Co. to procure purchasers for their drafts on Europe, proposed to the plaintiffs the drafts of V S & Co. on the defendants, and they bought the bills, on the broker's assurance "that the bills were all in order, he having seen R, B & Co.'s letter of credit to V S & Co., in virtue of which the bills were drawn"—Held, by *Crompton, J.* and *Hill, J.* (the Court having power to draw inferences of fact) that this amounted to no more than a statement that the transaction was regular, and that the bills would probably be accepted, and not to a contract that the bills should be accepted. *Ibid.*

C and the defendant carried on business as partners, in the name of the defendant alone, at Walworth; and the defendant likewise carried on another busi-

ness of his own at Woolwich. C, for the partnership purposes, accepted, in the name of the defendant, a bill drawn upon and directed to the defendant, at the place of business in Woolwich.—Held (*Bramwell, B. dissentiente*), that it was a question for the jury whether the name of the defendant was not the partnership name, and whether, therefore, the defendant was not liable on the acceptance. *Stephens v. Reynolds*, 29 Law J. Rep. (N.S.) Exch. 278; 5 Hurl. & N. 513.

(b) Trustees of Building Society.

To an action on a promissory note in this form—"Midland Counties Building Society, No. 3. Birmingham, March 12, 1858. Two months after demand we promise to pay T P one hundred pounds, with interest, for value received. W H, J T, trustees. W F, secretary," (the declaration also containing counts for money lent, interest and upon accounts stated).—the defendant J T pleaded that the several contracts in the declaration mentioned were made and entered into by the Midland Counties Building Society, duly established under the 6 & 7 Will. 4. c. 32, and all other statutes, whereof the defendants and other persons were members, the rules whereof were duly certified and allowed, and that the contracts were not made by the defendants otherwise than as members of the society, and that divers persons (of whom the defendant W F was not one) were trustees of the society, and by the rules of the society and by virtue of the said acts liable to be sued as such upon all the contracts of the society.—Held, that the plea was no answer to the action. *Price v. Taylor*, 29 Law J. Rep. (N.S.) Exch. 381; 5 Hurl. & N. 540.

(c) Joint and Several.

Where two persons give a joint promissory note for the debt of one, it is necessary, in order to give the other the rights of a surety as against the creditor, to shew that he was only a surety, that the creditor knew him to be so, and that he accepted him as such. *Strong v. Foster*, 25 Law J. Rep. (N.S.) C.P. 106; 17 Com. B. Rep. 201.

A person appearing on the face of an instrument to be a principal debtor jointly with another, cannot, at law, set up, as against third parties, that he was only a surety. *Ibid.*

Quære—whether he can do so in equity. *Ibid.*

Mere forbearance or inactivity on the part of a creditor will not discharge a surety. *Ibid.*

A, being a customer of a bank, got B to join him in a promissory note to the bank, and sent the note to the bank, intimating that he had got B to join him in it; but the note was not entered in A's account. After it became due, A had a balance at the bank larger than the amount of the note. In an action on the note by the bank against B, he pleaded, by way of equitable defence, that he was only surety, and was accepted as such by the bank, that the bank gave A time for the payment of the note, and forbore to enforce payment, and the bank might have obtained payment from A if they had not given him time.—Held, that even if B could say in equity that he was surety, the plea was not proved; that it did not appear that he was accepted as surety; that there was no evidence that time had been given to A so as to discharge B, and that the bank did not, by refraining

from appropriating A's balance to the payment of the note, discharge B from his liability on it. *Ibid.*

(B) FORM AND OPERATION OF.

(a) *In general.*

By the custom of Liverpool cotton-brokers (and *semble* also as a general proposition) the drawer of a bill of exchange drawn against certain specified goods deposited with the acceptor, is entitled as against the latter to have the proceeds of such goods applied in the first instance in retiring the bill, before any part of such proceeds can be applied in discharge of what may be due from the drawer to the acceptor upon the general account between them. And the drawer may transfer this right to the party discounting the bill, who may then maintain a suit to have the proceeds of the goods in the hands of the acceptor applied accordingly. But the party discounting the bill would have no equity to maintain a suit for this purpose in the absence of such a transfer. *Inman v. Clare*, John. 769.

(b) *Payee.*

The following instrument, signed by the defendant, was held not to be a promissory note, as not disclosing any certain payee:—"Nine months after date, I promise to pay to the secretary, for the time being, of the Indian L and M Assurance Society, or order, company's rupees 20,000, with interest at the rate of 6l. per cent. per annum; and I hereby deposit in his hands twenty-two Union Bank shares, as particularized at foot, by way of pledge or security for the due payment of the said sum of company's rupees 20,000, as aforesaid, and in default thereof, I hereby authorize the said secretary, for the time being, forthwith, either by public or private sale, absolutely to sell or dispose of the said twenty-two Union Bank shares so deposited with him, and out of the proceeds of sale to reimburse himself the said loan of company's rupees 20,000 therein as aforesaid; he rendering to me any surplus which may be forthcoming from such sale; and I hereby promise and undertake to make good whatever, if anything, may be wanting over and above the proceeds of such sale to make up the full amount of the said loan of company's rupees 20,000, and interest aforesaid." *Cowie v. Stirling* (Ex. Ch.), 25 Law J. Rep. (n.s.) Q.B. 335; 6 E. & B. 383.

In order to constitute a valid bill of exchange the payee must be a person, however he may be described, capable of being ascertained at the time the bill is drawn. Therefore, a bill drawn in the following form is invalid:—"Six months after date pay to the order of the treasurer for the time being of the &c. the sum of 20l. for value received.—A. B. To C. D.—Accepted, payable at &c.—C. D." *Yates v. Nash*, 29 Law J. Rep. (n.s.) C.P. 806; 8 Com. B. Rep. N.S. 306.

(c) *Imperfect Instrument: Ratification.*

In an action for a balance due upon a promissory note, it appeared that the amount had been advanced by the payee to one of the makers, on his undertaking that three other persons, of whom the defendant was one, would sign it with himself, as his sureties. Two of the three did sign it, and the money was advanced. The defendant, when afterwards applied to, declined

to sign it for some time, declaring that he had not authorized a note for so large an amount; but, ultimately, he signed it, and made payments upon account:—Held, that he was liable upon it for the balance. *Dodge v. Pringle*, 29 Law J. Rep. (n.s.) Exch. 115.

(d) *Qualified Promise.*

In an action upon a promissory note, the defendant, in his plea, set out the note, which was in this form,—“I promise to pay, &c. 100l., as per memorandum of agreement.”—Held, that the words “as per memorandum of agreement” did not qualify the promise in the note, and therefore that the plea was bad. *Jury v. Barker*, 27 Law J. Rep. (n.s.) Q.B. 255; E. B. & E. 459.

(C) STAMP.

The statute 17 & 18 Vict. c. 83. s. 5, which enacts that the holder of an unstamped bill of exchange drawn out of the United Kingdom shall affix an adhesive stamp before he shall present the same for payment, or indorse, transfer, or in any manner negotiate such bill, and further provides, that “no person who shall take or receive from any other person any such bill as aforesaid, either in payment or as a security, or by purchase or otherwise, shall be entitled to recover thereon, or to make the same available for any purpose whatever, unless at the time when he shall so take or receive such bill, there shall be such stamp as aforesaid affixed thereon,” does not apply to a bill of exchange or note indorsed abroad and sent by the payee to his agent in England for the purpose of being presented for acceptance, nor to such presentment for acceptance; and therefore on the non-acceptance and protest of such bill an action may be maintained by the indorsee against the drawer without a stamp being affixed. *Sharples v. Rickard*, 26 Law J. Rep. (n.s.) Exch. 302; 2 Hurl. & N. 57.

Quære—whether on issues on pleas only denying the presentment for acceptance and notice of dishonour, the plaintiff is bound to produce the bill of exchange. *Ibid.*

A bill of exchange, stamped with the right (or a greater) amount, but on the wrong denomination, is admissible in evidence, if it purports to have been re-stamped by the Commissioners of Inland Revenue. *Keiser or Heiser v. Groat*, 29 Law J. Rep. (n.s.) Exch. 20; 5 Hurl. & N. 35.

Semble—that a question as to the sufficiency of a stamp ruled at the trial to be sufficient cannot be reserved. *Ibid.*

(D) ACCEPTANCE.

(a) *In Blank.*

The authority given by a blank acceptance to fill it up for the amount which the stamp will cover, is not lost merely because the drawer, by mistake, antedates the instrument a whole year, even although it is made payable some time after date; and if the period has in fact elapsed, from the time of the completion of the instrument, an action may be maintained on it, and the variance will be amendable. *Armfield v. Aylport*, 27 Law J. Rep. (n.s.) Exch. 42.

An instrument drawn in the form of a bill, payable to bearer, even if accepted in blank, and afterwards filled up by the drawer, may be declared upon by the

indorsee, as a promissory note made by the drawer and indorsed by the drawee; at all events, the variance, if any, will be amendable. *Ibid.*

(b) *Qualified Acceptance.*

The acceptance of a bill of exchange, dated the 8th of September 1856, drawn and payable four months after date, was in these words, "Accepted, payable at Messrs. O & Co. London.—No. 1,756. Due December 11th, 1856." And then followed the signature of the acceptors in a different handwriting:—Held, that this was not a qualified acceptance, and that the bill became due on the 11th of January 1857 as a four months' bill. *Panshawe v. Peet*, 26 Law J. Rep. (n.s.) Exch. 314; 2 Hurl. & N. 1.

(E) TRANSFER.

(a) *In general.*

The rules and principles of law applicable to the conversion of a chattel are not always applicable to the case of a conversion of a negotiable instrument held by a person who is a party to it, and apparently its holder. And if the drawer of a bill, who is also in possession of it as the agent of and in trust for the legal holder, but authorized by him to receive the proceeds in a certain way, transfers it to a third party, who makes an advance of money upon it, and receives the bill in ignorance of the true state of the case, and believing it to be the property of the transferor, the receipt of the proceeds by the transferee (even in a manner not authorized by the legal holder), as it would not have been an act of conversion by the transferor, will not be a conversion by the transferee; even though followed by the appropriation and retention of the proceeds in discharge of his advance to the transferor; at all events, if the bill has been given up (on its satisfaction to the acceptors), and no demand of it has been made, until afterwards, upon the transferee. Nor is the transferee in such a case liable to the legal holder in an action for money had and received, his act in receiving the money having been ministerial, and he being liable to the party transferring the bill to him. *Symonds v. Atkinson*, 25 Law J. Rep. (n.s.) Exch. 313; 1 Hurl. & N. 146.

But, *semble*, that a demand and refusal of it while in the hands of the transferee would have been evidence of a conversion by him; and in that case he would have been liable to the legal holder, either in an action for the conversion, or for money received to his use. *Ibid.*

The burden being cast upon a defendant, sued as indorser of a bill of exchange, when the indorsement has been *prima facie* proved, of shewing that the delivery to the plaintiff was not with the intention of constituting an indorsement, but simply by way of deposit or security, it was held, that he did not shew this merely by proving that the bill was given by drawer and acceptor to the plaintiff, as security to the plaintiff for a loan of the amount or discount, half of which loan the defendant, by arrangement with the plaintiff, was to advance to him; even although the plaintiff so far admitted the arrangement as to claim only the moiety of the amount of the bill, such an arrangement not being inconsistent with an absolute indorsement, nor necessarily tending to disprove it. *Attenborough v. Clarke*, 27 Law J. Rep. (n.s.) Exch. 138.

The allegation of the indorsement of a bill of exchange in an action by the indorsee against the acceptor does not necessarily mean such an indorsement as will give a right of action against the indorser, but only such an indorsement as gives the plaintiff a title to the bill. *Smith v. Johnson*, 27 Law J. Rep. (n.s.) Exch. 363; 3 Hurl. & N. 222.

Where, therefore, the drawers of a bill of exchange indorsed it to a registered joint-stock company, and the officer of the company delivered the bill to the plaintiffs for value, bearing the indorsement of two directors of the company per procura-tion,—Held, in an action by the plaintiffs against the acceptor, that whether or not the indorsement was such as to give a right of action by the plaintiffs against the company, there was such an indorsement as entitled the plaintiffs to a verdict on a traverse of the allegation of the indorsement of the bill by the company to the plaintiffs. *Ibid.*

(b) *Indorsement in Blank.*

The plaintiff, who was a partner and manager of a banking company established under the 7 & 8 Vict. c. 110, received from B, a customer, for value given by the bank, a bill of exchange, indorsed in blank, drawn by B and accepted by the defendant. It was part of the plaintiff's duty, as manager, to receive and keep possession of all bills given to the bank, and by authority of the directors he sued the defendant upon this bill:—Held, that it was not necessary for the company to indorse it to the plaintiff to entitle him to recover; nor that the other partners should be joined in the action. *Lowe v. Parnell*, 29 Law J. Rep. (n.s.) C.P. 17; 7 Com. B. Rep. N.S. 282.

A member of a money club having obtained from it a loan, gave, with two sureties, a promissory note for the amount and interest and expenses, payable to the order of the then treasurer. He, having ceased to be treasurer, indorsed the note in blank, and delivered it to the attorney of the club, in the presence of another member, who forthwith instructed the attorney to sue in his name upon it. The action was brought against the three makers; and the two sureties, severing from the principal in their pleading, pleaded denying the indorsement, and also a general plea of payment and an equitable plea of set-off, but were not allowed to plead partnership with the plaintiff. It was proved that 21l. due to the principal from the society had been carried to his credit. After verdict for the plaintiff for the full amount of the note, a certificate for speedy execution was obtained *ex parte*:—Held, on motion for a new trial, that there was good evidence of an indorsement, and that the question of partnership was not admissible on these pleas. *Jenkins v. Tongue*, 29 Law J. Rep. (n.s.) Exch. 147.

Held, also, that the certificate was regular; and, *semble*, that the defendants, at all events upon these pleas, were not entitled to the benefit of the payment in reduction of the note; but a rule nisi to reduce the verdict on that ground was (reluctantly) granted. It appeared, however, upon affidavits on shewing cause, that the motion had been made on behalf of the sureties without their authority; and the Court at once granted a cross-rule to discharge the former rule on that ground, and, the plaintiff's affidavits not

being satisfactorily answered, afterwards made that cross-rule absolute. *Ibid.*

(c) *After Maturity.*

On the making of a bill of exchange, it was agreed between the drawer and the acceptors, that the latter should deposit with the drawer some canvas as a collateral security for the payment of the bill, with power to the drawer to sell the canvas and apply the proceeds in discharge of the bill, if it was not paid at maturity:—Held, that this agreement created an equity attaching to the bill in the hands of a party to whom the bill was indorsed when it was overdue; and that as the drawer after the indorsement had sold the canvas and retained the proceeds, the indorsee was debarred from recovering on the bill for so much as the canvas realized on the sale. *Holmes v. Kidd* (Ex. Ch.), 28 Law J. Rep. (n.s.) Exch. 112; 3 Hurl. & N. 891.

(F) DISCHARGE FROM LIABILITY ON.

(a) *By Payment.*

The defendant accepted a bill for 1,000*l.* for the accommodation of V. A bill for the same amount, purporting to be drawn by V, and accepted by the defendant, was presented to the defendant for payment, by the plaintiff, as holder for value. The defendant inspected the bill, and gave the plaintiff another bill for the same amount in exchange for it, but a month afterwards discovered that his acceptance to the original bill was forged, and gave notice thereof to the plaintiff:—Held, no answer to an action by the plaintiff on the second bill. *Mather v. Maidstone*, 25 Law J. Rep. (n.s.) C.P. 310; 18 Com. B. Rep. 273.

The plaintiffs, bankers, discounted for T a bill drawn by T on and accepted by the defendant. Before the bill became due the plaintiffs received from T, who had an account with them, another bill for the same amount, drawn by him, and purporting to be accepted by the defendant, for the purpose of retiring the first, but the plaintiffs having previously sent the first bill to their London agents, instructed them to obtain payment of it, and credited T in their books with the amount. It was subsequently discovered that the defendant's acceptance on the renewed bill was a forgery:—Held, that these facts did not support a plea of payment to an action by the plaintiffs against the defendant on the first bill. *Bell v. Buckley*, 25 Law J. Rep. (n.s.) Exch. 163; 11 Exch. Rep. 631.

(b) *By Cancellation.*

Where the maker of a negotiable instrument does some act *animo cancellandi*, but so imperfectly that his intention is not manifest on the face of the instrument, and it is afterwards put in circulation, he is responsible to a *bond fide* holder for value, though the instrument be put in circulation without his authority. *Ingham v. Primrose*, 28 Law J. Rep. (n.s.) C.P. 294; 7 Com. B. Rep. N.S. 82.

Therefore, where the acceptor of an accommodation bill of exchange intrusted it to the drawer for the purpose of getting it discounted, and on the latter failing to do so, tore it in half, and threw away the pieces in the street, but the drawer picked them up and put them in his pocket, saying that they

would be safer there, and afterwards pasted them together, and wrongfully negotiated the bill, there being nothing in the appearance of the bill to excite suspicion:—Held, that the acceptor was liable on the bill to a holder for value without notice. *Ibid.*

Semble—that the pasting the two portions of the bill together under the above circumstances did not amount to forgery. *Ibid.*

(c) *By giving Time.*

In an action by the payee against the maker of a promissory note, the defendant pleaded, by way of equitable defence, that the note was made by him jointly with J H and T H, at the request and for the accommodation of J H, as the surety only of J H, and to secure a debt due from J H solely to the plaintiff, and without value or consideration, and that the notes were delivered to the plaintiff, and accepted by him from the defendant, upon an express agreement between them that the defendant should be liable thereon as surety only for the said J H, and that the plaintiff, at the time the notes were made, had notice and knowledge of the same having been so made by him as such surety. That the plaintiff, whilst holder of the note, without the knowledge or consent of the defendant, for a good and valuable consideration, agreed to give, and did give, the said J H time for the payment of the note, and forbore to enforce it, and that he could and might, had he not given such time, have obtained payment from the said J H:—Held, upon demurrer, that the plea stated a good equitable defence at law to the action. *Pooley v. Harradine*, 26 Law J. Rep. (n.s.) Q.B. 156; 7 E. & B. 431.

A binding agreement for a good consideration, made by the creditor with a *stranger*, to give time to the principal debtor, does not operate as a discharge of the surety. *Fraser v. Jordan*, 26 Law J. Rep. (n.s.) Q.B. 288; 8 E. & B. 303.

Thus it is no defence to an action by indorsee against the drawer of a bill of exchange that the plaintiff, without the defendant's consent, agreed with K, who was no party to the bill, to give time to the acceptor, in consideration that K would bind himself to see the bill paid. *Ibid.*

In an action on a promissory note payable on demand, the defendant pleaded, as an equitable defence, that he signed the note only to secure a debt due from one S (one of the makers) to the plaintiffs, and that they knowing this, without the defendant's consent, for a good consideration agreed to give S time for payment of the note, whereby the defendant had been damaged. The only evidence in support of the plea was, that S, the principal, had repeatedly prepaid the plaintiffs a certain sum as interest in order to obtain forbearance for successive periods of three months:—Held, that this evidence was insufficient to sustain the plea. *Rayner v. Fussy*, 28 Law J. Rep. (n.s.) Exch. 132.

In an action on a joint and several promissory note, the defendant pleaded, as an equitable defence, that he made the note only as surety for one B, and to secure a debt due to the plaintiff solely from B; that it was given and taken on an express agreement between the plaintiff and the defendant, that the defendant should be liable thereon solely as surety; and that the plaintiff, without the knowledge of the defendant, gave B, for valuable consideration, time

for payment of the note, whereby the defendant had been damnified. It was proved that the note had been given as alleged, and that before it was due the plaintiff, for a certain sum, agreed (without the knowledge of the defendant) with B, who was then able to pay, to give him further time for payment, during which further time B became insolvent:—Held, that the plea was supported, and was an answer to the action—confirming *Pooley v. Harradine*. *Taylor v. Burgess*, 29 Law J. Rep. (N.S.) Exch. 7; 5 Hurl. & N. 1.

(d) *By Discounting by Acceptor.*

If the acceptor of a bill discounts it, he may re-issue it, so as to charge the drawer. *Attenborough v. Mackenzie*, 25 Law J. Rep. (N.S.) Exch. 244.

Nothing will discharge either drawer or acceptor but payment according to the law merchant, i. e., payment when due, or payment for the purpose of discharging and satisfying the bill. Therefore, if the acceptor discounts the bill for the drawer, and then re-transfers it, the latter will be liable upon it at the suit of a *bond fide* holder, and the transfer to the acceptor upon discount will operate as an indorsement, although at the time the drawer does not intend to transfer by way of indorsement, being under the impression that the bill is discharged by coming into the hands of the acceptor; nor will the payment of the amount, less the discount, be deemed a payment of the bill by the acceptor. *Ibid.*

Semble—that a bargain between the drawer and acceptor in such a case, that the bill shall not be re-issued or transferred, would bar the action on the bill against the drawer, by a party taking it with knowledge of the fact of such bargain. *Ibid.*

(e) *By Accepting Composition.*

It may be doubtful whether a creditor accepting a composition on certain bills, the debtor and the other creditors not supposing that he is the holder of any other bills for which the debtor is liable, can sue upon such other bills. But if he induces others to agree to the composition on the faith of his false representation that he is not the holder of the other bills, or that the bills for which he accepts the composition are the only bills of the debtor which he holds, he cannot afterwards sue the debtor upon them, if this defence is properly pleaded and proved. *Blackstone v. Wilson*, 26 Law J. Rep. (N.S.) Exch. 229.

An averment in pleading such a defence, that the false representation was made by one H, as the agent of the plaintiff, was held, after verdict, to mean that it was made with the authority of the plaintiff. *Ibid.*

The only evidence to affect the plaintiff was, that one S whom he had employed as the attorney in an action on one of the bills sued on (the actions on which were afterwards consolidated), made a statement, before the other bill was due, that "all the bills" (meaning the bills now sued on and those on which the composition had been accepted,) were the plaintiff's bills. It was held, although the admissibility of the evidence had not been objected to at the trial, that, as it was the only evidence against the plaintiff, and it was doubtful whether it was admissible (and *per Martin, B.* it was not admissible), the verdict for the defendant was unsatisfac-

tory as not supported by evidence, and a new trial was granted. *Ibid.*

(G) CONSIDERATION.

Where a bill or note is shown to have originated in illegality or fraud, a presumption arises that a subsequent holder gave no value for it; and such presumption will support a plea that the plaintiff is a holder without consideration, unless rebutted by the defendant shewing that he gave value. But where there is a mere absence of consideration between the original parties, no such presumption arises, and the defendant is bound to prove by evidence the allegations in his plea. *Fitch v. Jones*, 24 Law J. Rep. (N.S.) Q.B. 298; 5 E. & B. 238.

A promissory note, payable at two months, bore date the 1st of January 1854. Across the note was written, in the handwriting of the maker before it was negotiated, "Due 4th March 1855." To a declaration upon this note by an indorsee against the maker, the defendant pleaded that the note was made to secure the payment of a sum of money due from the defendant to the payee under a wagering contract (upon the amount of hop duty payable in 1854) made after the 8 & 9 Vict. c. 109; and that the plaintiff had notice of the premises when it was indorsed to him; and that there was no consideration for the indorsement to him, and that the note was overdue when indorsed to the plaintiff. Issue was joined on this plea. The note was proved to have been, in fact, made on the 1st of January 1855, and to have been indorsed to the plaintiff before the 1st of March 1855:—Held, first, that the note upon its face shewed that it was not due till the 4th of March 1855, and that it was not overdue when indorsed to the plaintiff. Secondly, that there being a mere want of consideration in the inception of the note under the 8 & 9 Vict. c. 109, and no illegality or fraud, the defendant was bound to shew that the plaintiff took it without value. *Ibid.*

A having performed gratuitously services for B, received from him a promissory note, with the understanding that he should accept it not only as a gift for what was past, but that it should be a remuneration for future services to be rendered as long as B should require them. A continued to perform the services until B's death, when he sued B's executors upon the note:—Held, that as there was no contract binding A to perform future services, there was no consideration. *Hulse v. Hulse*, 25 Law J. Rep. (N.S.) C.P. 177; 17 Com. B. Rep. 711.

The presumption that the holder of a bill of exchange has given value for it, is rebutted when it appears that the acceptance is a forgery; and it then lies on the holder to prove that he gave consideration. *Mather v. Maidstone*, 26 Law J. Rep. (N.S.) C.P. 58; 1 Com. B. Rep. N.S. 273.

Where M, believing a bill shewn to him to have been accepted by himself, gave another acceptance in lieu of it, and in consideration thereof it was delivered up; and it turned out that the first acceptance was a forgery; in an action on the second bill by an indorsee against M, the acceptor, the plaintiff admitted that the acceptance of the first bill was a forgery, but set up that he was a *bond fide* holder of that bill for value:—Held, that the onus was cast on the plaintiff of proving that he was such *bond fide* holder. *Ibid.*

A person who gives another a bill, payable at a future day, for the debt of a third party due to that other, cannot, in an action against him on the bill, set up want of consideration as a defence. *Balfour v. the Official Manager of the Sea, Fire, Life Assur. Co.*, 27 Law J. Rep. (n.s.) C.P. 17; 3 Com. B. Rep. N.S. 800.

Therefore, in an action by the indorsees against the drawers of a bill of exchange at sixty days' date, the Court refused to allow the defendants to put a plea upon the record, either on legal or equitable grounds, to the effect that the bill was drawn by the defendants for a debt due to the plaintiffs from another company, which had assigned to them its business and obligations on the supposition that such assignment was valid, but that such assignment was wholly illegal and void. *Ibid.*

J & Co., at Rio, in consideration of a sum of money, agreed to be paid to them in a month by the firm of A & Co., consisting of the plaintiffs and another, drew upon the defendants in Liverpool, at ninety days after sight, for 3,000*l.*, payable to the plaintiffs' order in London. A & Co. did not pay the price of the bill, but the defendants, without notice of this default, accepted it on account of the drawers:—Held, that the defendants were not liable to the plaintiffs, the consideration having failed, and the fact that A & Co. consisted of another person besides the plaintiffs not affecting the position and rights of the parties. *Astley v. Johnston*, 29 Law J. Rep. (n.s.) Exch. 161; 5 Hurl. & N. 137.

(H) PRESENTMENT.

Where a bill of exchange is addressed to the payee, with his private residence added, and is accepted by him payable at his bankers', in order to charge an indorser, presentment at the bankers' is necessary, and presentment at the acceptor's place of residence is not sufficient. *Saul v. Jones*, 28 Law J. Rep. (n.s.) Q.B. 86; 1 E. & B. 59.

That there were no effects of the acceptor in the bankers' hands at the time the bill became due does not excuse the want of due presentment as against an indorser. *Ibid.*

A bill of exchange drawn in Jersey, and payable by the drawers' correspondents in London three days after sight, or order, was not presented until thirty-seven days after date:—Held (affirming the judgment of the Royal Court at Jersey) that being a foreign bill of exchange, it was presented within a reasonable time. *Godfray v. Coulman*, 13 Moore's P.C. 11.

(I) NOTICE OF DISHONOUR.

The plaintiff and the defendant being shareholders of a company, the defendant agreed to advance certain money to A B, the manager, for the purposes of such company, upon having the bond of the said A B, with the guarantee of the plaintiff for its repayment. In order to carry out such agreement, and in lieu of such bond and guarantee, a bill of exchange was given, which was drawn by such manager upon and accepted by himself as agent and on behalf of such company, and indorsed by the plaintiff, to whose order it was made payable:—Held, that the plaintiff was entitled to notice of dishonour; and that therefore, for want of such notice, the defendant could not make the

bill the subject of a set-off. *Mallins v. Siddle*, 28 Law J. Rep. (n.s.) C.P. 257; 6 Com. B. Rep. N.S. 494.

The indorsee of a bill of exchange, drawn by J upon B, gave J the following written notice of dishonour:—"B's acceptance to J, 500*l.*, due 12th of January, is unpaid. Payment to Roberts & Co. is requested before four o'clock":—Held, a good notice of dishonour—affirming the decision below, 27 Law J. Rep. (n.s.) Exch. 380; 3 Hurl. & N. 455. *Paul v. Jones* (Ex. Ch.), 28 Law J. Rep. (n.s.) Exch. 143; 4 Hurl. & N. 355.

(K) ACTIONS AND SUITS.

[Interest recoverable, see INTEREST.]

(a) When Bill or Note Lost.

A party taking a negotiable instrument *bona fide* and for full value, is entitled to recover on it, though it has been stolen and he took it negligently. *Raphael v. the Bank of England*, 26 Law J. Rep. (n.s.) C.P. 33; 17 Com. B. Rep. 161.

Where a money-changer changed a bank note which had been stolen, and the jury found that he gave full value for it, and took it *bona fide*, not having knowledge at the time that it had been stolen, but that he had the means of knowledge if he had taken care of certain notices delivered to him,—Held, that he was entitled to recover. *Ibid.*

The declaration by the plaintiffs, J, K and M, alleged that the defendant agreed to accept four bills of exchange for the payment of 450*l.* each, the price of certain shares sold by the plaintiffs to him, and that the defendant promised to pay the sums of money for which such bills were to be given at the times when the bills should become due; and that in pursuance thereof the defendant accepted a bill drawn by J upon him for payment to the order of K and M of a sum of 450*l.* on a day mentioned, and that the bill was so drawn and made payable at the request of the plaintiffs, and without any consideration in respect of K and M being the payees, and was afterwards indorsed by the payees to one J, to hold as the agent of the plaintiffs and on their account, and whilst it was so held, the bill was wrongfully destroyed by the defendant. The declaration then alleged, that although the time when the bill was due had elapsed, and the defendant had notice of the premises, he had not paid the bill:—Held, on demurrer, that the declaration disclosed no cause of action, there being no other promise by the defendant than the promise to pay the party entitled to the bill. *Jungbluth v. Way*, 25 Law J. Rep. (n.s.) Exch. 257; 1 Hurl. & N. 71.

Where an action is brought on a bill of exchange, which is alleged to have been lost, a Judge has no power to order a stay of proceedings until an indemnity be given, the defendant undertaking to pay the debt and costs. *Aranguren v. Scholfield*, 1 Hurl. & N. 494.

(b) Pleading and Practice.

The declaration, in an action by the indorsee against the indorser, of a bill of exchange, stated that the bill was drawn by P and directed to L, requiring him to pay to the order of P. 1,800*l.* six months after the date, and alleged that P indorsed the same to the defendant, who indorsed the same to the

plaintiff, and that the bill was dishonoured for non-payment. Plea, traversing the indorsement to the defendant as alleged:—Held, that the defendant was estopped from denying the indorsement to him; and that the plea was bad as raising an immaterial issue. *Macgregor v. Rhodes*, 25 Law J. Rep. (N.S.) Q.B. 818; 6 E. & B. 266.

To an action by the drawer against the acceptor of a bill of exchange, at three months, dated the 12th of July, the defendant pleaded by way of equitable defence that the bill ought to have been, and was represented to him by the plaintiff to be, drawn on the 25th of July, and three months from the 25th had not elapsed before action brought. The Court set aside the plea, but allowed the defendant to substitute a plea of fraud. *Drain v. Harvey*, 25 Law J. Rep. (N.S.) C.P. 81; 17 Com. B. Rep. 257.

Action by the plaintiffs as payees of a promissory note against the makers. Plea, that the note was made by the plaintiff R S, the defendant and one T S (the plea set out the note, which appeared to be a joint and several promissory note, made as alleged in the plea), and that the said R S, in the said note mentioned as one of the payees thereof and as one of the makers thereof, was and is the plaintiff R S, and the said note at the time it was made was one upon and by virtue whereof the defendant in case he paid the same, or more than one-third part thereof, would be entitled to call upon the plaintiff R S to pay a contribution to the defendant, and that in case the plaintiff R S recovered against the defendant the amount of the note, he, the defendant, would be entitled to sue for and to recover from the plaintiff R S one-third part of the amount so recovered against him the defendant:—Held, that the plea was bad. *Beecham v. Smith*, 27 Law J. Rep. (N.S.) Q.B. 257; E. B. & E. 442.

In an action on a bill of exchange, proof of any such circumstances of suspicion as might be left to the jury as evidence of fraud in the original negotiation of the bill will be sufficient to call upon the plaintiff to prove that he is a holder for value. And where the defence pleaded is that the bill was issued by the defendant for the purpose of its being discounted for himself, and that he never had consideration for it, and that in fraud of the defendant it was indorsed to the plaintiff without any consideration for the indorsement, proof that the first holder had the bill to get it discounted for the defendant, and got it discounted for himself, representing that it was drawn for his own accommodation, was held to be such evidence of fraud in the original issuing of the bill as to cast the onus of proof upon the plaintiff; and that the plaintiff having offered evidence, the defendant had a right to go to the jury on the whole case. *Hall v. Featherstone*, 27 Law J. Rep. (N.S.) Exch. 308; 3 Hurl. & N. 284.

A drawer in Louisiana of bills of exchange upon acceptors in London held entitled to prove under a deed of arrangement executed by the latter, upon their becoming insolvent, to their creditors, not only for the amount of the bills, but also for 10l. per cent. upon that amount in lieu of re-exchange which by the law of Louisiana he had been obliged to pay to the holders of the bills on their return dishonoured and protested for non-payment in Louisiana. *Walker v. Hamilton*, 1 De Gex, F. & J. 602.

(L) SUMMARY PROCEDURE ON BILLS OF EXCHANGE ACT, 1855.

(a) When applicable.

The Bills of Exchange Act (18 & 19 Vict. c. 67.) applies to cheques or "drafts or orders on bankers." *Eyre v. Waller*, 29 Law J. Rep. (N.S.) Exch. 246; 5 Hurl. & N. 460.

A promissory note payable on demand is within the Bills of Exchange Act, 18 & 19 Vict. c. 67; and the six months within which the action may be commenced, run from the date of the note. The issue of a writ after the six months is, however, an irregularity which may be waived by the defendant's acquiescence. *Maltby v. Murrells*, 29 Law J. Rep. (N.S.) Exch. 377; 5 Hurl. & N. 813.

Therefore, where a writ was issued under the Bills of Exchange Act, more than six months after the date of a note payable on demand, and the defendant did not apply for leave to defend, but upon execution being issued signed a request to the sheriff to withdraw, after partial satisfaction of the judgment, with an authority to re-enter and levy at any time for the amount remaining due, and afterwards personally assisted the sheriff in packing and removing the goods, the Court refused to set aside the proceedings or to compel the plaintiff to pay the amount levied to the assignees of the defendant, who had become bankrupt. *Ibid.*

(b) Writ of Summons.

Under the Bills of Exchange Act, 18 & 19 Vict. c. 67, a plaintiff may indorse on the writ of summons a claim for costs and noting, and the blank in the form given under that act may be filled up with the words "four days," pursuant to the Common Law Procedure Act, 1852. *Hall v. Coates, and Robinson v. Cotterell*, 25 Law J. Rep. (N.S.) Exch. 3; 11 Exch. Rep. 476.

The bill of exchange was indorsed on the writ, but the amount in figures in the corner of the bill was for a larger sum than that set out in the body of the bill:—Held, that the writ was not on that account irregular. *Ibid.*

A notice to set aside the writ and service is not too late if within ten days after the service. *Ibid.*

Under the 222nd section of the Common Law Procedure Act, 1852, the Court can amend a writ improperly sued out under the Bills of Exchange Act, 18 & 19 Vict. c. 67. (which was inapplicable to the case), and make it a good writ under the former act, imposing such terms as to service, &c. as the circumstances of the case may require; *Cockburn, J. dubitante* as to the power of amendment. *Leigh v. Baker*, 26 Law J. Rep. (N.S.) C.P. 220; 2 Com. B. Rep. N.S. 367.

(c) Leave to Appear and Defend.

In an action in the county court under the Summary Procedure on Bills of Exchange Act, 1855, the defendant may avail himself of any defence of which the facts admit, and is not confined to the particular defence disclosed on the affidavit on which he is let in to defend. *Saul v. Jones*, 28 Law J. Rep. (N.S.) Q.B. 36; 1 E. & E. 59.

Under the Bills of Exchange Act, 18 & 19 Vict. c. 67, the affidavit for leave to appear and defend need not disclose the defence with the certainty necessary

in a plea; but it is enough if it discloses reasonable and plausible grounds for supposing that there is a defence. *Olney v. Turley*, 27 Law J. Rep. (N.S.) Exch. 2.

Where (the action being by drawer against acceptor,) the affidavit stated that the bill had been accepted for the price of coals supplied to a company, of which the defendant was manager, and the business of which had since been transferred to another company, who had agreed to pay the plaintiff for the coals; and that the plaintiff had re-invoiced the coals to the latter company, and had told the defendant that they would pay, and that he should look to them, and not to the defendant, for payment,—the Court thought it sufficient, and allowed the defendant to defend the action; it being reasonably probable that there might upon the facts be a defence either on the ground of exoneration from the acceptance, or of acceptance of the substituted liability of third parties, although an agreement with plaintiff was not definitely stated, but only evidence of it. *Ibid*.

Under the Bills of Exchange Act, (18 & 19 Vict. c. 67. s. 2.) the defendant will be allowed to appear and defend, where there is any defence suggested, either in law or in fact, which there is any reasonable ground for supposing may possibly be supported. And hence where a bill was directed to a firm of A & Co., and was accepted in the name of A & B, although the acceptance was not denied to be in the handwriting of B, the defendant, and he had represented to the plaintiff, the drawer, that he was in partnership with A. and had asked for time after the bill was due, he was allowed to defend the action. *Mathews v. Marsland*, 27 Law J. Rep. (N.S.) Exch. 148.

Where a defendant has obtained leave to appear and defend an action brought under the Bills of Exchange Act, 18 & 19 Vict. c. 67, the Court will interfere to set aside such order if obtained fraudulently. *Pollock v. Turncock*, 1 Hurl. & N. 741.

(M) CHEQUES.

[The Law relating to crossed Drafts on Bankers, amended by 19 & 20 Vict. c. 25.—The Law relating to Cheques or Drafts on Bankers, amended by 21 & 22 Vict. c. 79.]

The crossing of a cheque with the words “& Co.” or with the name of a banker does not affect the negotiability of the cheque; and an individual who receives the cheque *bond fide* and gives value for it, is entitled to retain the amount received through his bankers from the bankers on whom it is drawn. In an action, therefore, for the conversion of a crossed cheque against an individual who had cashed it for a clerk of the plaintiff, the payee of the cheque (the clerk being intrusted with it to hand to the bankers of the plaintiff),—Held, that the proper question for the jury was, whether the defendant took the cheque *bond fide* and for value. *Carlton v. Ireland*, 25 Law J. Rep. (N.S.) Q.B. 113; 5 E. & B. 765.

If the crossing on a cheque crossed by the drawer is erased by a subsequent holder, the banker on whom it is drawn is justified in paying it, though it be not presented through another banker; for the statute 19 & 20 Vict. c. 25. gives the crossing the force of a direction to the banker to pay through another banker, only when the cheque bears the crossing

upon its face at the time the cheque is presented for payment—affirming the judgment below, 27 Law J. Rep. (N.S.) C.P. 45; 2 Com. B. Rep. N.S. 528. *Simmonds v. Taylor* (Ex. Ch.), 27 Law J. Rep. (N.S.) C.P. 248; 4 Com. B. Rep. N.S. 468.

A cheque drawn upon the G branch of a banking company by H, who kept an account at that branch, was presented by the defendant at the B branch of the same banking company, where it was cashed in the usual way across the counter, and the same day sent to G, but H having no funds there, it was returned to the B branch, who gave notice of dishonour to the defendant, H had no account with the B branch; and the two branches were distinct in respect of the accounts kept there, and issued cheques denoting the particular branch upon which they were drawn:—Held, that this did not amount to payment of the cheque by the B branch, as the bankers of H or on his credit, but on the credit of the defendant, and that, the cheque proving to be worthless, the bank was entitled to recover back the money paid. *Woodland v. Fear*, 26 Law J. Rep. (N.S.) Q.B. 202; 7 E. & B. 519.

As between the drawer of a cheque and the holder, no time less than six years is unreasonable for presentment for payment, unless some loss is occasioned to the drawer by the delay. *Laws v. Rand*, 27 Law J. Rep. (N.S.) C.P. 76; 3 Com. B. Rep. N.S. 442.

A banker's cheque, payable to bearer, is negotiable, and passes by indorsement, so that an indorser may be sued thereon by the holder. *Keene v. Beard*, 29 Law J. Rep. (N.S.) C.P. 287; 8 Com. B. Rep. N.S. 372.

BILL OF SALE.

[See DAMAGES—INTERPLEADER—TROVER.]

- (A) VALIDITY OF, IN GENERAL.
- (B) WHAT DEEDS ARE WITHIN THE ACT, AND MUST BE REGISTERED.
- (C) EFFECT OF INVALID DEED ON SUBSEQUENT DEED.
- (D) AFFIDAVIT OF ATTESTING WITNESS.
- (E) DESCRIPTION OF ASSIGNOR AND ATTESTING WITNESS.
- (F) EVIDENCE OF THE FILING.

(A) VALIDITY OF, IN GENERAL.

In a case stated by a county court Judge, upon an interpleader summons, for the opinion of this Court, after setting out the facts under which a bill of sale had been given to secure a past debt and a contemporaneous advance, and finding that the transaction was *bond fide*,—the question submitted was, “whether the bill of sale was void as against the execution creditors (the respondents), seizing after the first instalment secured by the bill of sale became due, and whilst the debtor was allowed to remain in possession, and with his name over the door as it had been before,”—Held, that, there being nothing to shew that the deed was fraudulent, the appellant was entitled to judgment. *Weaver v. Joulie*, 3 Com. B. Rep. N.S. 309.

A, by deed, assigned to B all the machinery in and about a certain mill, upon trust for securing a sum

of money; and it was thereby provided, that all the machinery which, during the continuance of the security, should be fixed or placed in the mill in addition to or substitution for the former machinery, should be subject to the trusts of the assignment. The assignment was duly registered as a bill of sale; and after the date of it A placed other machinery in the mill, in addition to that which was there at the date of the assignment:—Held, that as between B and a judgment creditor of A, who had sued out execution, B was entitled to the additional machinery in the mill. *Holroyd v. Marshall*, 29 Law J. Rep. (n.s.) Chanc. 655; 2 Giff. 382: reversed on appeal, 30 Law J. Rep. (n.s.) Chanc. 385.

(B) WHAT DEEDS ARE WITHIN THE ACT AND MUST BE REGISTERED.

The freehold of a mill was mortgaged by J to M; and for further security J afterwards assigned to M certain machinery then upon the premises. By indenture of the 14th of September 1853, J assigned to the defendant, subject to the said mortgage, the equity of redemption of the mill and all the machinery included in the assignment to M, and also certain other machinery that had been subsequently erected and fixed in the mill. By another indenture of the 14th of August 1854, J sold and assigned to the defendant, to secure a further advance of 500*l.*, certain machinery then on the premises, and set forth in a schedule to the deed, and which did not include any of the machinery assigned by the deed of the 14th of September 1853; and also further charged with the said 500*l.* the equity of redemption in the premises before charged to the defendant. The machinery assigned by this latter deed was affixed to the premises only for the purposes of trade, and this deed of sale treated them as machinery which J had a right to sell distinct from the land. The deed of the 14th of August had not been filed as required by the 17 & 18 Vict. c. 36. J became bankrupt, the defendant at the time having taken possession of the said machinery:—Held, in an action by the assignees of J, first, that the machinery assigned by the deed of the 14th of August 1854 was personal chattels within the 17 & 18 Vict. c. 36. s. 7; and that the deed itself was a bill of sale, as it created a primary charge on the machinery distinct from the land; and, therefore, that the deed, not having been filed as required by section 1, was inoperative. *Waterfall v. Penistone*, 26 Law J. Rep. (n.s.) Q.B. 100; 6 E. & B. 876.

Held, also, that being trade fixtures, the machinery did not by subsequent annexation pass to the mortgagee of the freehold. *Ibid.*

A post-nuptial settlement by which a man, in consideration of natural love, conveys goods and chattels to trustees for the benefit of his wife and children, is within the provisions of the Bills of Sale Act, and should be filed as required by that Act. *Fowler v. Foster*, 28 Law J. Rep. (n.s.) Q.B. 210.

A tradesman expecting the execution of a writ of *fieri facias* issued by the Court of Chancery for payment of costs in a suit, effected a sale of the whole of his furniture and stock-in-trade. The only document passing upon the occasion was a receipt for the money paid upon the purchase. A few days after the purchaser had taken possession the writ was issued, and the sheriff subsequently filed a bill of interpleader, upon which the question arose whether the sale was

fraudulent and void:—Held, that it was not a ground for vitiating a sale that it was made with a view to defeat an expectant execution; that under the particular circumstances of this case, there was no ground for saying that the purchase was not *bond fide*, and consequently the sale could not be set aside; but, there being facts of a highly suspicious character attending the transfer of the property, the purchaser was ordered to pay his own costs. *Hale v. the Metropolitan Saloon Omnibus Co.*, 28 Law J. Rep. (n.s.) Chanc. 777; 4 Drew. 492.

Held, also, that the receipt given for the goods did not amount to a "bill of sale" under the provisions of the statute 17 & 18 Vict. c. 36, and therefore that it did not require registration. *Ibid.*

(C) EFFECT OF INVALID DEED ON SUBSEQUENT DEED.

In trover by assignees of a bankrupt, the defendant, who claimed under a bill of sale, invalid under the Bills of Sale Act, was not allowed to set up a subsequent bill of sale to a third party, who himself had not set it up, and who, even if he were the "true owner," would be defeated by the bankrupt's reputed ownership. *Nicholson v. Cooper*, 27 Law J. Rep. (n.s.) Exch. 393; 3 Hurl. & N. 384.

A made a fraudulent bill of sale of goods to B, who subsequently, in the presence and with the sanction of A, but without his being a party to it, assigned to C *bond fide*, and for a valuable consideration. The actual possession of the goods throughout remained in A:—Held, that the second bill of sale was not affected by the fraud in the first, and that therefore C's assignment was protected against the creditors of A. *Morewood v. the South Yorkshire Rail. and River Dun Co.*, 28 Law J. Rep. (n.s.) Exch. 114; 3 Hurl. & N. 798.

A B, a trader, on the 19th of April 1856, executed to C D a bill of sale of furniture on the premises where he, A B, carried on business, the consideration being stated as for goods sold, money lent, and money for which C D had become responsible for A B. At the request of A B the bill of sale was not registered within the twenty-one days required by the statute 17 & 18 Vict. c. 36, but on the expiration of that time another bill of sale of the same furniture was executed in similar terms and was not registered. A third, a fourth and a fifth bill of sale were in the same manner executed and not registered, and ultimately a sixth was executed on the 5th of August 1856 and was registered within the prescribed time, but none of the other bills of sale were cancelled. A B was adjudicated bankrupt in December 1856, the act of bankruptcy being committed in July previously by being denied to his creditors. Assignees were appointed, who filed a bill against C D, praying an injunction to prevent him from removing the furniture, and a declaration that the bills of sale were fraudulent and void, and that they might be delivered up to be cancelled:—Held (affirming a decision of one of the Vice Chancellors), that neither of the bills of sale, nor the registration of the last, constituted "a dealing" within the meaning of the 133rd section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106); and that, notwithstanding the registration of the last bill of sale the furniture remained in the order and disposition of the bankrupt. *Per*

Lord Justice Turner—The statute 17 & 18 Vict. c. 36. in no degree affects the doctrine of reputed ownership. *Stansfield v. Cubitt*, 27 Law J. Rep. (n.s.) Chanc. 266; 2 De Gex & J. 222.

(D) AFFIDAVIT OF ATTESTING WITNESS.

The affidavit of the attesting witness to the execution of a bill of sale, required by section 1. of 17 & 18 Vict. c. 36. to be filed with the bill, will be sufficient if, on comparison with the bill, it appear to have been made by the attesting witness to the bill, although the affidavit itself does not expressly state that the deponent was the attesting witness. *Routh v. Roubloth*, 28 Law J. Rep. (n.s.) Q.B. 240.

The Bills of Sale Act (17 & 18 Vict. c. 36. s. 11.) requires that every bill of sale of personal chattels, or a true copy thereof, shall "together with" an affidavit of the time of such bill of sale being made, be filed with the officer of the Queen's Bench:—Held, that both the bill of sale and the affidavit must be filed at the same time. *Grindell v. Brendon*, 28 Law J. Rep. (n.s.) C.P. 333; 6 Com. B. Rep. N.S. 698.

(E) DESCRIPTION OF ASSIGNOR AND ATTESTING WITNESS.

The object of the Bills of Sale Act is to give the assignee and creditor a true idea of the position in life of the assignor; and therefore a misdescription or absence of due description in regard to his occupation is substantial, and invalidates the transaction. *Allen v. Thompson*, 25 Law J. Rep. (n.s.) Exch. 249; 1 Hurl. & N. 15.

Under that act it is not a sufficient description of the occupation of the assignor, if he have any office or occupation, to term him simply "gentleman." *Ibid.*

In the case of a clerk in a public department, e.g., the Audit Office, he should be described as "clerk in the Audit Office." And, *semble*, that even were he at the head of a department, he should be so described. *Ibid.*

A bill of sale containing a description of the residence and occupation of the assignor was filed, but not together with any affidavit containing such a description:—Held, that the bill of sale was void under the 17 & 18 Vict. c. 36. s. 1. *Hutton v. English*, 26 Law J. Rep. (n.s.) Q.B. 161; 7 E. & B. 94.

A bill of sale contained the following description of the attesting witness, "W. R. Cuthbert, of King's Bench Walk, Inner Temple, in the city of London, clerk to Messrs. Brundrett & Randall, of the same place, solicitors":—Held, that such a description was sufficient under the 17 & 18 Vict. c. 36. s. 1. *Blackwell v. England*, 27 Law J. Rep. (n.s.) Q.B. 124; 8 E. & B. 541.

Under the Bills of Sale Act (17 & 18 Vict. c. 36. s. 1.), which requires an affidavit containing a description of the residence of the party giving the bill of sale, and of the attesting witness thereto, it is sufficient to state the places where they carry on their business; and, in the case of a clerk, to state the place where his employers carry on their business. *Attenborough v. Thompson*, 27 Law J. Rep. (n.s.) Exch. 23; 2 Hurl. & N. 559.

Under the Bills of Sale Act, 17 & 18 Vict. c. 36,

it is necessary that the occupation of the attesting witness, as well as that of the assignor, should duly be described in the affidavit on registry; and an attorney or an attorney's clerk, long known as such, is not duly described merely by the term "gentleman" without the mention of his profession. *Tutton v. Samner*, 27 Law J. Rep. (n.s.) Exch. 293; 3 Hurl. & N. 280.

There must be a sufficient description of every attesting witness to a bill of sale under the Bills of Sale Act, 18 & 19 Vict. c. 36, as well as of the assignor. *Bath v. Sutton*, 27 Law J. Rep. (n.s.) Exch. 388.

But, though where a person has any fixed profession, or business, or avocation by which he gains his living it must be mentioned in such description, it is not necessary to insert a description of an occupation which he has only casually and temporarily followed. And where the assignor was a medical student who had for some short time acted as surgeon's assistant, but for six months before action had been in no business:—Held, that he was sufficiently described as "gentleman." *Ibid.*

An objection that the attesting witness was not duly described, not having been made at the trial, was not allowed to be urged. *Ibid.*

An office copy of the affidavit admitted as good and sufficient evidence. *Ibid.*

Under the Bills of Sale Act it is requisite that there shall be a sufficient description of the occupation and residence of every attesting witness (where there are more than one) as well as of the assignor. But his description in the affidavit is sufficient "affidavit" of such description. *Nicholson v. Cooper*, 27 Law J. Rep. (n.s.) Exch. 393; 3 Hurl. & N. 384.

In the bill of sale and affidavit of registration under the 17 & 18 Vict. c. 36, A was described as a "gentleman." It appeared that he had been formerly a coal-agent, but having been dismissed, he was at the time of the bill of sale out of employment:—Held, that there was no such misdescription as affected the validity of the bill of sale. *Morewood v. the South Yorkshire Rail. Co. and River Duns Co.*, 28 Law J. Rep. (n.s.) Exch. 114; 3 Hurl. & N. 798.

By the 17 & 18 Vict. c. 36. a description of the residence and occupation of the person giving a bill of sale must be filed with the bill of sale. A, whose situation in life was that of attorney's clerk, gave a bill of sale, which was registered under the above provision. He described himself as "gentleman." At the time of giving the bill of sale, he had no definite employment, but had been employed in making out the bills and accounts of a firm of attorneys:—Held, that the description was improper. *Beales v. Tenant*, 29 Law J. Rep. (n.s.) Q.B. 188.

The affidavit accompanying a bill of sale under the 17 & 18 Vict. c. 36. must contain (in itself or by reference) a description of the residence and occupation of the grantor; and it is not enough to state that he is the person mentioned in the bill of sale, unless it is averred that he is truly described therein. *Pickard v. Brett*, 29 Law J. Rep. (n.s.) Exch. 18; 5 Hurl. & N. 9.

Under the 17 & 18 Vict. c. 36. s. 1, where the occupation of a party to, or the witness of, a bill of sale, is not stated, the onus of proving that such

party or witness has an occupation lies on the party seeking to impeach the bill of sale on that ground. *Daniel v. Sutton*, 3 Hurl. & N. 382.

(F) EVIDENCE OF THE FILING.

By section 3. of the 14 & 15 Vict. c. 99. the officer of the Queen's Bench is required to keep a book containing a list of every bill of sale filed in the office, and the dates of the execution and filing of the same:—Held, that this book was of such a public nature that a certified copy was admissible in evidence, under the 14 & 15 Vict. c. 99. s. 14, and that such certified copy proved the time at which the affidavit was filed, as well as the time at which the bill of sale was filed. *Grindell v. Brendon*, 28 Law J. Rep. (N.S.) C.P. 333; 6 Com. B. Rep. N.S. 698.

BLOCKADE.

[See SHIP AND SHIPPING.]

BOND.

- (A) CONSTRUCTION AND OPERATION.
- (B) LIABILITY OF HEIR OF OBLIGOR.
- (C) DISCHARGE.
- (D) ACTION—COSTS.

(A) CONSTRUCTION AND OPERATION.

The condition of a bond executed by C and the defendant, recited that C had opened and then kept and proposed to continue to keep an account with a banking company, of which the plaintiff was the registered officer, and that for the security of the bank it had been arranged that C and the defendant should execute the bond. The condition was for the payment by C and the defendant, or one of them, on demand, &c. of all such sums not exceeding in the whole 1,000*l.*, as should from time to time be due and owing on account of cash and bills, &c., and for the payment of charges and advances for interest, &c. as usually charged by bankers. At the time of the execution of the bond by the defendant, the balance due from C was 978*l.* 4*s.* 11*d.*, and that sum formed the commencement of the account secured by the bond, and was continued for several years. When the defendant received the bond from the bank she objected that it might make her liable beyond the sum of 1,000*l.*, and thereupon it was suggested, by the company, that if the balance exceeded 1,000*l.* at their half-yearly accounts they should require it to be reduced, or that the amount should be limited to 950*l.*, which would leave a sufficient margin for interest, &c. In consequence of the defendant still refusing to execute the bond, a memorandum was given her, and annexed to the bond, to the following effect: "Cock's advance to be limited to 950*l.*, and Mrs. Rae to be informed if the amount, with interest, shall reach 1,000*l.* and not be reduced within a month." Upon the faith of this, the defendant signed the bond. On many occasions the limit of 950*l.* was exceeded; on three occasions the amount of 1,000*l.* was exceeded, without the defendant having been informed of it, though it was

not reduced within a month, and on one occasion at the half-yearly account, the amount was 1,004*l.* 10*s.* 1*d.*, but was within two days reduced to 1,000*l.* An action having been brought upon the bond to recover from the defendant the sum of 996*l.* 12*s.* 11*d.*, together with interest and commission usually charged by bankers, it was held, that the bond did not become inoperative by reason of an advance beyond the stipulated sum, and that the words "not exceeding," &c. did not raise any condition or restriction against the bank giving C a larger credit. Held, also, that the meaning of the memorandum was, that 950*l.* should be substituted for 1,000*l.*, as the sum which the defendant was bound to pay as principal money under the bond. Held, therefore, that the above facts could not be relied upon as raising an equitable defence to the action. *Gordon v. Rae*, 27 Law J. Rep. (N.S.) Q.B. 185; 8 E. & B. 1605.

The defendant and B, being in partnership as surgeons, agreed to assign a portion of their business to the plaintiff for 150*l.* A bond was entered into between them, by the condition of which it was declared, that if the defendant or B should practise, &c. within one mile of W, or should within three years attend any of the patients of the plaintiff, or should induce any of the patients of the plaintiff to employ or consult the defendant or any other medical practitioner, or should induce any other practitioner to set up in practice within such distance of one mile, or should carry on the business of a chemist or druggist within W; or if B should underlet or assign his term in his house at W to any physician, or should permit any person carrying on such profession to reside in the said house, "then, and in any or either of the said cases, if the defendant or the said B, their executors or administrators, or either of them, did and should forthwith well and truly pay unto the plaintiff the sum of 300*l.* the said bond should be void." The defendant committed a breach of the bond by practising within one mile of W:—Held, that the plaintiff was entitled to recover the whole sum of 300*l.* *Mercer v. Irving*, 27 Law J. Rep. (N.S.) Q.B. 291; E. B. & E. 563.

The condition of a bond, after reciting that S had been appointed treasurer of C, under the 5 & 6 Will. 4. c. 76, (which, by section 58. required the treasurer of every borough to be appointed every year) was, that S should faithfully, and according to the provisions of the before-mentioned act, and of such statutes as might be thereafter passed relating to the said office, conduct himself in the said office, and perform all the duties thereof:—Held, that the bond did not extend beyond the year of office for which S had been appointed at the time of the execution of the bond. *The Mayor, Aldermen and Burgesses of Cambridge v. Dennis*, 27 Law J. Rep. (N.S.) Q.B. 474; E. B. & E. 680.

The defendant, on being appointed agent for the sale of wines and spirits of the plaintiffs, gave to them a bond, with a condition that the defendant should diligently, honestly and faithfully serve the plaintiffs as such agent, and should not engage in, undertake, transact or do any business in the same trade, within ten miles of the town of T for himself or any other person or firm, and should use his best endeavours to promote the interest and increase the business and connection of the plaintiffs; and should

faithfully and punctually collect, account for and pay over all debts of the plaintiffs:—Held, that the restriction, as to the defendant doing business for other persons in the same trade within the particular district, was limited to the time he remained in the plaintiff's service. *King v. Ansell*, 5 Hurl. & N. 106.

(B) LIABILITY OF HEIR OR OBLIGOR.

T, the heir-at-law and executor of a bond debtor, entered into possession of his real estates, and admitted assets, and died before 1838, having devised his real estates to A, whom he appointed executrix. A paid interest on the bond up to her death in 1834, and interest was afterwards paid by her executors. Upon a bill filed within twenty years after the death of A, seeking payment of the bond out of the real estates of T and A.—Held, first, that the debt was the personal debt, but not the specialty debt of T, and the creditors were not entitled to have it paid out of his real estates; secondly, that the debt was not the debt of A unless by reason of her *devastavit*, the remedy for which was barred by the Statute of Limitations. *Thorne v. Kerr*, 25 Law J. Rep. (n.s.) Chanc. 57; 2 Kay & J. 54.

(C) DISCHARGE.

In 1842 certain persons bound themselves as sureties for the due discharge by D. Murray of the duties of treasurer of the borough of Berwick. He was at that time appointed "for the remainder of the year ending the 9th of November next, if it should so long please the council." In August 1843 the 6 & 7 Vict. c. 89. passed, and under that the appointment of the treasurer was no longer to be annual. Murray was then appointed "during the pleasure of the council for the time being." The bond given in 1842 was conditioned for Murray's due execution of his office "during the whole time of his continuing in the said office, in consequence of the said election or under any annual or future election of the said council to the said office":—Held, that the sureties continued liable on this bond, notwithstanding the change in the tenure of the office. *Oswald v. the Mayor, &c. of Berwick-upon-Tweed* (House of Lords), 25 Law J. Rep. (n.s.) Q.B. 383.

The defendant became surety to the guardians of a poor-law union that the treasurer should pay over to the plaintiffs all "balances, monies," &c. belonging to the union which should be in his possession by virtue of his office. The treasurer, who was a corn-dealer, was in the habit of receiving from the overseers of the parishes of the union, who were farmers, payment of the poor-rates collected by them in the following manner: they sent their corn to him for sale, and he, after debiting himself with the amount so received, credited them with the amount of poor-rates which they were liable to pay to him from their respective parishes, settling with them from time to time for the balance, and receiving or paying as the case might be. The poor-law auditors, who were in the habit of auditing his accounts, found that a balance of 239*l.* 1*s.* 7*d.* was due from him to the plaintiffs:—Held, that the defendant, the surety, was liable for the payment of this amount. *The Guardians of the Poor of the Belford Union v. Pattison*, 25 Law J. Rep. (n.s.) Exch. 91; 11 Exch. Rep. 623.

Debt on bond. Plea, payment. The sum of 200*l.* having been lent by the plaintiff to the defendant on his bond through one M, the defendant's attorney, and who acted for him generally as his agent in his pecuniary affairs, and repayment being afterwards demanded, M obtained from his bankers (the real plaintiffs in this case) an advance of 400*l.* for himself, depositing the bond in question and another bond as a security for repayment, stating in a letter to the plaintiff that he had laid down the money to prevent her any further inconvenience. The defendant was not aware of the application for, or of the repayment of, the 200*l.*:—Held, that this was not a payment by the defendant. *Lucas v. Wilkinson*, 26 Law J. Rep. (n.s.) Exch. 13; 1 Hurl. & N. 420.

A discharge of the principal under the Insolvent Debtors Act, 1 & 2 Vict. c. 110, does not exonerate him from the claim of a surety on a bond, in respect of payments subsequently made under it by the latter. *Emery v. Clark*, 3 Com. B. Rep. N.S. 582.

(D) ACTION—COSTS.

In an action on a common money bond conditioned for the payment of a less sum than 20*l.*, the penalty not exceeding 30*l.*, no costs are recoverable. *Govens v. Moore*, 27 Law J. Rep. (n.s.) Exch. 391; 3 Hurl. & N. 540.

Quære—whether it would be so supposing the penalty exceeded 20*l.*? *Ibid.*

BOUNDARIES.

[See COMMISSION TO ASCERTAIN BOUNDARIES.]

[Amendment of 20 & 21 Vict. c. 45, relating to the Survey of Boundaries in Ireland, by 22 & 23 Vict. c. 8.]

In beating the boundaries of the parish of Rotherhithe the authorities proceed along the embankments, wharves, or other shore of the river Thames, while in the adjoining parish of Bermondsey the authorities go along the middle of the river; the parish of Rotherhithe has never done or exercised any parochial act or authority beyond the embankments, &c.:—Held, that the inference from the above circumstances was, that the parish of Rotherhithe extended to the middle of the river; and that a pier built on piles in the bed of the river, opposite one of the embankments, but not connected with it, was rateable to the poor-rate of the parish. *M'Cannon v. Sinclair*, 28 Law J. Rep. (n.s.) M.C. 247.

BOROUGH.

[See MUNICIPAL CORPORATION—POLICE.]

BOTTOMRY.

[See SHIP AND SHIPPING.]

BRAWLING.

[Jurisdiction of the Ecclesiastical Courts in Ireland in Cases of Defamation, and in England and Ireland in certain Cases of Brawling, abolished by 23 & 24 Vict. c. 32.]

BRIBERY.

[See PARLIAMENT.]

BRIDGE.

WIDENING AND REPAIR.

The 43 Geo. 3. c. 59. s. 2. enacts that where any bridge, repaired at the expense of the county, shall be narrow and inconvenient, *it shall and may be lawful* to and for the Justices at Quarter Sessions to order and direct such bridge to be widened and made commodious for the public; provided that no money shall be applied to the amendment or alteration of any such bridge until presentment shall have been made of its insufficiency, inconvenience or want of reparation, in pursuance of some or one of the statutes in force concerning public bridges:—Held, that the act gave the Justices a discretion in the matter; and that the mere fact of the bridge being too narrow for the traffic over it did not render it imperative upon them to order it to be widened. *In re Newport Bridge*, 29 Law J. Rep. (N.S.) M.C. 52.

Held, also, by *Hill, J.* and *Blackburn, J.*, that the presentment was a necessary preliminary before making an order. *Ibid.*

Section 46. of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, enacts that if a railway cross a turnpike-road or highway, then, except where otherwise provided by the special act, the road shall be carried over or under the railway by means of a bridge of the height and width, and with the ascent or descent by that or the special act provided; "and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company." Section 56. requires the company to restore any road interfered with, to as good a condition as it was in at the time when the same was first interfered with by the company, or as near thereto as may be:—Held, in accordance with *The North Staffordshire Rail. Co. v. Dale*, that the act imposes on the company the burden of the perpetual maintenance, not only of the fabric of the bridge and approaches, but of the roadway over the bridge and approaches. *Leech v. the North Staffordshire Rail. Co.*, 29 Law J. Rep. (N.S.) M.C. 150.

The special act (10 & 11 Vict. c. cviii. s. 61.) for the formation of a railway, incorporated with it the provisions of the Railways Clauses Consolidation Act, so far as they were not modified or affected by the special provisions, or were not inconsistent with them. By a section of the special act, the company were required to carry a certain turnpike-road over the railway by a bridge, the parapet-walls of which were to be higher, but the width of the road less than mentioned in the general act. The section then provided "that the said turnpike-road shall be made and

altered at the expense of the said company on both sides of such bridge, so that the surface of the said turnpike-road shall when completed have one uniform inclination on both sides, not exceeding one in thirty; and that so much of the said turnpike-road as shall be broken up or damaged for the purposes of this act, shall be reinstated and made good with the same materials as the said road is now composed of, and the fences thereof, wherever necessary, reconstructed and put into complete order by the said company, and kept in repair for twelve months after the making, forming and completing thereof":—Held, that the company were bound perpetually to maintain the roadway over the bridge and approaches. *Ibid.*

BROKER.

[See PRINCIPAL AND AGENT—SHIP AND SHIPPING.]

BUILDING.

[See CONTRACT—FRIENDLY AND OTHER SOCIETIES—TOWN IMPROVEMENT ACTS.]

BUILDING SOCIETY.

[See FRIENDLY AND OTHER SOCIETIES.]

BURIAL.

- (A) BURIAL BOARDS.
- (B) BURIAL GROUNDS.
- (C) DISINTERMENT.

[The 15 & 16 Vict. c. 85. amending the Laws concerning the Burial of the Dead in the Metropolis, so far as relates to the City of London and the Liberties thereof, amended by 20 & 21 Vict. c. 34.—The Laws relating to the Burial of the Dead in Ireland amended by 19 & 20 Vict. c. 98.—The Burial Grounds (Ireland) Act (1856) amended by 23 & 24 Vict. c. 76.—The Burial Acts amended by 20 & 21 Vict. c. 81.—Danger to the Public Health from Places of Burial more effectually prevented by 22 Vict. c. 1.]

(A) BURIAL BOARDS.

Where a district of a parish is entitled, under section 12. of the 18 & 19 Vict. c. 128, though not supporting its own poor, to appoint a separate burial board, the rest of the parish, minus the district, may appoint a burial board; and a poor-rate made and assessed for the purposes of the burial board on such part of the parish is good. *Viner v. the Churchwardens and Overseers of the Parish of Tonbridge*, 28 Law J. Rep. (N.S.) M.C. 251.

Under a local act for the administration of the poor laws in the parish of L a select vestry was to be elected to carry out the provisions of the act and to be the board of guardians of the poor, with the duties and privileges of such guardians in general. A select vestry had accordingly been elected, and performed the duties imposed by the act, the vestry of the parish

at large retaining all its functions in the general management of the parish:—Held, that the select vestry was not "a vestry elected under a local act for the government of the parish" within section 52. of the 15 & 16 Vict. c. 85, and that the right to appoint a burial board under the 10th and 11th sections was in the general vestry. *Ex parte Uryghart, in the matter of the Burial Board of Liverpool*, 26 Law J. Rep. (n.s.) Q.B. 213.

In the parish of L, under a local act, a body called The Select Vestry of L, have the functions of a board of guardians. There is also a general vestry, having the management of the general parochial affairs of L:—Held, that the members of a burial board for L, under statutes 16 & 17 Vict. c. 134. s. 7, 15 & 16 Vict. c. 85. ss. 10, 11, 52, were to be elected by the general vestry having the management of the general parochial affairs, and not by the body created by the local act. *Regina v. Gladstone*, 7 E. & B. 575.

(B) BURIAL GROUNDS.

The 15 & 16 Vict. c. 85. s. 10. requires that a meeting of the vestry of a parish shall be called to determine whether a burial ground shall be provided under that act, and by section 51. "vestry" is to mean the inhabitants assembled in vestry or for any of the purposes for which vestries are holden, except in parishes where there is a select or other vestry erected under the provisions of a local act for the government of any parish by vestries, in which parishes it is to mean such select or other vestry. The parish of S was newly created by a local act of parliament, which provided for twenty-four vestrymen being chosen for the purpose of managing the affairs of the church, providing scavengers, &c. This vestry had always acted in all the affairs of the parish:—Held, that this vestry was the proper body to determine whether the burial ground should be provided for the parish of S. *In re Sunderland Vestry*, 25 Law J. Rep. (n.s.) Q.B. 271; s.c. nom. *Regina v. Peters*, 6 E. & B. 225.

The 16 & 17 Vict. c. 134. s. 5. (for regulating the interment of the dead beyond the metropolis), which excepts from the provisions of that act "cemetries established under the authority of any act of parliament," applies only to cemetries established by companies authorized by act of parliament, and not to the burial-ground annexed to a district church erected under the Church Building Acts. *The Queen v. Maude and another, Justices of Manchester*, 25 Law J. Rep. (n.s.) M.C. 45.

The 52nd section of 15 & 16 Vict. c. 85. (the act for the burial of the dead within the metropolis) enacts, that in that act "parish" shall mean every place having separate overseers of the poor, and separately maintaining its own poor:—Held, where three parishes, not having separate overseers, and not separately maintaining their own poor, concurred with a hamlet in providing a common burial-ground, under 15 & 16 Vict. c. 85. and 16 & 17 Vict. c. 134, and that they were not, by reason of the words in section 52. above cited, precluded from availing themselves of the powers given by those acts. *The Queen v. the Burial Board for the Parishes of St. Peter, St. Gregory, All Saints, and Ballingdon-cum-Brandon, in the Borough of Sudbury*, 27 Law J. Rep. (n.s.) Q.B. 232; E. B. & B. 264.

Divers persons purchased private graves and vaults

in the burial-ground attached to a dissenters' chapel; the receipt for the money stated that the purchase was made in perpetuity. Upon an interference with the graves and a mutilation and removal of the tombstones by persons claiming to be mortgagees, and claiming also a right to resume the entire burial-ground and to convert it to building or other purposes,—Held, upon an application by five purchasers of private graves and vaults, that they were entitled to an injunction to restrain any interference with their own particular graves and tombstones, &c. *Moreland v. Richardson*, 25 Law J. Rep. (n.s.) Chanc. 883; 22 Beav. 596.

Held, also, that as no further relief was asked with respect to other parts of the ground in which interments had taken place, except in general terms, no injunction could be granted to restrain the defendants from using such other parts of the burial-ground as they thought fit. *Ibid.*

Where land has been set apart as a burial-ground, in which burial places have been purchased in perpetuity, the Court will restrain the holders of the legal estate, though claiming as mortgagees, from destroying or defacing such graves, or doing any act which may prevent future interments. *Moreland v. Richardson*, 26 Law J. Rep. (n.s.) Chanc. 690; 24 Beav. 33.

(C) DISINTERMENT.

It is a misdemeanor at common law to enter an unconsecrated burial-ground, and without the knowledge or consent of the owners of the ground or authority of any kind, to dig up and carry away a corpse buried therein; although the person committing the act may have been actuated by motives of affection and respect to the deceased, and of religious duty, and have conducted the removal decently. *The Queen v. Sharpe*, 26 Law J. Rep. (n.s.) M.C. 47; Dears. & B. 160.

CANAL AND CANAL COMPANY.

- (A) CONSTRUCTION OF CANAL ACTS IN GENERAL.
- (B) TOLLS.
- (C) WATER RIGHTS.
- (D) PUBLIC RIGHTS OF NAVIGATION.

(A) CONSTRUCTION OF CANAL ACTS IN GENERAL.

A local act for the formation of a canal empowered the owners of any lands through which it was made, to erect and use any wharves, quays or landing-places, in or upon their lands adjoining or near to the canal, and to land any goods upon such wharves, &c., or upon the banks lying between the same and the canal, and also to make and use proper and convenient places for boats, barges and other vessels to lie and turn in and pass each other, so that the making or using thereof respectively did not obstruct or prejudice the navigation of the canal or any towing-path on the sides thereof:—Held, that the right of the adjacent owners to land goods upon the banks included the right to land them on the towing-paths. *The Monmouthshire Rail. and Canal Co. v. Hull*, 28 Law J. Rep. (n.s.) Exch. 283; 4 Hurl. & N. 421.

The power given by the 57th section of the Glamorganshire Canal Act, 30 Geo. 3. c. lxxxii. (found also in other similar acts), enabling the proprietor of a mineral district to make roads and railways over lands of other persons from his mines to the canal, does not restrict him to the shortest practicable route, but enables him to adopt any more circuitous route which, in the *bond fide* exercise of his judgment, he may find expedient, provided the point at which he joins the canal is within four miles of the boundary of his estate. *Richards v. Richards, in re the Glamorganshire Canal Act*, John. 255.

Saving time by avoiding a lock:—Held, a sufficient reason for preferring a more circuitous route for this purpose. *Ibid.*

Proceedings to be taken by persons seeking to avail themselves of such powers where the lands to be traversed are in the possession of a receiver appointed by the Court. *Ibid.*

By an act of 1846 a railway company was authorized to purchase the S. canal, and was bound to maintain the canal, and keep it open for traffic when purchased. By this act it was provided that as soon as the purchase was completed the railway company might exercise all the rights, powers and privileges which the canal company might before the sale have exercised in relation to the canal, under any acts relating to the canal which might be in force at the time of the conveyance. The canal company did not, before the sale, take any steps to adopt the power of 8 & 9 Vict. c. 42. (the act to enable canal companies to become carriers of goods upon their canal). After the purchase, the railway company proceeded, under the 8th section of the last-mentioned act, to take a lease of the tolls of the W canal. The clerk of the G company, which was likely to be injured by the granting of the lease, took shares in the railway company, and filed a bill on behalf of himself and the other shareholders to prevent the acceptance of the lease as being *ultra vires*:—Held, that by the purchase of the S canal the railway company had become a canal company so as to be entitled to avail itself of the powers given to canal companies by the 8 & 9 Vict. c. 42, and that the taking of such lease was therefore not *ultra vires*. *Rogers v. the Oxford, Worcester and Wolverhampton Rail. Co.*, 2 De Gex & J. 662.

Whether, if the acceptance of the lease had been *ultra vires* the Court would have declined to interfere on the ground that the bill was filed by the nominee of another company with a view solely to the interest of that company—*quære*. *Ibid.*

(B) TOLLS.

By the 33 Geo. 3. c. lxxx. for making the Grand Junction Canal, tonnage rates were imposed on all stone and manure conveyed along the canal: section 68. enacts, that the said rate shall not be payable in respect of any gravel for making public roads; and section 97. enacts, that it shall be lawful for any person owning or occupying any lands through which the canal should pass to use boats for the conveyance of manure upon the canal, for the improvement of such lands, free of toll. By two subsequent acts, 34 Geo. 3. c. xxiv. and 35 Geo. 3. c. lxxxv., the Grand Junction Company were empowered to make cuts, and the acts enacted that the powers, provisions, and rates for tonnage contained in the original act should

be used and applied by them, and should also be used and exercised by the owners and proprietors of adjoining lands in such and the like manner as if the several powers, rates of tonnage, and other matters, were re-enacted in the body of those acts, and as if the cuts authorized by those acts had been included in the works of the original act, and that the like exemption from payment of rates of tonnage, allowed by the original act, should be allowed in respect of the like articles carried on the cuts. By the 35 Geo. 3. c. xliii. the company was empowered to make a cut to Paddington; and it was enacted that the powers, authorities, and provisions in the original and other acts, except the rates of tonnage, should be used and exercised by the company, and should extend to and be applied and enforced for making the cut, and in all other respects in such and the like manner and as fully and effectually, to all intents and purposes, as if the said several powers, authorities, and provisions were repeated and re-enacted, and as if the Paddington cut had been part of the works authorized to be made by the previous acts. Distinct tonnage rates were imposed by the last-mentioned act in respect of all goods, and, *inter alia*, of all manure:—Held, that the powers or exemptions from toll contained in the original act did not extend to the last-mentioned act. *Tame v. the Grand Junction Canal Co.*, 25 Law J. Rep. (N.S.) Exch. 222; 11 Exch. Rep. 786.

(C) WATER RIGHTS.

By an agreement a canal company were authorized to open the sluices of a lock at other times than when boats or barges navigating the canal were passing or about to pass through the lock, and to take water for the purpose of maintaining the navigation of the canal below the lock, paying to the plaintiff a weekly rent for each occasion when water was so taken. To this there was a proviso that the company might once a year let out the water for the purpose of cleansing and repairing the canal and refill it for seventy-two successive hours without paying rent. A boat having sunk in the lock, the water was let out of the pond below the lock, the boat emptied, and then the water was let into the lock and pond again:—Held, that this was not a taking of the water at a time other than when a boat was passing through, and consequently that the plaintiff was not entitled to claim rent. *Llewellyn v. the Swansea Canal Navigation Co.* (Ex. Ch.), 27 Law J. Rep. (N.S.) Exch. 85; 2 Hurl. & N. 507.

On another occasion the company emptied the pond below the lock with a view of repairing another lock below, and on the repairs being done, they opened the sluices of the lock in question and let the water down to refill the pond:—Held, that there was a taking of the water for the purposes of maintaining the navigation, and that the plaintiff was entitled to his rent. *Ibid.*

Where a company had been incorporated and empowered by act of parliament for the purposes of forming a canal, and had, under the powers of that act constructed a canal, and had acquired by grant, and for more than twenty years used the water of certain natural streams to feed the canal; and then, under another act of parliament was reconstituted and empowered to construct a railway, and enabled to dispose of all land not required for it, including the site of the canal, and all rights and easements

enjoyed by the canal company were vested in the railway company for the purposes of the railway; and the company had afterwards leased the water-right they had formerly enjoyed to the plaintiffs, whose exercise thereof for the purposes of their mills had been obstructed by the defendants on the ground that it interfered with their rights as mill-owners on the streams in question,—Held, that the plaintiffs' title could not be sustained; the company had only been enabled to acquire the water-right in their capacity as a canal company, and as such they had ceased to exist. *The National Manure Co. v. Donald*, 28 Law J. Rep. (N.S.) Exch. 185; 4 Hurl. & N. 8.

(D) PUBLIC RIGHTS OF NAVIGATION.

The right of traverse by the public on a canal cannot be confined within the state of science as it existed when the undertaking was projected. *Case v. the Midland Counties Rail. Co.*, 28 Law J. Rep. (N.S.) Chanc. 727; 27 Beav. 247.

The public may adopt the inventions and discoveries of practical science to secure a more complete and efficient enjoyment of rights conferred, but such inventions and discoveries must not interfere with or endanger the existence of the property in or over which such rights exist. *Ibid.*

A carrier claimed a right to navigate a canal with boats propelled by steam, both for carrying loads as well as for drawing barges. Upon a bill to establish the right,—Held, after experiments made by an engineer at the instance of the Court, that the plaintiff had a right to adapt modern improvements to the enjoyment of his rights, provided such improvements did not injure the canal or tend to destroy its existence. *Ibid.*

CARRIER.

[See 19 & 20 Vict. c. 60, the Act for amending the Laws of Scotland affecting Trade and Commerce.]

(A) WHO ARE COMMON CARRIERS.

(B) DUTY AND LIABILITY OF CARRIERS.

(a) Conveyance of Passengers and their Luggage, and Station Accommodation.

(b) Conveyance of Goods and Live Stock.

(1) General Extent of Liability.

(2) Liability for felonious Acts of Servants.

(3) Special Contract, and Notice restricting Liability.

(i) Effect of, generally.

(ii) Reasonableness of Conditions.

(4) Goods within 11 Geo. 4. & 1 Will. 4. c. 68. — Declaration of Nature and Value.

(5) Liability beyond their own Line of Railway.

(c) Duty as regards Arrangements for Delivery of Goods and Admission of Public Vehicles to their Stations.

(C) CHARGES AND TRAFFIC ARRANGEMENTS.

(a) Unequal and unreasonable Charges.

(b) Undue Preference and Prejudice.

(D) ACTIONS.

(E) DAMAGES RECOVERABLE.

(A) WHO ARE COMMON CARRIERS.

In an action against a railway company for negligence in carrying goods delivered to them as common carriers, whereby the plaintiff lost a market for them, the first plea traversed the delivery to, and acceptance of the goods by the defendants, to be carried by them as common carriers; and other pleas averred that the goods were delivered on special conditions. It appeared that the plaintiff delivered a quantity of cheese at a station of the defendants' railway, to be carried to B for the purpose of being sold at a certain market, and signed a note containing the condition, among others, that the company should not be liable for loss of market or other delay arising from detention:—Held, that the Judge at the trial was right in nonsuiting the plaintiff, on the ground that the defendants had not received the cheese to be carried by them as common carriers—confirming *Latham v. Rutley and Walker v. the York and North Midland Rail. Co. White v. the Great Western Rail. Co.*, 26 Law J. Rep. (N.S.) C.P. 158; 2 Com. B. Rep. N.S. 7.

Held, by *Channell, Serj.*, the Judge at the trial, that the above-mentioned condition was a reasonable one within the Railway and Canal Traffic Act, 1854, section 7. *Ibid.*

(B) DUTY AND LIABILITY OF CARRIERS.

(a) Conveyance of Passengers and their Luggage, and Station Accommodation.

In the printed and published time-tables of the defendants, for the month of March 1855, which were kept in circulation throughout the month, a passenger-train was advertised to leave the defendants' station in London at 5 P.M. and to arrive at Peterborough at about 7-20 the same evening, and about the same time to proceed on to Hull, arriving at Hull about midnight. The time-tables contained a notice to the effect that the defendants would not hold themselves responsible for delay or the consequences arising therefrom. The defendants' line of railway extended as far as A beyond Peterborough, but they had running powers over the L and Y Railway to M, where the N-E Railway Company's line joined; and, under the Railway Clearing Act, 1850, the defendants had for some time been issuing tickets with which passengers were conveyed, as advertised, from Peterborough to Hull. But, on the 1st of March, the N-E Railway Company discontinued running their train, having given previous notice to the defendants, but not until after their time-tables had been printed and published, and, in consequence, the defendants were no longer able to issue tickets by the train as advertised. Relying on the time-tables, the plaintiff left London on the 25th of March for Peterborough, on business, intending to go on to Hull the same evening. He accordingly applied to the clerk at the Peterborough station in proper time for a ticket by the train advertised to leave for Hull about 7-20 P.M., and offered to pay the fare; the clerk, however, refused to grant the ticket, stating as a reason, that the N-E Railway Company had discontinued running their train as before. The plaintiff then took a ticket, and proceeded as far as the M Junction, where he was obliged to remain that night, and, it was admitted, had, in consequence, sustained

a pecuniary loss:—Held, first, (*Crompton, J. dubitante* on this point), that the publication of the time-tables amounted to a promise by the defendants that a train would leave Peterborough for Hull, as advertised, for the conveyance of any person who regularly applied for a ticket and tendered the proper fare, although part of the line of railway belonged to a different company, and that the defendants therefore were liable to the plaintiff for a breach of contract. Secondly, that by continuing the publication of the time-tables throughout the month of March, the defendants were also liable for the loss to the plaintiff, caused by a false representation knowingly made. And, per *Crompton, J.*, that an action would lie against the defendants for a breach of duty in refusing to take the plaintiff to Hull as advertised. *Denton v. the Great Northern Rail. Co.*, 25 Law J. Rep. (N.S.) Q.B. 129; 5 E. & B. 860.

In order to induce the Court to interfere under the Railway and Canal Traffic Act, 1854, for the purpose of enjoining a railway company to run trains at particular times, it is not necessary to shew a case of individual grievance; but it is necessary to shew a case of public inconvenience. *In re Barret v. the Great Northern and the Midland Rail. Companies*, 26 Law J. Rep. (N.S.) C.P. 83; 1 Com. B. Rep. N.S. 423.

The Court, in judging what is reasonable accommodation, will consider the general traffic of the railway, and the accommodation which such traffic requires. *Ibid.*

Semble—If there were two competing companies having lines from A to B, and one of them had a continuation from B to C, and the company having such continuation arranged the departures from B so as to interfere seriously with the other line, and put the public to inconvenience thereby and force the traffic to B over a greater extent of line, at a sacrifice of time or cost, the Court would interfere. *Ibid.*

It is not a sufficient ground for the interference of the Court, under the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, that a railway company charge higher fares for distances on one of their branch-lines than they charge for equal distances on another; nor that they issue third-class return tickets on one branch-line and not on another. Nor will the Court interfere with the arrangements of a railway company respecting the number of trains that stop, or the times at which they stop, at any particular station, unless it be distinctly shewn that such arrangements do not sufficiently provide for the accommodation of the public. *In re the Caterham Rail. Co. v. the London and Brighton Rail. Co. and the South-Eastern Rail. Co.*, 26 Law J. Rep. (N.S.) C.P. 161; 1 Com. B. Rep. N.S. 410.

A railway company issued third-class return tickets to stations a certain distance only down their line. The Court refused to enjoin them to issue such tickets to stations beyond that distance. *Ibid.*

Semble—A covered station is a reasonable accommodation which a railway company is bound to provide for the public. *Ibid.*

By an act of parliament, for making a certain railway, every passenger travelling upon such railway was to be allowed to take with him, without extra charge, his articles of clothing, not exceeding a certain weight; and the railway company were not

to be liable for the safe carriage of any article belonging to such passenger other than and except such articles of clothing. The company, under the powers of their act, made regulations, by one of which passengers were required to see their luggage marked with the company's labels, and the company stated that they would not be responsible for the loss or detention of any article of luggage not so marked and properly addressed; and by another of such regulations all unclaimed property found on the company's premises was to be deposited in the lost-property office, and to be restored to the owner on payment of 6d. for each article. The plaintiff, who was a passenger upon such railway, required the company's porter to label and take in the luggage-van a package, consisting only of his wearing apparel; the whole was wrapped in a shawl, properly packed and addressed, and was within the allowed weight. The porter refused to do so, as the company had made a rule not to label shawls; but offered to put it in the carriage with the plaintiff, where it was to be under his charge. This the plaintiff objected to, unless it was to be at the company's risk, but did not prevent the company from putting it there or in any other part of the train. The package being left behind in consequence of such refusal to label and carry it with the rest of the luggage, was taken by the porter to the lost-property office, and refused to be restored to the plaintiff, except on payment of 6d.:—Held, that this was a wrongful act, for which the company were responsible, as the company were not, under the circumstances, justified in refusing to carry this parcel with the responsibility of carriers. *Munster v. the South-Eastern Rail. Co.*, 27 Law J. (N.S.) C.P. 308; 4 Com. B. Rep. N.S. 676.

Semble, per Cockburn, C.J., that if the company had been justified in refusing to carry the parcel, the taking it to the lost-property office would have been justifiable. *Ibid.*

Quære—If the company would have been bound to have carried in like manner for the plaintiff a parcel containing, besides articles of clothing, other articles which the company had been in the habit of carrying for passengers, without extra charge, under their said act of parliament. *Ibid.*

Where, by a traffic arrangement between two railway companies, passengers are booked through, the contract is one entire contract between the passenger and the company issuing the ticket. *Mytton v. the Midland Railway Company*, 28 Law J. Rep. (N.S.) Exch. 885; 4 Hurl. & N. 615.

A traffic arrangement for booking passengers through, existed between the South Wales Railway Company and the Midland Company. The South Wales Company issued a through ticket to the plaintiff from Newport to Birmingham, the words "via Midland from Gloucester" being printed on the ticket. The plaintiff's portmanteau was lost on the Midland line, between Gloucester and Birmingham. Under the South Wales Company's act, a passenger's ordinary luggage is conveyed at his own risk. The fares paid are divided between the companies according to the mileage:—Held, that the plaintiff had no cause of action against the Midland Company, the contract entered into by him being with the South Wales Company for the whole distance. *Ibid.*

Pencil sketches of an artist, placed in his portman-

team, do not form part of his ordinary luggage, so as to entitle them to be conveyed free of charge. *Ibid.*

(b) *Conveyance of Goods and Live Stock.*

(1) *General Extent of Liability.*

The defendants, common carriers by water, were conveying the plaintiff's goods for hire in a boat towed by one of their steam-packets. As the steam-packet approached the pier to take in passengers, the captain of the packet stopped its course in order to allow another vessel to clear away from the pier. This was a proper course on the part of the captain, but the day being boisterous and the tide running strong, with a good deal of sea, though there was nothing unusual in the weather, the effect of the stoppage was that the tow-boat was driven by the wind and tide against the rudder of the steam-packet, so that it was injured and the plaintiff's goods damaged. There was no negligence on the part of any one:—Held, that though there was no negligence, the defendants, as common carriers, were liable to indemnify the plaintiff for the damage caused by the accident, since it could not be said to be imputable immediately to the act of God, for the proximate cause of the injury was the stoppage of the steam-packet. *Oakley v. the Port of Portsmouth and Ryde United Steam-Packet Co.*, 25 Law J. Rep. (n.s.) Exch. 99; 11 Exch. Rep. 618.

There is no general rule of law requiring carriers to give notice to the consignor of the refusal of the consignee to receive goods, but carriers are merely bound to do what is reasonable under the particular circumstances of each case. *Hudson v. Bazendale*, 27 Law J. Rep. (n.s.) Exch. 93; 2 Hurl. & N. 575.

A cask of gin having been sent by the plaintiff, a spirit merchant in London, to his customer at Brecon, by the defendants, and the customer having refused to receive it on the ground that he had not ordered it, the defendants' agent placed it in a warehouse, where it remained three months, when it was found that a part of the contents had escaped by leakage. It appeared that the fact that the cask was leaky at the bung had been noticed by one of the defendants' agents during its transmission. In an action against the defendants as common carriers, the jury were directed that there was no general law requiring a carrier to give notice of such a refusal by the consignee, but that it might be reasonable under some circumstances, and that the jury were to say whether, under the circumstances the defendants had done what was reasonable. The jury having found for the defendants,—Held, that the direction was right, and that there was no ground for disturbing the verdict. *Ibid.*

The plaintiff sent a parcel by the defendants, the G W Railway Company, from Paddington to Plymouth. The consignee (the plaintiff's agent) refused to pay the charge for carriage, and the parcel was not delivered. The next day the consignee applied for the parcel, and offered to pay the charge under protest; but the parcel had that morning been sent back to Paddington, where it remained till the commencement of the action, the plaintiff making no application to have it returned to him, nor did the defendants offer it to him. To an action for not carrying and delivering the parcel at Plymouth, with

a count in trover, the defendants pleaded to the first count, that the plaintiff refused to pay the reasonable charge for carriage, and that therefore they refused to deliver; to the second count they pleaded, not guilty. The plaintiff replied to the plea to the first count, that within a reasonable time after the offer to deliver the parcel, the plaintiff at Plymouth was ready and willing to receive it, and offered to pay for the carriage, but the defendants refused to deliver it at Plymouth. The jury found that the tender of the price and the demand of the parcel were made within a reasonable time after the offer to deliver it by the defendants; and that the parcel was sent back to London before a reasonable time had elapsed; and that the parcel ought not to have been sent back to London:—Held (affirming the judgment below 26 Law J. Rep. (n.s.) 418; 2 Hurl. & N. 491), by all the Court, except *Crowder, J.*, that, on the pleadings and finding of the jury, the plaintiff was entitled to the verdict. Held, by *Cockburn, C.J.*, *Williams, J.*, *Crompton, J.* and *Willes, J.*, that the company were guilty of a wrongful act in sending the parcel, in a time found by the jury to be unreasonably short after the refusal to pay the hire, to a place where it was, as found by the jury, unreasonable to send it. Held, by *Willes, J.*, that it is the duty of a carrier, if he keep the parcel for his lien on refusal of the consignee to pay for the carriage, to deal with it in a reasonable manner, and to keep it in a reasonable place; and that this duty would generally impose upon him the obligation of keeping it at the place of delivery for a reasonable time, if he had a convenient place there. Held, by *Crowder, J.*, that the defendants were not bound to keep the parcel at Plymouth for a reasonable time after the refusal of the consignee to pay for the carriage; that though they must take care of it, they were not bound to keep it any particular place, and were not guilty of any wrongful act in taking it to London. *Crouch v. the Great Western Rail. Co.* (Ex. Ch.), 27 Law J. Rep. (n.s.) Exch. 345; *nom. The Great Western Rail. Co. v. Crouch*, 3 Hurl. & N. 183.

A carrier of goods or cattle is only bound to carry in a reasonable time under ordinary circumstances, and is not bound to use extraordinary efforts or incur extra expense in order to surmount obstructions caused by the act of God; as, a fall of snow. *Bridgdon v. the Great Northern Rail. Co.*, 28 Law J. Rep. (n.s.) Exch. 51.

(2) *Liability for felonious Acts of Servants.*

In cases within the Carriers' Act the carrier is not liable for the felonious acts of his servants, without gross negligence on his part; but felony by his servants is alone a good answer to a defence by him under the Carriers' Act, 1 Will. 4. c. 68.—*Butt v. the Great Western Rail. Co.* explained. *The Great Western Rail. Co. v. Rimell*, 27 Law J. Rep. (n.s.) C.P. 201.

A mere suspicion that the loss arose from felony by the carrier's servants is not sufficient: it must be proved. *Ibid.*

To a declaration against the defendants as common carriers for negligence, whereby the plaintiffs' goods were lost, the defendants pleaded that the value of the goods exceeded 10*l.*, and was not declared under the Carriers' Act, 1 Will. 4. c. 68. s. 1.

Replication, that the loss arose from the felonious acts of the defendants' servants:—Held, on demurrer, a good replication. *Metcalfe v. the London, Brighton and South Coast Rail. Co.*, 27 Law J. Rep. (N.S.) C.P. 205; 4 Com. B. Rep. N.S. 307.

Declaration against the defendants, as common carriers, for negligence, whereby the plaintiffs' goods were lost. Plea, that the value of the goods exceeded 10*l.*, and was not declared under the Carriers' Act, 1 Will. 4. c. 68. s. 1. Replication, felony by one of the defendants' servants:—Held, that in order to support this replication, it was necessary to prove, not only that the goods had been feloniously abstracted by some one of the defendants' servants unknown, but that evidence ought to have been given, sufficient to convict some one or more of such servants of the felony. *Metcalfe v. the London, Brighton and South Coast Rail. Co.*, 27 Law J. Rep. (N.S.) C.P. 333; 4 Com. B. Rep. N.S. 311, 317.

The plaintiffs A and B were separate owners of articles contained in a box delivered to a railway company, but joint owners of none. The box was delivered at a station belonging to the company, by a servant of a friend with whom the plaintiffs had both been staying; it was addressed to A, who paid the charge on it when delivered:—Held, that there was evidence of a joint bailment to the company. *Ibid.*

(3) *Special Contract, and Notice restricting the Liability.*

(i) *Effect of, generally.*

A horse was delivered to the G W Railway Company at N, to be conveyed to W for the plaintiff. The person who delivered the horse signed a contract, agreeing to abide by a notice contained in it that the directors would not be answerable for damage done to any horses conveyed by the railway. The horse reached the station at W safely, but the company's servants there either forgot or did not notice that the horse had arrived, and on the plaintiff calling for it the next day it was discovered in a horse-box on a siding, and found to have sustained serious injuries from cold, and from remaining in a confined position all night:—Held, that the railway company was protected from liability under the 17 & 18 Vict. c. 31. s. 7. by the signed contract. *Wise v. the Great Western Rail. Co.*, 25 Law J. Rep. (N.S.) Exch. 258; 1 Hurl. & N. 63.

Semble—Independently of such contract, the company would not have been responsible, the injury having been the result of the plaintiff not being ready to receive the horse on its arrival at W. *Ibid.*

Where in a bill of lading of goods carried by the defendant in his ship for the plaintiffs, the defendant stipulated that he should not be accountable for leakage and breakage.—Held, that the defendant was liable for loss arising from leakage and breakage caused by the negligence of the defendant and his servants in stowing the goods. *Phillips v. Clark*, 26 Law J. Rep. (N.S.) C.P. 167; 2 Com. B. Rep. N.S. 156.

Where carriers by sea had received a cask of brandy to carry, on the terms (*inter alia*) that they should not be liable for any loss or damage arising from any cause whatever during the transit.—Held,

that they were not liable as common carriers for an injury to the cask. And, the only evidence as to the loss being that the cask arrived staved in (there being no proof as to the cause of this injury)—*quare*, whether they would have been liable, even had the condition been "not to be liable for leakage unless arising from bad stowage." *Phillips v. Edwards*, 28 Law J. Rep. (N.S.) Exch. 52; 3 Hurl. & N. 813.

The plaintiff's agent having delivered some cases of marble to the defendants, a railway company, to be carried, was asked the terms on which they were to be conveyed, and was supplied with a copy of the conditions made by the defendants for the conveyance of goods, &c., by the fifth of which the defendants were not to be responsible for marbles, and certain other delicate articles, unless declared and insured according to their value. The agent then signed an order, "Please to forward the marbles, not insured." The marbles were forwarded accordingly, and were damaged, without any wilful negligence of the defendants. In an action for this damage against the defendants as common carriers, the defendants traversed the bailment as alleged, and also pleaded, under the 17 & 18 Vict. c. 31. s. 7, fourthly, that the marbles were delivered under a special contract, signed by the person delivering them, whereby it was agreed that the defendants should not be responsible for loss or injury to the marbles, unless declared and insured according to their value, and that the goods were marbles, and were not declared or insured:—Held (reversing the judgment below, 27 Law J. Rep. (N.S.) Q.B. 465; E. B. & E. 958), first, that the letter signed by the plaintiff's agent, and acted upon by the defendants, constituted a special contract, sufficiently signed within the meaning of the fourth proviso to section 7. of the statute; and, secondly (*dissentiente Williams, J.*), that whether the letter was looked at by the light of the Carriers Act only, or in connexion with the other facts of the case, as it might be, or simply by itself, the terms of it shewed that the defendants were to be free from risk, and consequently that the fourth plea was proved; also that the defendants were entitled to the verdict on the plea traversing the bailment. *Peck v. the North Staffordshire Rail. Co.* (Ex. Ch.), 29 Law J. Rep. (N.S.) Q.B. 97; E. B. & E. 958.

A dog (although not specifically mentioned in the proviso as to the limit of compensation) is within the 7th section of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31). *Harrison v. the London, Brighton and South Coast Rail. Co.*, 29 Law J. Rep. (N.S.) 209.

The plaintiff delivered to the defendants, a railway company, a dog to be carried, and signed this ticket:—"Received the annexed ticket, subject to the following conditions: The company will not be liable in any case for loss or damage to any horse or other animal above the value of 40*l.*, or any dog above the value of 5*l.*, unless a declaration of its value, signed by the owner or his agent, at the time of booking, shall have been given to them; and by such declaration the owner shall be bound, the company not being in any event liable to any greater amount than the value declared. The company will in no case be liable for injury to any horse or other animal, or dog, of whatever value, where such injury arises wholly or partially from fear or restive-

ness. If the declared value of any horse or other animal exceed 40*l.*, or any dog 5*l.*, the price of conveyance will, in addition to the regular fare, be after the rate of 2½ per cent. upon the declared value above 40*l.*, whatever may be the amount of such value, and for whatever distance the animal is to be carried." The value of the dog was 21*l.*, but the plaintiff made no declaration of its value, and paid only the regular fare, 3*s.* The dog escaped from the train during the journey, and was lost, without any negligence on the part of the defendants. The plaintiff having sued the defendants for the loss,—Held, by *Cockburn, C.J.* and *Blackburn, J.*—first, that the meaning of this ticket, the whole of which must be read together, was, that if the value of a dog was above 5*l.*, and its value was not declared, and the extra price paid accordingly, the defendants would not be liable at all, even for loss or injury caused by their own negligence, and that the condition was, therefore, within the 17 & 18 Vict. c. 31. s. 7; secondly, that this condition was not "just and reasonable," inasmuch as the extra charge of 2½ per cent. (without proof to the contrary, which it lay on the defendants to give) appeared excessive and unreasonable; and, thirdly, that the condition being void, the plaintiff, although there was no negligence on the part of the defendants, was entitled to recover the full value of the dog against them as common carriers. Held, by *Wightman, J.*, that the different clauses of the ticket were separable; that the first condition meant that the defendants would not be liable beyond 5*l.* for injury, however caused, unless the value of the dog were declared; and that this was a reasonable condition, and afforded a good defence beyond 5*l.*, which sum the plaintiff was entitled to recover. *Ibid.*

(ii) *Reasonableness of Conditions.*

[See the case immediately preceding.]

The Railway and Canal Traffic Act, 17 & 18 Vict. c. 31. s. 7, makes notices by railway and canal companies, limiting their liability as carriers, void; but it does not prevent them from entering into special contracts for the carriage of goods, provided the conditions contained in such contracts be such as are held just and reasonable by the Judge or Court before whom any question relating thereto is tried, and provided the contract be signed by the party delivering the goods to be carried. *Symons v. the Great Western Rail. Co.*; *The London and North-Western Rail. Co. v. Dunkham*, 26 Law J. Rep. (N.S.) C.P. 25; 18 Com. B. Rep. 805 and 826.

A condition that a railway company should not be responsible for loss or damage, from any cause whatsoever, to goods conveyed at a special or mileage rate, was held reasonable. *Ibid.*

A condition that they should not be liable for the loss, detention or damage of any package insufficiently packed, was held unreasonable. *Ibid.*

A condition affixed by a railway company to its "cattle receiving notes," that the company was to be held free from all risk or responsibility in respect of any loss or damage to cattle arising in the loading or unloading, from suffocation, or from being trampled on, bruised, or otherwise injured in transit, from fire, or from any other cause whatsoever, is a reasonable condition within the Railway and Canal Traffic

Act, 1854 (17 & 18 Vict. c. 31. s. 7.) *Pardington v. the South Wales Rail. Co.*, 26 Law J. Rep. (N.S.) Exch. 105; 1 Hurl. & N. 392.

Held, therefore, that a request note, filled up and signed by the sender, requesting trucks to be provided for the conveyance of cattle on the above condition, protected the company from responsibility for the loss of cattle by suffocation during the journey, occasioned by the negligence of the company's servants. *Ibid.*

The railway company conveyed the plaintiff's cattle from N station to G station in a close van intended for salt, but to the use of which the plaintiff's agent did not object. The plaintiff's drover, who had a free pass to travel with the cattle, was permitted to travel in the guard's break; and on arriving at G it was found that the lid of the van had, by some unexplained means, closed during the journey, by which the cattle were suffocated. *Semble*—that, independently of the condition, there was no evidence of negligence on the part of the railway company. *Ibid.*

A special contract for the conveyance of horses by railway, which was signed by the party sending them, contained the following words:—"This ticket is issued, subject to the owners undertaking all risks of conveyance, loading and unloading, whatsoever, as the company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles." The horses were placed by the defendants' servants in a truck, apparently sound, but in reality insufficient, whereby the horses were damaged. On an action being brought by the plaintiff for the injury,—Held by the Court of Exchequer Chamber, (*Erle, J. dissentiente*), that the stat. 17 & 18 Vict. c. 31. s. 7. gave power to the Court or Judge trying the cause to decide upon the justice and reasonableness of conditions in a special contract for the carriage of animals or goods on a railway. Held, further, reversing the judgment below (27 Law J. Rep. (N.S.) Exch. 201; 2 Hurl. & N. 698), *Erle, J. dissentiente*, that the condition of the special contract above set forth was not just or reasonable, as it professed to protect the defendants from responsibility for all loss, though occasioned by their own negligence or misconduct; that consequently it was void, and that the plaintiff was entitled to recover, on the ground that he had employed the defendants to carry his horses safely, and that they had issued an insufficient and improper vehicle, whereby the horses had been injured. *M'Manus v. the Lancashire and Yorkshire Rail. Co.* (Ex. Ch.), 28 Law J. Rep. (N.S.) Exch. 353; 4 Hurl. & N. 327.

The plaintiff, on removing his household effects, delivered them, in eighteen packages, to the defendants, a railway company, for carriage, and signed a delivery note, which described them as "furniture," and containing at the foot "Conditions—The company will not be answerable for the loss of goods untruly or incorrectly described; no claim for loss will be allowed unless made within seven days after the time when the goods should have been delivered." The packages arrived in due course at the station of their destination, where they were kept for four days, at the plaintiff's request; and they were then delivered by the defendants at his residence. The

plaintiff, on opening one of the packages, which contained books and clothes, and not furniture, found that the whole had been abstracted and empty sacks substituted; he immediately made a claim against the defendants: this was more than seven days after the arrival of the packages at the station, but within seven days of their actual delivery at the plaintiff's residence. The plaintiff, having brought an action for the loss, the defendants pleaded two pleas—that the packages were delivered to them on the above conditions; and alleging, in one plea, that the claim was not within seven days of the time when the packages ought to have been delivered, and, in the other, that the contents were not correctly described. At the trial, on the above facts, the Judge held that the pleas were proved, and directed a verdict for the defendants, ruling that the conditions were "just and reasonable," within the Railway Traffic Act, 1854, 17 & 18 Vict. c. 31.—Held, that, assuming on that question the decision of the Judge not to be final, where the point is not reserved, the conditions were reasonable; and that the Judge was, in substance, right, as it was clear, upon the evidence, that the plaintiff was bound by the conditions; and that the pleas were proved. *Lewis v. the Great Western Rail. Co.*, 29 Law J. Rep. (N.S.) Exch. 425; 5 Hurl. & N. 867.

By the terms of a special contract between a fish-monger and a railway company for the conveyance of fish, the company was declared to be exempt from all liability for loss or injury arising from delay or detention of trains, or from any cause other than gross neglect or fraud.—Held (*Martin, B. dissentiente*), that the condition was not unreasonable, under the 17 & 18 Vict. c. 31, and that therefore the company was not liable for damages in consequence of a delay in the arrival of a train, whereby the fish was too late for the market, there being no proof that the delay arose from gross negligence. *Beal v. the South Devon Rail. Co.*, 29 Law J. Rep. (N.S.) Exch. 441; 5 Hurl. & N. 375.

(4) *Goods, within 11 Geo. 4. & 1 Will. 4. c. 68.—Declaration of Nature and Value.*

Ivory bracelets, ornamental shirt-pins, gilt rings, brooches, tortoise-shell and pearl ornamental portmonnaies and ladies' scent-bottles, are trinkets within the Carriers' Act, 11 Geo. 4. & 1 Will. 4. c. 68, but a plain German silver-box for holding fuses is not a trinket within such enactment. *Berwstein v. Bazendale*, 28 Law J. Rep. (N.S.) C.P. 265; 6 Com. B. Rep. N.S. 251.

That act extends to silks made up into any article, and therefore a silk guard is "silks" within the meaning of that statute. The correctness of the ruling of Lord Abinger, in *Davey v. Mason*, impeached. *Ibid.*

To a count charging the defendants, common carriers by railway from London to Southampton, and thence to Jersey by steam-vessels, with the loss of a passenger's portmanteau, the defendants pleaded, that the goods contained in the portmanteau were writings, silks, furs and lace, within the meaning of the Carriers Act, 11 Geo. 4. & 1 Will. 4. c. 68, and exceeded the value of 10*l.*, and were delivered by the plaintiff to the defendants, "then being common carriers by land for hire, to be carried by them as such carriers by land, over their

said railway;" that such delivery was made to the servants of the defendants; that, at the time of such delivery, the value and nature of the said goods were not declared by the plaintiff; and that the non-delivery of the said goods to the plaintiff in the count complained of was by reason of the same being lost by the defendants out of their possession while the same were upon the railway of the defendants, and in their possession and under their care as such carriers by land as aforesaid:—Held, a good plea. *Pianciani v. the London and South-Western Rail. Co.*, 18 Com. B. Rep. 226.

(5) *Liability beyond their own Line of Railway.*

Goods were delivered to a railway company to be delivered from Penzance to Wolverhampton, a place beyond the limits of the company's line, and with which it had no communication:—Held, that the Court (having the same power as a jury) might and would infer a contract to carry the whole distance, although the goods were directed to be conveyed part of the way by sea, and by a different route to that which would have been adopted by the company if no such direction had been given. *Wilby v. the West Cornwall Rail. Co.*, 27 Law J. Rep. (N.S.) Exch. 181; 2 Hurl. & N. 703.

Goods were received at the Great Western Railway Company's station in Bath to be conveyed to Torquay. At Bristol the goods were placed on the Bristol and Exeter Railway, and at Exeter they would have had to be placed on the South Devon line to reach Torquay; while on the Bristol and Exeter line they were destroyed by fire. The receipt-note at Bath stated that the goods were received "to be sent to the Torquay station and delivered to R. C. Collins, consignee, or his agent":—Held (reversing the judgment of the Exchequer Chamber, 26 Law J. Rep. (N.S.) Exch. 103; 1 Hurl. & N. 507; and upholding that of the Court below, 25 Law J. Rep. (N.S.) Exch. 185; 11 Exch. Rep. 790); that the contract was with the Great Western Company, and the Bristol and Exeter Company was not liable. *The Directors of the Bristol and Exeter Railway v. Collins* (House of Lords), 29 Law J. Rep. (N.S.) Exch. 41; 7 H.L. Cas. 194.

Verdict for the plaintiff Collins at Nisi Prius. Afterwards rule to enter nonsuit granted, because the defendants received the goods under a condition that they were not liable for loss by fire:—Held, that it was still open to the defendants in the House of Lords to deny that there was any contract between them and the plaintiff Collins. *Ibid.*

The plaintiff delivered cattle at a station of the Shrewsbury and Hereford Railway Company, to be conveyed to Birmingham, and signed a contract-note with that company, one of the terms of which was, that the company would not be subject to liability for any damage arising on other railways. The cattle were placed on a truck of the defendants lying at the station, and were conveyed in it along the 8 and H line to Shrewsbury, and then on the defendants' line to Birmingham. Between Shrewsbury and Birmingham the cattle were injured by the floor of the truck giving way:—Held, that as the contract of carriage was with the Shrewsbury and Hereford Company for the entire journey, the defendants were not liable. *Guxon v. the Great Western Rail. Co.*, 29 Law J. Rep. (N.S.) Exch. 165; 5 Hurl. & N. 274.

(c) *Duty as regards Arrangements for Delivery of Goods and Admission of Public Vehicles to their Stations.*

A railway company, which had been in the habit of unloading goods conveyed by them on their railway, by taking them out of the trucks and placing them in or adjacent to the waggons of the consignees, established a new system, under which they declined to allow their servants to unload the goods of C from their trucks without extra charge. They, however, continued to unload the goods of P, as these, from the smallness of their quantity, were not carried, like the goods of C, in separate trucks, but were mixed with the company's own traffic; and it was, therefore, for the company's own convenience that they unloaded them from the trucks. The Court refused to make absolute a rule for an injunction under the Railway Traffic Act, 1854, enjoining the company to unload the trucks containing C's goods, and to deliver such goods to C by placing the same in or adjacent to the waggons. *In re Cooper v. the London and South-Western Rail. Co.*, 27 Law J. Rep. (N.S.) C.P. 324; 4 Com. B. Rep. N.S. 738.

Semble—that if C had previously complained to the company of their giving an advantage to P over him in so unloading P's goods, and the company had not afterwards removed such ground of complaint, the Court would have interfered to prevent the continuance of such undue advantage, although the rule nisi for the injunction was not framed for such a case. *Ibid.*

A railway company having made an arrangement with W for the conveyance of passengers to and from their station to the town of K, admitted his omnibus within the gates of the station, but refused admittance to the omnibus of M, which conveyed passengers to and from the station through the town of K to more distant places, to which it was the only public conveyance. No special circumstances being shown by the company to justify the exclusion of M's omnibus, the Court made absolute a rule under the Railway Traffic Act, 1854, enjoining the company to admit M's omnibus in the same manner and to the same extent as they admitted other vehicles of a similar description. *In re Marriott v. the London and South-Western Rail. Co.*, 26 Law J. Rep. (N.S.) C.P. 154; 1 Com. B. Rep. N.S. 499.

A rule calling on a railway company to shew cause why they should not act in compliance with the Railway Traffic Act is too vague. *Ibid.*

The above rule having been moved without mention of costs, the Court made it absolute, without costs. *Ibid.*

A railway company made arrangements with a cab-proprietor, whereby they gave him the exclusive right to have his cabs standing at their station, and plying there. Another cab-proprietor, who had been refused leave for his cabs to stand and ply at the station, applied for an injunction, under the Railway and Canal Traffic Act, 1854; but the injunction was refused, on the ground that no inconvenience to the public was made out;—distinguishing *Marriott v. the London and South-Western Rail. Co.* *In re Beadell v. the Eastern Counties Rail. Co.*, 26 Law J. Rep. (N.S.) C.P. 250; 2 Com. B. Rep. N.S. 509.

(C) CHARGES AND TRAFFIC ARRANGEMENTS.

(a) *Unequal and Unreasonable Charges.*

By the 5 & 6 Will. 4. c. cvii. s. 171. (which was in force till the 1st of November 1852) the Great Western Railway Company were enabled to fix the sum to be charged for the carriage of small parcels, not exceeding 500 lb. weight, as shall seem proper to them; provided that this provision shall not extend to articles, &c. sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal and the like, but only to single parcels, unconnected with parcels of a like nature sent upon the railway at the same time. By the 7 Vict. c. iii. s. 49. the tolls for the use of the railway are to be charged equally to all persons, and after the same rate, and whether per mile, per ton, or otherwise, in respect of all goods, &c. of a like description, and conveyed along the same portion of and over the same distance along the railway. By section 50. the company may charge for locomotive power and carriages certain sums either per ton or per mile, or by bulk, &c. as they think expedient; provided that in whatever way the said charges are made, they shall be made equally to all persons in respect of all goods, &c. of a like description and quantity, and conveyed by a like carriage over the same portion and over the same distance along the said railway, and under the like circumstances; and no reduction or advance in any of such charges is to be made partially in favour of any particular person. By section 51, the company may make arrangements with persons with reference to the collection and delivery of goods or to any facilities or accommodation afforded to or by such persons in reference to such goods, subject to an appeal to Quarter Sessions by any person who considers that the company have, to his prejudice, accorded any special facilities to any other persons which they are unwilling to accord to him. By the 10 & 11 Vict. c. cxxvii. (in force since the 1st of November 1852), s. 47, the company are not to take tolls or charges exceeding "for cotton and other wools, drugs and manufactured goods, 2½d. per ton per mile." By section 49, the maximum rates of charges for the conveyance thereof, including tolls and every expense incident to such conveyance, except a reasonable sum for loading, covering and unloading of goods, and for delivery and collection, and any other service incidental to the business of a carrier, when such services are performed by the company, are not to exceed, for cotton and other articles before classed therewith, 3d. per ton per mile. By section 53, for the carriage of small parcels (i.e., parcels not exceeding 500 lb. weight each) the company may demand any sum they think fit, provided that articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal and the like, shall not be deemed small parcels, but such terms shall apply only to single parcels in separate packages. The plaintiff, a common carrier, at various times delivered to the company to be carried by them upon their line goods which he was employed to carry for his customers. For the purpose of charging for the carriage of goods, the company divide goods into certain classes, according to which they are charged by a "tonnage rate"; those charges being for conveyance and every expense incident thereto, including a sum

for loading, covering and unloading, and every other service incidental to the business of a carrier, but exclusive of collection, delivery or carting to or from the station, and being the same for all goods included in the same class. Packages not exceeding 500 lb. weight are charged according to "parcel rates," which are greater than the tonnage rates. Both before and after the 1st of November 1852, the plaintiff sent to a station of the company, to be carried by the same train, several parcels of goods, each of which weighed less than 500 lb. Each parcel contained goods of the same class, viz., drugs, drapery, glass and stationery, and was a separate package. The company charged for each parcel separately according to the "parcel rate"; the plaintiff claimed to have the whole treated as one parcel and charged on the aggregate tonnage weight:—Held, that under the 5 & 6 Will. 4. c. cvii. s. 171. and the 10 & 11 Vict. c. ccxxvi. s. 53, whether the aggregate weight of these parcels did or did not exceed 500 lb., the company were entitled to charge for each parcel separately. *Parker v. the Great Western Rail. Co.*, 25 Law J. Rep. (N.S.) Q. B. 209; 6 E. & B. 77.

The plaintiff sent, on the same day, three loads of goods to the station, each load containing a package of coffee, of which he was both consignor and consignee, to be forwarded to the same station and by the same train, which was accordingly done. Each package weighed less than 500 lb., but the three together exceeded that weight. The plaintiff at each delivery gave in, as required, a ticking-off note, in which the weight was entered by him, and on the first and second deliveries the weight was entered as "carried forward," but the company had no other notice that any other goods would be sent before the starting of the train, and placed each load, as it arrived, in trucks, this being necessary for the due conduct of their business:—Held, that, under these circumstances, the company were entitled to charge for each load as a separate package. *Ibid.*

After the 1st of November 1852 the plaintiff, on two occasions, sent at the same time respectively several packages of goods, of which he was both consignor and consignee, to be forwarded by the same trains to the same destination. The articles sent were glass, stationery, shoes, drapery and ironmongery; where the parcels were less than 500 lb. the company charged them as parcels:—Held, that "manufactured goods" in the 10 & 11 Vict. c. ccxxvi. s. 49. must be understood in a popular sense as meaning not merely goods produced from the raw state by manual skill and labour, but such as are ordinarily produced in manufactories; and that the maximum rate in that section applied only to tonnage rates, and not to cases where the company were entitled to charge parcel rates. *Ibid.*

Held, also, that under the same section the company were entitled to charge beyond the maximum rates a reasonable sum for loading, covering and unloading, they having rendered those services. *Ibid.*

The company agreed with certain persons called "agents," who were to collect and receive goods for carriage by the company and also to deliver them to the consignees, to pay them for these services 3s. 4d. per ton, for cartage, 2d. for delivering each lot of parcels under 200 lb., and, for each separate parcel, 1s. 6d. per ton for agency. The first two of those sums were insufficient remuneration for the services

performed, the deficiency being made up by the 1s. 6d. per ton. The plaintiff himself collected, carted and delivered all goods sent by him for carriage on the railway, and having paid the charges for carriage under protest, claimed a return of part on the ground that he was charged unequally in comparison with the "agents":—Held, that under the 50th and 51st sections of the 7 Vict. c. iii. the charges for conveyance between the same stations must be equal to all persons; but that the company had power to make such arrangements as they thought fit with particular persons in regard to the collection and delivery of parcels, subject only to an appeal to the Sessions by any person to whom they were unwilling to grant the same facilities. *Ibid.*

A railway company had power by their act to charge any rate they thought proper for parcels under one cwt., while by another section they were to charge rates and tolls equally and to make advances and reductions of rates without partiality. The company charged the plaintiffs, the only common carriers on their line, certain rates for parcels under one cwt., but if there were various small parcels of the same article, though loose, delivered at one time and directed to the same person, amounting to more than one cwt., they weighed and entered them in the bulk, and charged the lower or tonnage rate; but if the parcels delivered at the same time were directed to different persons, they weighed and entered them separately, and charged the higher or small parcels rate, even although the whole were delivered to the plaintiffs at the end of the journey. If among many parcels there were several directed to one person, exceeding together one cwt., they were lumped and charged the tonnage rate:—Held, that, whether the section as to equality applied to the small parcels clause or not, there was nothing unreasonable in charging the higher rate, when the parcels, though all sent and received by the plaintiffs, were directed to different persons; and that the plaintiffs could not recover back the difference between the lower and the higher rates, which latter they had paid under protest. *Baxendale v. the Eastern Counties Rail. Co.*, 27 Law J. Rep. (N.S.) C. P. 137; 4 Com. B. Rep. N.S. 63.

The defendants were incorporated for the purposes of making and working the South-Eastern Railway, and by the 6 Will. 4. c. lxxv. s. 133. were empowered to fix the sum to be charged by them in respect of small parcels not exceeding 100 lb. weight each, as to them should seem proper, "provided always, that the provisions hereinbefore contained shall not extend to articles, matters or things sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, &c., and the like, but only to single parcels unconnected with parcels of a like nature which may be sent upon the railway at the same time." By 2 Vict. c. xlii. s. 17, it is enacted, "that the charges by the above act (among others) authorized to be made for the carriage of any goods, &c. to be conveyed by the said company, or for the use of any steam power or carriage to be supplied by the said company, shall be at all times charged equally to all persons, and after the same rate per mile or per ton per mile in respect of all goods, &c. of a like description, conveyed or propelled by a like carriage or engine passing on the same portion of the line," &c.:—Held, that, reading these two sections together,

the defendants had not an absolute power to charge what they pleased for the carriage of packages not exceeding 100 lb. weight. *Piddington v. the South-Eastern Rail. Co.*, 27 Law J. Rep. (N.S.) C.P. 295; 5 Com. B. Rep. N.S. 111.

Where, therefore, the plaintiff, a carrier, had sent by the defendants' railway a number of "packed parcels," i.e. parcels consisting of a number of smaller parcels packed together, for which the defendants had charged, and the plaintiff had paid double the rates which they would have charged for the same goods when not packed, and the jury found that there was no increased risk in the carriage of the parcels when so packed.—Held, that such double charge was unlawful, and that the plaintiff was entitled to recover the sum which he had paid in excess. *Ibid.*

The Bristol and Exeter Railway Company was incorporated by the 6 Will. 4. c. xxxvi., and the B & E Railway and certain branches were made under that and subsequent acts. The 8 & 9 Vict. c. clv. was passed "to amend the acts relating to the Bristol and Exeter Railway Company, and to authorize the formation of a junction railway and several branch railways connected with the same. Section 19. of the last-mentioned act limited the charge for the carriage of certain articles conveyed on "the railway." The words "the railway" in other parts of the act were used sometimes to denote the original line, and sometimes merely the junction and branch railways authorized by the act:—Held, that "the railway" in section 19. applied to the whole of the line. *Garton v. the Bristol and Exeter Rail. Co.*, 28 Law J. Rep. (N.S.) Exch. 169; 4 Hurl. & N. 33; affirmed in error, 30 Law J. Rep. (N.S.) Q.B. 273; 4 Hurl. & N. 831.

By the original act the company was authorized to make reasonable charges for the conveyance of goods. The company's published table of charges comprised five classes, and "packed parcels" were charged as if they comprised articles of the fifth or highest priced class, with 50 per cent. extra. Packed parcels were sent by persons other than carriers without examination or payment of the extra rate of 50 per cent.; but when sent by carriers they were charged with the extra rate:—Held, that the charges were unequal; and also, that in the absence of evidence shewing any proportionate extra risk, the extra charge of 50 per cent. was unreasonable. *Ibid.*

(b) Undue Preference and Prejudice.

In determining, under the 2nd section of the Railway and Canal Traffic Act, 1854, whether a railway company has given an undue and unreasonable preference to a particular person, company or traffic, or subjected a particular person, company or traffic to an undue or unreasonable prejudice or disadvantage, this Court may take into consideration the fair interests of the railway itself, and entertain such questions as whether the company might not carry larger quantities, or for longer distances, at lower rates per ton per mile, than smaller quantities, or for shorter distances, so as to derive equal profits to itself. *In re Ransome v. the Eastern Counties Rail. Co.*, 26 Law J. Rep. (N.S.) C.P. 91; 1 Com. B. Rep. N.S. 437.

But where it was manifest from the affidavits that a railway company charged Messrs. R., coal-

merchants at Ipswich, who sent from thence coal which had come thither by sea, a higher rate for the carriage of their coal over the company's lines, than they charged Messrs. P., who had made agreements with them to carry large quantities from Peterborough over their line, and that the sums charged to Messrs. P. were fixed, so as to enable them to compete with Messrs. R., this Court granted an injunction enjoining the company to desist from giving any undue preference to Messrs. P., and to carry coal for Messrs. R. on equal terms with Messrs. P., due regard being had to the circumstances, if any, which rendered the cost to the company less in carrying for the one party than for the other. *Ibid.*

A railway company is justified in carrying goods for one person at a less rate than that at which they carry the same description of goods for another, if there be circumstances which render the cost to the company of carrying for the former less than the cost of carrying for the latter. *In re Oxlade v. the North-Eastern Rail. Co.*, 26 Law J. Rep. (N.S.) C.P. 129; 1 Com. B. Rep. N.S. 454.

The North-Eastern Railway Company from a desire to introduce the northern coke into Staffordshire were induced to make special agreements with different merchants for the carriage of coal and coke at a rate lower than their ordinary charge:—Held, that this was not a legitimate ground for making such agreements, and that lowering their rates for that purpose, there being nothing to shew that the pecuniary interests of the company were affected, was giving an undue preference to that traffic. *Ibid.*

The Court refused to require the company to provide trucks for the carriage of coal and coke for a merchant who refused to pay demurrage therefor at the same rate as was charged to all other merchants under similar circumstances. *Ibid.*

The view of the Railway and Canal Traffic Act, 1854, expressed in *Ransome v. the Eastern Counties Rail. Co.* acted upon. *Ibid.*

A railway company were threatened by the owner of extensive collieries, which he had, at considerable expense, connected with their line, that, unless they agreed to carry his coals to W, the terminus of their line, at a certain rate, he would construct a tramway from his collieries to W, and so divert his coal traffic from their line altogether. The company entered into an agreement with him accordingly, under which they carried his coals at such a rate, being a less rate than that which they charged the proprietors of other collieries situate in the same district for the carriage of their coals over the same portion of their line:—Held, that this was an undue preference within the 17 & 18 Vict. c. 31. s. 2. *In re Harris v. the Cocker-mouth and Workington Rail. Co.*, 27 Law J. Rep. (N.S.) C.P. 129; 3 Com. B. Rep. N.S. 693.

A railway company adjusted certain districts within which they carried coals at reduced rates for quantities not less than a train load, 200 tons. Those districts were so adjusted that the places where the complainants (coal-dealers at I) dealt, instead of being put into one district, were distributed into three, so that it was necessary for them, in order to take advantage of the reduced rates, to send three train loads from I into each district, which was more than their traffic demanded; whereas for dealers sending coals from P a single district was constituted,

comprising, besides other places, those at which the complainants dealt, and so afforded a traffic requiring coals enough to enable the P dealers to take advantage of the lower rates. The Court refused to interfere under the 17 & 18 Vict. c. 31. s. 2, it not being shown that the complainants were unduly subjected to this disadvantage, or that it was caused by undue preference; the adjustment of districts not being disadvantageous to the public at large, or objectionable in other respects. *In re Ransome v. the Eastern Counties Rail. Co.*, 27 Law J. Rep. (N.S.) C.P. 166; 4 Com. B. Rep. N.S. 185, 159.

The company made a scale of charges for the carriage of coals from P and from I to places on their line at which the complainants dealt, the effect of which was to diminish the natural advantages which the position of the dealers at I, by reason of its greater proximity to those places, gave them over the dealers at P by annihilating in point of expense of carriage a portion of the distance between P and those places:—Held, that an undue preference was thereby given to the dealers at P. *Ibid.*

Where a preference was given by a railway company to a customer who engaged to employ other lines of the company for traffic distinct from and unconnected with that in respect of which such preference was given,—Held, that this was an undue preference within the 17 & 18 Vict. c. 31. s. 2. *In re Baxendale v. the Great Western Rail. Co.*, 28 Law J. Rep. (N.S.) C.P. 69; 5 Com. B. Rep. N.S. 309.

A railway company formerly charged a uniform rate of 3s. 6d. per ton on all goods conveyed on their line between R and P. The goods were collected and delivered both by the company and B at a charge of 4s. 10d. per ton. The company, who had power under their acts to impose their own rates of charge for carrying, but no power to impose tolls for collecting and delivering, raised the charge for carrying to 8s. 4d., being the aggregate of the above two charges, with an intimation to the public that they would collect and deliver goods free of all charge. The real purpose of this arrangement was to compel persons desiring to have their goods conveyed by the railway to employ the company to collect and deliver such goods, and thus to secure this business and the profits upon it to the company, as well as to exclude B from competing with them in this department of business:—Held, that this arrangement was an undue preference to the company in their separate capacity of carriers other than on the line of railway; and also an undue prejudice to B. *In re Baxendale v. the Great Western Rail. Co.*, 28 Law J. Rep. (N.S.) C.P. 81; 5 Com. B. Rep. N.S. 336.

The Railway and Canal Traffic Act, 1854, s. 2, which speaks of "undue and unreasonable preference or advantage," and "undue or unreasonable prejudice or disadvantage," implies that there may be advantage to one person or one class of traffic, and prejudice to another, which would not be within the act. *In re Nicholson v. the Great Western Rail. Co.*, 28 Law J. Rep. (N.S.) C.P. 89; 5 Com. B. Rep. N.S. 366.

It is not giving an undue or unreasonable preference within the meaning of that section for a railway company to carry goods for A at a lower rate than they do for B, in consideration of A's guarantee of

large quantities and full train loads, at regular periods (provided the real object of the company be to obtain thereby a greater remunerative profit by the diminished cost of carriage), although the effect may be to exclude from the lower rate B, who cannot give such a guarantee. *Ibid.*

A railway company charged certain rates for the conveyance of goods on their line from P to B, the charge including that of collecting and delivering the goods to and from the stations at P and B. The company, who had formerly allowed a deduction in respect of goods delivered and received at the P and B stations (as the expense of carting to and from such stations was thereby saved to the company), discontinued making such allowance, in order to induce persons who sent goods by the railway to employ the company to collect and deliver such goods, and to exclude common carriers from competing in this with the company:—Held, that though no profit was made by collecting and delivering the goods, the system of charge was an undue prejudice to those persons who did not wish to have their goods collected and delivered for them by the company. *In re Garton v. the Great Western Rail. Co.*, 28 Law J. Rep. (N.S.) C.P. 158; 5 Com. B. Rep. N.S. 669.

A railway company refused to receive goods sent to their station by the public generally after a quarter past five o'clock p.m. to be forwarded by the goods train which left such station on the same night, but they received goods for the same train brought there by their agent W as late as eight o'clock p.m. W had a receiving office for goods about a mile from the station, where he weighed, classified and prepared the goods for loading, which would otherwise have had to be done at the station, and but for which having been so previously done the goods could not generally have been received at the station at so late an hour. On the goods so received at such receiving office W made a charge for conveying them to the station in addition to the company's usual rates of charge for carriage upon the railway:—Held, that the facility so given to W for forwarding goods after the station was closed to others was an undue prejudice to those who did not wish to have their goods conveyed for them to the station. *In re Garton v. the Bristol and Exeter Rail. Co.*, 28 Law J. Rep. (N.S.) C.P. 303; 6 Com. B. Rep. N.S. 639.

A preference with respect to a reduced rate of carriage of certain goods given by a railway company to certain individuals in consideration of their contracting to have all such goods consigned to them through the railway, and not by water or other means, is an undue preference within the 17 & 18 Vict. c. 31, unless it be clearly shown that it is done in order to prevent a competition with the railway, or that there is secured thereby to the company such an amount of traffic as to compensate for making the reduced rate. *Ibid.*

By a railway company's tariff, which had been previously sanctioned by the Court, a reduced rate was published for the carriage of coals in quantities of not less than 200 tons, or thirty-five trucks, consigned to any one of certain specified districts. The company afterwards charged such reduced rate for the carriage of coals consigned by dealers at P, in the prescribed quantities of thirty-five trucks for one

of such districts, though not carried by the company in one train load all the way, the company, for their own convenience, in consequence of steep gradients, which would otherwise have required increased steam-power, detaching at C some of the trucks from the train, and sending them on afterwards by the ordinary goods or other trains to which they might be advantageously attached. None of the coals were ever left at C for consumption there, but were all carried to the district to which they had been so consigned:—Held, that by so doing the company had not given an undue preference to the consignors at P, since, the tariff being valid, it was immaterial how the company carried the coals most conveniently to themselves, provided the tariff was not infringed. *Ransome v. the Eastern Counties Rail. Co.*, 29 Law J. Rep. (N.S.) C.P. 329; 8 Com. B. Rep. N.S. 709.

(D) ACTIONS.

The defendants, a railway company, contracted to deliver the luggage of passengers wishing to proceed further at the station of an adjoining railway company. The plaintiff, at the end of his journey on the defendants' line, intending to proceed further, told the defendants' porter, who placed the plaintiff's portmanteau on a truck in his sight. This was the last the plaintiff saw of his portmanteau. The truck was afterwards taken to the adjoining station, but the plaintiff, though he saw the truck, did not see his portmanteau on it; but he did not see that it was not on it. The plaintiff proceeded on his journey by the second railway, and on arriving at the end of it his portmanteau could not be found. In an action by the plaintiff against the defendants for the loss, it was held, that as the evidence did not preponderate in favour of the supposition that the portmanteau was lost or stolen on one railway more than on the other, but was equally consistent with both views, there was no evidence for the jury, and that the plaintiff ought to be nonsuited. *The Midland Rail. Co. v. Bromley*, 25 Law J. Rep. (N.S.) C.P. 24; 17 Com. B. Rep. 372.

A carrier of passengers and goods to the station of a railway company cannot maintain an action against the company, either at common law or under the Railway and Canal Traffic Act, 1844, for refusing to admit him with his carriage within the precincts of the station, although the company are in the habit of admitting the public generally. *Barker v. the Midland Rail. Co.*, 25 Law J. Rep. (N.S.) C.P. 184; 18 Com. B. Rep. 46.

To a declaration charging the defendants, as common carriers, for the loss of goods alleged to have been delivered to them by the plaintiff, the defendants pleaded that the goods were delivered to and received by them from one A, and being accidentally lost, and A, as the consignor, having claimed compensation, the defendants paid to him, and he accepted a sum of money as the value of the goods, and in satisfaction of the claim; and that the defendants had not at the time of the delivery or payment notice that A was acting for the plaintiff, or was his agent for delivery; and that the payment was made in the *bona fide* belief that the goods were delivered by A on his own account; and that he was the person entitled to claim and receive satisfaction for their loss:—Held, that the plea was no answer to the action. *Coombs v. the Bristol and Exeter*

Rail. Co., 27 Law J. Rep. (N.S.) Exch. 269; 8 Hurl. & N. 1.

In an action against carriers for the loss of a parcel of whalebone, it appearing that the plaintiff had agreed with one A to take such whalebone as he should send by the defendants, at a certain price, and the parcel in question having been so sent,—Held, that the consignor, and not the plaintiff, was the party to maintain the action. *Coombs v. the Bristol and Exeter Rail. Co.*, 27 Law J. Rep. (N.S.) Exch. 401; 8 Hurl. & N. 510.

A common carrier is not estopped from disputing the title of the person from whom he has received goods to carry. And it is an answer to trover against the carrier by such person, that the goods have been delivered to the real owner on his claiming them. *Sheridan v. the New Quay Company*, 28 Law J. Rep. (N.S.) C.P. 58; 4 Com. B. Rep. N.S. 618.

C, who resided at M, ordered goods of D to be shipped to the port of L, and to be paid for in cash against the bill of lading. C never obtained the bill of lading or paid for the goods, but he sold the latter to the plaintiff. The goods arrived at the port of L, but were not to be delivered, except on payment of freight. At an interview between the captain and B (the plaintiff's agent at L), at which D was present, the captain said, in answer to B's question, where the bill of lading was, that D had passed it on to C, which was true, the bill having, in fact, been sent to D's agent at M for that purpose, but C not paying for the goods, the bill was returned to D after this interview. No arrangement was then come to, but shortly afterwards B, as plaintiff's agent, paid the freight, on receiving from the captain a document given to him by D when the bill of lading was signed, by which D requested C's agents at L to pay the captain his freight. The defendants, who were common carriers, were then employed by B to forward the goods to the plaintiff:—Held, that the plaintiff had acquired no right to take possession of the goods as buyer, either by the purchase from C or by the conduct of D at the interview between the captain and B, coupled with the document requesting payment of freight, and the payment of freight thereon. *Ibid.*

Held, also, that the defendants were protected against the plaintiff by their giving up the goods to D on his claiming them. *Ibid.*

(E) DAMAGES RECOVERABLE.

A declaration by a carrier against a railway company for not carrying a parcel to Leeds in a reasonable time, and for not delivering it, laid, as damages, that the plaintiff was injured in his trade as a collector of parcels, and lost the custom of several persons. The plaintiff, a carrier in London, was in the habit of collecting in London small parcels from different persons to be sent to various persons in the country. After collecting them, he used to make them into one parcel, called a "packed parcel," which he directed to his agent in the country, and brought to the defendants to be carried. The plaintiff was also in the habit of bringing to the defendants for carriage into the country parcels, containing other small parcels, belonging to one individual in London, and sent by him to one individual in the country. These parcels were called "enclosures." The defendants charged the plaintiff at a higher

rate for "packed parcels" than for "enclosures," and they also charged him at a higher rate than the rest of the public. The learned Judge stated to the jury that an action of trover against the defendants could not be brought by each of the owners of the packages contained in the "packed parcels," in the event of loss or "misdelivery, although an action might lie by each owner for the destruction of the packages by the defendants, independently and beyond their duty as carriers. He also left it to the jury to say whether there was a difference as regarded the risk between carrying "packed parcels" and "enclosures." The jury found that there was no substantial difference as regarded the risk of carrying the two kinds of parcels; and they found a verdict for the plaintiff, damages 200*l.*, on the ground that the plaintiff had sustained injury in his trade and loss of custom to that extent, in consequence of the defendants' acts:—Held, that the Judge rightly directed the jury, the question of risk as regarded the two kinds of parcels being a question of fact, and not of law. *Crouch v. the Great Western Rail. Co.*, 25 Law J. Rep. (N.S.) Exch. 137; 11 Exch. Rep. 742.

Held, also, that as the declaration was framed, the plaintiff was not entitled to recover the 200*l.* as damages for the injury to his trade and loss of custom.

Semble, per *Martin, B.*, that if the fact had been that the plaintiff was a carrier whose business consisted in collecting goods to be forwarded by the defendants' railway, and that the defendants designedly refused to carry his parcels, which they were bound by law to carry, in order to obtain a monopoly and to destroy the plaintiff's business, under such circumstances a jury would be justified in giving very heavy damages. *Ibid.*

CEMETERY.

[See BURIAL.]

CENSUS.

[See 23 & 24 Vict. c. 61, and (Ireland) 23 & 24 Vict. c. 62, and (Scotland) 23 & 24 Vict. c. 98.]

CENTRAL CRIMINAL COURT.

[The Court of Queen's Bench empowered to order certain Offenders to be tried at the Central Criminal Court by 19 & 20 Vict. c. 16.]

CERTIORARI.

[Proceedings on removal of indictments by *certiorari* regulated by 19 & 20 Vict. c. 16.]

(A) FOR REMOVAL OF CAUSES IN THE COUNTY COURT.

(B) FOR REMOVAL OF INDICTMENTS.

(C) FOR REMOVAL OF CORONER'S INQUISITION.

(D) FOR REMOVAL OF PRESENTMENT OF COURT OF SEWERS.

(E) FOR REMOVAL OF AWARD OF METROPOLITAN BOARD OF WORKS.

(F) FOR REMOVAL OF A CONVICTION IN A BRITISH COLONY.

(A) FOR REMOVAL OF CAUSES IN THE COUNTY COURT.

Where a Justice of the Peace who has been sued in a county court for an act done in the execution of his office has given notice, under 11 & 12 Vict. c. 44. s. 10, of his objection to be sued in such court, he is not entitled to remove the plaintiff by *certiorari* into the superior court. *Weston v. Sneyd*, 26 Law J. Rep. (N.S.) Exch. 161; 1 Hurl. & N. 703.

A defendant having removed from the county court, by *certiorari*, under the 19 & 20 Vict. c. 108. s. 38, a plaintiff for a claim not exceeding 5*l.*, the plaintiff is not bound to follow the action into the superior court; and the defendant, after notice to the plaintiff to declare, is not entitled to sign judgment, and he cannot obtain from the plaintiff the costs of removing the plaintiff. *Garton v. the Great Western Rail. Co.*, 28 Law J. Rep. (N.S.) Q.B. 103; 1 E. & E. 258.

On an application by a defendant for a *certiorari* to remove from a county court a cause in which the demand is over 20*l.* the Court does not make it a condition that the defendant, if successful, shall have no more costs than would have been allowed in the county court. *Ex parte the Great Western Rail. Co.*, 2 Hurl. & N. 557.

(B) FOR REMOVAL OF INDICTMENTS.

The Court will not interfere with the discretion of a Judge in granting a writ of *certiorari* to remove an indictment, at the instance of one of several defendants, where all the facts were fairly laid before the Judge upon the application for the writ. *Regina v. Wilkes*, 25 Law J. Rep. (N.S.) Q.B. 47; 5 E. & B. 690.

Where one of several defendants against whom an indictment has been found removes it by *certiorari*, it is lawful for a Judge to impose the condition that he shall pay the costs of the prosecution occasioned by the removal, in the event of any of the defendants being convicted. *Regina v. Jewell*, 26 Law J. Rep. (N.S.) Q.B. 177; 7 E. & B. 140.

Where an indictment against a corporation, for non-repair of a highway, is removed by *certiorari*, at the instance of the prosecutor, the prosecutor is not required by section 5. of the 16 & 17 Vict. c. 80. to enter into recognizances to pay the defendant's costs in case of acquittal; indictments against corporations being excepted from the operation of the act. *Regina v. the Mayor, Aldermen and Citizens of Manchester*, 26 Law J. Rep. (N.S.) M.C. 65; 7 E. & B. 458.

(C) FOR REMOVAL OF CORONER'S INQUISITION.

The Court of Queen's Bench will remove a coroner's inquisition, or an indictment to be found at the ensuing assizes, for murder, from a county at large to the Queen's Bench, by *certiorari*, if it appears that a fair trial cannot be had in the county. *Regina v. Palmer*, 5 E. & B. 1024.

When after removal the defendant is ordered to

be tried, under the statute 19 & 20 Vict. c. 16, at the Central Criminal Court, the Court will not make it a condition under section 24. that the prosecutor shall furnish the defendant with evidence which, it is suggested, has been obtained by the prosecutor since the taking of the depositions. *Ibid.*

(D) FOR REMOVAL OF PRESENTMENT OF COURT OF SEWERS.

If a person against whom a presentment is made by a Court of Sewers obtain a writ of *certiorari* to remove it into the Court of Queen's Bench, he must, before the allowance of the writ, enter into the recognizances required by the statute 5 & 6 Will. 4. c. 33. *Regina v. Baker*, 28 Law J. Rep. (N.S.) Q.B. 377.

(E) FOR REMOVAL OF AWARD OF METROPOLITAN BOARD OF WORKS.

A claim for compensation having been made to a district board of works, under the 214th section of the Metropolitan Management Act, 18 & 19 Vict. c. 120, for the loss of the office of clerk of the works to certain Commissioners for paving, &c., the board rejected the claim. The claimant then appealed to the Metropolitan Board of Works, and they, after considering the circumstances, made an order, awarding compensation for the loss of the said office. This order was afterwards brought up by *certiorari* to be quashed, on the ground of a want of jurisdiction. The writ had been obtained upon affidavits shewing that the claimant was not an officer to the Commissioners as alleged, and that the district board had rejected the claim on that ground:—Held, upon cause being shewn against the rule to quash the order, that the question of whether the claimant was an officer or not was necessarily within the appellate jurisdiction of the Metropolitan Board, and that the *certiorari* therefore had improvidently issued. *Regina v. the Metropolitan Board of Works*, 27 Law J. Rep. (N.S.) Q.B. 5.

(F) FOR REMOVAL OF A CONVICTION IN A BRITISH COLONY.

Where, in a colony, a person has been convicted of a criminal offence, and is in execution of a sentence passed for that offence, no writ of error will be granted to bring up the record of conviction, unless the Attorney General has first issued his fiat for a writ of error. *Regina v. Lees*, 27 Law J. Rep. (N.S.) Q.B. 403.

Nor will a *certiorari* be granted in general to remove a record under such circumstances, in order that a writ of error may afterwards be brought. *Ibid.*

Nor will a *habeas corpus* be granted under such circumstances to bring up a prisoner. *Ibid.*

CHAMPERTY.

[See CONTRACT.]

CHARITY.

[The exemption of certain charities from the operation of the Charitable Trusts Acts continued for a limited time by 19 & 20 Vict. c. 76.—The exemption of certain charities from the operation of the Charit-

able Trusts Acts further continued for a limited time by 20 & 21 Vict. c. 76.—Exemption of certain charities from the operation of the Charitable Trusts Acts continued by 21 & 22 Vict. c. 51.—Substitution in certain cases of the bishop of one diocese for the bishop of another as a trustee of certain trusts by 21 & 22 Vict. c. 71.—Exemption of certain charities from the operation of the Charitable Trusts Acts further continued by 22 & 23 Vict. c. 50.—Charitable and provident societies and penny savings banks enabled to invest all their proceeds in savings banks by 22 & 23 Vict. c. 3.—An act to amend the law regarding Roman Catholic charities, 23 & 24 Vict. c. 134.]

- (A) CHARITABLE TRUSTS ACT.
- (B) SUPERSTITIOUS USES.
- (C) CONSTRUCTION OF INSTRUMENT CREATING IT.
- (D) DEVISE AND BEQUEST TO—VALIDITY OF.
- (E) ADMINISTRATION.
 - (a) Scheme.
 - (b) Trustees.
 - (c) Estates.
 - (d) Overplus Income.
- (F) JURISDICTION OF COURT OF CHANCERY OVER.
- (G) PLEADING AND PRACTICE.
- (H) COSTS.
- (I) GRAMMAR SCHOOL.

(A) CHARITABLE TRUSTS ACT.

Upon petition by the trustees of a charity, for payment out of court of money paid in under the Lands Clauses Act upon the purchase, since 1853, of a portion of the charity property, it was held, that this was an application for an order respecting the charity funds; and that it did not come within the exception contained in the 17th section of the Charitable Trusts Act, as to a suit or matter actually pending; and consequently that the sanction of the Charity Commissioners must be obtained for such an application. *In re the Chelsea Waterworks Act, and Skeat's Charity*, 25 Law J. Rep. (N.S.) Chanc. 49.

A trustee of a fund applicable in emergencies arising from war to the maintenance of a volunteer corps, the income of which, after the cessation of such emergencies, was applicable to the benefit of the poorer members of the corps, their wives and children, may pay it into court under the 10 & 11 Vict. c. 96, and ask for a scheme for its future management, without obtaining the certificate of the Charity Commissioners, under the 16 & 17 Vict. c. 137. s. 17. *In re St. Giles's and St. George's, Bloomsbury*, 27 Law J. Rep. (N.S.) Chanc. 560; 25 Beav. 813.

If a charitable society invests its funds upon permanent security, or in the purchase of an estate, the consent of the Charity Commissioners is not necessary to the realization of such security, or to the sale of such estate; but when endowment is contemplated, and the investment is made as an endowment, then their consent will be necessary. *The Corporation of the Sons of the Clergy v. Sutton*, 29 Law J. Rep. (N.S.) Chanc. 393; 27 Beav. 651.

When a final order has been made on a petition it can no longer be said to be a matter "actually pending" for the purposes of the 16 & 17 Vict.

e. 187. s. 17. Therefore, where a petition was presented for the appointment of new trustees, under a scheme ordered and settled by the Court, upon a petition presented in 1864, the Court required the certificate of the Charity Commissioners to such petition. *Re Jarvis's Charity*, 1 De Gex & Sm. 97.

The assent of the Charity Commissioners is not requisite to an application for the disposal of money paid into court by a railway company on the purchase of land belonging to a charity. *In re Lister's Hospital*, 6 De Gex, M. & G. 184.

The words, "in any suit or matter actually pending," in the 17th section of the Charitable Trusts Act, 1853, refer to a suit or matter actually pending at the time of the application. *Ibid*.

(B) SUPERSTITIOUS USES.

A testator gave an annuity of 10*l.* a year to the wardens of a Jewish congregation, and directed them to pay the same to three qualified persons to learn in their college daily for ever, and on every anniversary of his death to say a prayer called Cawdish:—Held, to be a good charitable bequest within the 9 & 10 Vict. c. 59, and not a superstitious use. *In re Michel's Trusts*, 29 Law J. Rep. (N.S.) Chanc. 547; 28 Beav. 39.

(C) CONSTRUCTION OF INSTRUMENT ORNATING IT.

Lands granted to a vestry in 1786 by virtue of an act of parliament, for parochial purposes, for building a workhouse, and for the employment and support of the poor of the parish, are within the 16 & 17 Vict. c. 137, and the charitable trusts will be enforced, whether they are for the benefit of the poor,—independent of the poor-rates,—or in aid of the poor-rates, &c. *Attorney General v. Blizard*, 25 Law J. Rep. (N.S.) Chanc. 171; 21 Beav. 283.

Where common land was inclosed, over which the inhabitants of a parish had a right of common, and a grant of land was made for parish purposes, and for the employment and support of the poor of the parish,—Held, that the income was well employed for the relief of the poor in aid of the poor-rates and other parochial burthens of the parish. *Ibid*.

The Hospital of St. Cross, in 1157, was established for certain charitable purposes, and was governed by a Master and Brethren. In 1446, the Bishop of Winchester appropriated the rectory of St. Faith to the Hospital of St. Cross, saving his episcopal rights and the right of instituting a vicar of St. Faith. The object of the bishop was recited to be for the purpose of founding an Almshouse of Noble Poverty within the precincts of St. Cross. The vicar never was appointed. The church of St. Faith fell to decay; and the parishioners attended divine service at, and the sacrament of baptism and rites of marriage and burial were performed in the chapel and chapel-yard of St. Cross:—Held, that the chapel of St. Cross was not, by such appropriation and practice, made the parish church of St. Faith. *Attorney General v. the Master and Brethren of the Hospital of St. Cross, ex parte Holloway*, 25 Law J. Rep. (N.S.) Chanc. 202; 8 De Gex, M. & G. 88.

Held, also, that a churchwarden, as such, has no authority to perform or provide for the performance of divine service during a vacancy. The course to be pursued is, for the churchwarden to act under a

sequestration to provide for the services, and in so doing he acts as officer of the bishop, and not as churchwarden. *Ibid*.

By long custom four measures of corn were distributed to the poor of two parishes by the owners of the M estate. In 1795 a bill for partition was filed, and subsequently an act of parliament to effect the same was passed, and lot 2. in the schedule was allotted to W, and in the same schedule the above measures of corn were mentioned as attaching to that lot, though it was not expressly said that they were a charge on the land. For thirty years the owner of lot 2. paid a sum of money in respect of the measures of corn, and on F W, the son of W, succeeding to lot 2, he refused further payment, though for two years later the money had been paid by the agents of F W. On an *ex officio* information being filed against F W, he insisted that the payments had been all along merely voluntary, and for the last two years without his authority; but the Master of the Rolls declared the value of the measures of corn were a charge on the land in lot 2, which was affirmed, on appeal. *Attorney General v. West*, 27 Law J. Rep. (N.S.) Chanc. 789.

(D) DEVISE AND BEQUEST TO—VALIDITY OF.

Where one of several residuary legatees was, after the making of the will, verbally informed, in the testator's presence, of his confidence that the legacy would be appropriated to certain purposes, and did not dissent,—Held, that the share of such legatee was subject to a trust. *Tee v. Ferris*, 25 Law J. Rep. (N.S.) Chanc. 437; 2 Kay & J. 357.

Held, also, that the shares of the other legatees were not affected by the trust.—*Huguenin v. Baseley* and *Russell v. Jackson* distinguished. *Ibid*.

A gift to found, establish and uphold an "Animal Sanatory Institution" for studying, investigating and curing the maladies, distempers, and injuries of any quadrupeds or birds useful to man, and for providing a superintendent, who was annually to give five open lectures on the business of the institution,—Held, to be a good charitable bequest. *University of London v. Yarrow*, 26 Law J. Rep. (N.S.) Chanc. 430, 70; 1 De Gex & J. 72; 23 Beav. 159.

A testatrix, after bequeathing certain specific and pecuniary legacies, gave several pecuniary legacies to charities, and directed that the charitable bequests should be paid, in precedence of the other pecuniary legacies, out of such part of her personal property not specifically bequeathed as was by law applicable for charitable purposes. The pure personal estate was insufficient to pay the charity legacies; but the other personal estate was sufficient to pay the other legacies and the debts, &c.:—Held, reversing the decision of one of the Vice Chancellors, that the pure personal estate must, before being applied to the satisfaction of the charitable legacies, contribute, with the other portion of the personality, to the payment of the debts, funeral and testamentary expenses and costs. *Tempest v. Tempest*, 26 Law J. Rep. (N.S.) Chanc. 601; 7 De Gex, M. & G. 470; 2 Kay & J. 635.

A bequest to a charitable institution to be appropriated for the purposes of the charity is good if some of the objects are such as it can be legally applied to, although the purposes of the charity may comprise objects to which the bequest could not

legally be applied. *Carter v. Green*, 26 Law J. Rep. (N.S.) Chanc. 845; 3 Kay & J. 591.

A testator, after bequeathing several legacies to charities, gave all his residuary estate to trustees upon trust for a charitable association; and by a codicil, after reciting that he had by his will and other methods disposed of parts of his personal estate to charitable uses, declared that in case any parts of the same should be considered not to have their full operation, he bequeathed all such personal estate to the same trustees, free from any trust or condition, express or implied. The testator having afterwards attempted to dispose by deed of a sum of money for charitable purposes in a manner clearly void,—Held, that this fund was included in the residuary bequest to the charity trustees, and also in the substitutional bequest contained in the codicil. *Ibid*.

Semble—If the bequest for the charitable association had been void, the substituted bequest to the same trustees would be good. *Attorney General v. Tyndall* observed upon. *Ibid*.

A testator gave personal estate to his wife for life, and at her decease to be divided, one moiety thereof to the testator's daughter for life, and the other moiety to be at the disposal of his said wife, therewith to apply a part to the foundation of a charity school or such other charitable endowment for the benefit of the poor of O as she might think proper, and the remainder to be at her disposal among his relations, in such proportions as she might be pleased to direct. On the death of the testator's widow without having made any disposition of the latter moiety,—Held, that one half was well bequeathed for charitable purposes, and the other belonged to the next-of-kin. *Salisbury v. Denton*, 26 Law J. Rep. (N.S.) Chanc. 851; 3 Kay & J. 529.

A testator gave the interest of — to establish a charity in the parish of M, leaving in blank the space for the sum. In a subsequent part of his will he gave an annuity of 15*l.* to J for life; and after his decease he gave "to the minister and churchwardens of the parish aforesaid the said sum of — a year, in addition to the two sums before mentioned";—Held, that the gift not only referred to the 15*l.* a year given to J for life, but also to the charity established in the previous part of the will. *Hartshorne v. Nicholson*, 27 Law J. Rep. (N.S.) Chanc. 810; 26 Beav. 58.

Held, also, that the charity was valid, and that it did not necessarily contemplate bringing land into mortmain. *Ibid*.

Trustees had the option of establishing a charity in either of two ways, the one valid and the other invalid. The fund was ordered to be paid to them without any undertaking as to the mode in which they would apply it, and without any declaration or direction of the Court on the subject. *University of London v. Yarrow*, 24 Beav. 472.

A gift of a legacy to be divided "between twenty aged widows and spinsters of the parish of P" is a good charitable gift. *Thompson v. Corby*, 27 Beav. 649.

Bequests—"To such poor widows, or credible, industrious unmarried women, upwards of forty years of age, residing at Ulverstone, &c., having no relief from those places, 5*l.* each;" "to poor, credible, industrious persons, residing in the said town, with two children or upwards, or above fifty years of age,

maimed, or otherwise unable to gain a living, whose income shall not exceed 5*l.*, the sum of 2*l.* 10*s.* each"; "to the poor people residing in Ulverstone 50*l.*, to be paid among them as the trustees shall think proper"—Held, 1, that the words contained such a particular and singular definition of the object that, though a charitable legacy, the doctrine of *cypres* was inapplicable. 2. The will having directed the overplus to be divided among the legatees in proportion to their legacies, the Court directed the share of the overplus falling to the charity to be apportioned among such objects as should be in existence at the time of distribution. *Russell v. Kellett*, 3 Sm. & G. 264.

(E) ADMINISTRATION.

(a) Scheme.

Although the governors of a private charity are incorporated by royal letters patent, and are empowered to make rules and regulations for its management, still the Court has jurisdiction and will direct a scheme for the future management of the charity, and will include in the scheme divers other charity estates, some of which were given for purposes wholly different from those of the incorporated charity. *Attorney General v. the Governors of the Free Grammar School in Dedham*, 26 Law J. Rep. (N.S.) Chanc. 497; 23 Beav. 350.

In the administration of charities where the intention of the founder is not clearly defined, or where deeds are lost and the object unknown or uncertain, the religion of the founder will be considered as an index of intention if the foundation is ecclesiastical; but it will be disregarded if it is educational or eleemosynary. *Attorney General v. Calvert*, 26 Law J. Rep. (N.S.) Chanc. 682; 23 Beav. 248.

In educational charities the tenets of the founder will be attended to if any doubtful directions have been given respecting religious instruction. *Ibid*.

In eleemosynary charities the founder's opinions are disregarded, and if the power of selecting objects is given to the rector and churchwardens, it will not necessarily confine the benefit of the charity to objects of the Established Church, but recipients must comply with forms. *Ibid*.

Immemorial usage is no test of the exclusive character of a charity in the absence of evidence or unavoidable inference. *Ibid*.

Dissenters who can comply with the present existing law relating to charities are eligible to participate in them, though they may have been founded at times and under circumstances very different from those now existing. *Ibid*.

If a testator points out clearly the purposes of a charity he intends to establish, this Court cannot speculate upon whether it would be better for the community if a different application of the funds had been established; but it is bound to carry them into effect, provided they are not in opposition to the law of the country. *Philpott v. St. George's Hospital*; *Attorney General v. Philpott*, 28 Law J. Rep. (N.S.) Chanc. 657; 27 Beav. 107.

Property was devised to the town and commonalty of Grantham, for the discharge of the tax of the commonalty to the king for ever. The tax referred to was unknown, and the income had been applied to the use of poor freemen and their widows.—Held, that this application was improper; that this was a

charity property belonging to the town generally, and not to the corporation beneficially; and a scheme was directed. *Attorney General v. Bushby*, 24 Beav. 299.

(b) Trustees.

A grammar school founded and endowed by King Edward the Sixth is essentially a Church of England school, founded for Church of England purposes, and members of the Church of England alone will be appointed trustees. The Court is bound by the charter of foundation: it has no power to expand, curtail or diminish the purposes of the foundation. It will, therefore, leave the trustees, when authorized, to frame the rules and ordinances from time to time required for the government of the school; and so that the school is preserved in its integrity it will not restrain them from making rules and ordinances to extend the general benefit of the foundation to persons not members of the Church of England. *In re the Stafford Charities*, 27 Law J. Rep. (N.S.) Chanc. 381; 25 Beav. 28.

Certain inhabitants of the town of I purchased in 1549 property (long leasehold houses and buildings), and conveyed it to trustees, upon trust to provide an honest and discreet person to be schoolmaster, who should instruct as well in all godly learning and knowledge as in other manner of learning all such children as should be brought to him. The trusts then provided for the payment of the schoolmaster and repair of the buildings out of the rents, and the surplus to be applied in mending and repairing the highways, bridges and watercourses of the parish of I. Dissenters had for a very long period been appointed some of the trustees, and upon an application for the appointment of new trustees, the Master of the Rolls being of opinion that, the charity being substantially founded for other objects besides a school, dissenters might be the trustees, appointed several who were not members of the Church of England; but, upon appeal, held, reversing his Honour's decision, that the primary object of the charity being education, including religious education, it must be understood as education in conformity with the tenets of the Church of England, and therefore that the trustees ought to be persons who were members of that Church. *In re Ilminster Charities*, 27 Law J. Rep. (N.S.) Chanc. 496; 2 De Gex & J. 535: affirmed, *nom. Baker v. Lee*, 8 H.L. Cas. 495; 30 Law J. Rep. (N.S.) Chanc. 625.

Trustees of a charity were disqualified on "departing the United Kingdom, from whatever cause or motive, or under whatsoever circumstances."—Held, that a temporary absence abroad was not within the proviso. *In re the Moravian Society*, 26 Beav. 101.

A scheme made in 1855 provided that no person should act as trustee of the charity who should hold or occupy any part of the charity property. At that time one of the trustees held a small piece of charity land under a twenty-one years' lease, granted in 1847 by public tender:—Held, that he must either give up the lease or the trusteeship. *Foord v. Baker*, 27 Beav. 193.

(c) Estates.

[*Attorney General v. Davey*, 6 Law J. Dig. 136; reversed 4 De Gex & J. 136.]

Land was vested in a trustee upon trust out of the rents and profits to maintain buildings, and on the

breaking out of the plague, and for no other intent and purpose whatsoever, to permit the parish officers of four parishes to apply and convert the buildings to the use of the infected poor inhabitants during their sickness, and no longer, and the land as a burial-ground for the dead:—Held, that the property was subject to an immediate and permanent charitable trust to maintain the buildings ready for use in case of a plague, and that in the mean time there was no resulting trust in the donor or his heirs, either for use, occupation, or the reception of surplus rents, although the epidemic was casual in its visitation, and had not appeared for 180 years. *Attorney General v. Craven*, 25 Law J. Rep. (N.S.) Chanc. 291; 21 Beav. 392.

Held, also, that the buildings might until the appearance of the plague be used as an hospital. *Ibid.*

The gift of a piece of land to apply the rents for the repair, &c. of the parish church is in its purpose indivisible, and a new ecclesiastical district carved out of that parish and another can claim no portion of the rents or any subdivision of the charity estate. *Attorney General v. Love*, 26 Law J. Rep. (N.S.) Chanc. 539; 23 Beav. 499.

The exclusive advantages to be derived from the rents will attach themselves to a new church substituted for the original parish church. *Ibid.*

The Court of Chancery has jurisdiction to alien the real estate of a charity, and it can do so upon an application under Sir S. Romilly's Act. *Re Ashton Charity*, 22 Beav. 288.

Trustees of a charity authorized to grant building leases for 600 years, such being the custom of the neighbourhood, and it appearing beneficial. *In re Cross's Charity*, 27 Beav. 592.

An improvident lease was granted by a charitable corporation to a trustee for the master:—Held, after twenty years' enjoyment under it, that the rights of the Attorney General to question its validity was barred by the Statute of Limitations (3 & 4 Will. 4. c. 27). *Attorney General v. Payne*, 27 Beav. 168.

The decision in *Attorney General v. Wyggeston Hospital* (12 Beav. 113) questioned by V. C. Kindersley. *Ibid.*

(d) Overplus Income.

In 1652 a testator gave to the mayor and corporation of the town of B for ever an estate (which he described as producing 47*l.* a year), on trust to pay to the lecturer of the town of B 10*l.* a year, and to the schoolmaster of the said town 10*l.* a year, and to the testator's sister for her life 20*l.* a year, and after her decease the said 20*l.* were to be paid to three poor scholars of the town of B for their maintenance at the University of Cambridge; to each one of them the sum of 6*l.* 13*s.* 4*d.* But if there should not always be three poor scholars of the town of B at the University who should stand in need of that maintenance (for his will was, that no son of any alderman, or of any other of sufficient ability to maintain his son at the University, should be capable of that maintenance), he willed that, in the interim, so much as could be spared of the said 20*l.* (no poor scholar having above 6*l.* 13*s.* 4*d.* yearly) should be distributed amongst the poorest people of the town, and while the taxes for the maintenance of the army of the Commonwealth should continue, "what the mayor, &c. could not spare out of the overplus of rent, viz.

7L," should be deducted out of the 20l. given to the lecturer and schoolmaster, so that his sister should always have her 20l. yearly. An increase in the rents took place:—Held, that, subject to the specified charges, the increased rents went to the mayor and corporation. *The Mayor, Aldermen and Burgesses of Beverley v. the Attorney General*, 27 Law J. Rep. (n.s.) Chanc. 66; 6 H.L. Cas. 310: reversing 24 Law J. Rep. (n.s.) Chanc. 374.

If lands are given to a corporation, subject to certain specified charges for charitable purposes, the increased rents will belong to the donees of the lands. *Attorney General v. the Dean and Canons of Windsor*, 27 Law J. Rep. (n.s.) Chanc. 320; 24 Beav. 679: affirmed, 30 Law J. Rep. (n.s.) Chanc. 529; 8 H.L. Cas. 369.

Where property is given for charitable purposes which do not exhaust the whole income, one rule is that this *prima facie* is an indication of an intention to benefit the donee. *Attorney General v. Trinity College, Cambridge*, 24 Beav. 383.

In charity cases the contemporaneous acts of a donor are of importance for the purpose of putting a construction upon the instrument of gift, but the contemporaneous acts of the donee are only valuable as showing the intention and view of the donee in accepting the gift. *Ibid.*

When property is given for charitable objects which do not exhaust the whole income, and the question is as to the right of the donee to the surplus, the case is varied when the donee is a charity from that where the donee is a trading corporation. *Ibid.*

In 1858, a testator devised real estates, which he described as of "the clear yearly value of fourscore pounds or thereabouts," to Trinity College, Cambridge, "to their only proper use and behalf," to the intent following, "with part of the rents," to keep, find and maintain three grammar schools, and pay every master 13l. 6s. 8d., and "with part of the rents keep, &c. a chaplain, and pay him 13l. 6s. 8d.," and he directed other charitable payments. At the testator's death the rents exceeded the specific payments by 1l. 6s. 8d. The rents having greatly increased, the Court on a critical examination of the will came to the conclusion that after providing for the charitable objects the college was entitled to the surplus rents. *Ibid.*

A testatrix made provision for six almswomen and for other charitable objects, and she gave the residue of the income to the six almswomen. The income having greatly increased,—Held, that the almswomen were not entitled to the surplus income, as the effect would be to defeat the intention by making them cease to be almswomen.—Held also, that the other objects were not entitled thereto, but that it was applicable to charity generally, and that the foundation of a school was a proper object to apply it to. *Re Ashton's Charity*, 27 Beav. 115.

(F) JURISDICTION OF COURT OF CHANCERY OVER.

A testator bequeathed a sum to Sir E. A. upon trust to lay it out in lands for the endowment of a school, and he appointed that Sir E. A. and his heirs "should be feoffees in trust and patrons and protectors of the said school for the electing a fit and sufficient schoolmaster"—Held, that the right of patronage was alienable. *Attorney General v. Boucherett*, 25 Beav. 116.

Observations as to the jurisdiction and authority of the Court to alter or modify charitable trusts. *Ibid.*

When the founder of a charity commits the administration of it to a man and his heirs, the Court cannot interfere with their discretion so long as they perform their trust properly. *Ibid.*

In charity informations where the case is doubtful, the Attorney General should require a trustee to be named to be answerable for the costs even in cases certified by the Charity Commissioners. *Ibid.*

Power of the Attorney General to sanction a compromise in charity cases. *Ibid.*

Presumption of legitimacy under the circumstances of a person named in a will of 1776 as the testator's son. *Ibid.*

(G) PLEADING AND PRACTICE.

The rector and overseers of a parish conveyed to purchasers for value (subject to a perpetual rent-charge) some land belonging to the parish, and the income from which was applied to the purposes of the relief of the poor. Above sixty years elapsed, and then the Attorney General filed an information to have the deed of conveyance cancelled:—Held, that the Attorney General in such a suit was merely acting for the interests of the parishioners; that they would, under the 3 & 4 Will. 4. c. 27, be barred as against a purchaser for value; and that he, suing in their interest as against such a purchaser, was therefore barred. *The President and Scholars of Magdalen College, Oxford, v. the Attorney General*, 26 Law J. Rep. (n.s.) Chanc. 620; 6 H.L. Cas. 189: reversing 53 Law J. Rep. (n.s.) Chanc. 844; 18 Beav. 223.

(H) COSTS.

One reference having been made to settle a scheme as to twenty charities, the costs were paid out of an existing available fund belonging to three of them; but it was ordered that they should be ultimately borne, rateably, by the twenty charities. *Re the Stafford Charities*, 26 Beav. 567.

(I) GRAMMAR SCHOOL.

Masters of free grammar schools are not, as a general rule, allowed to take boarders. Every scheme for that purpose will be considered with reference to the circumstances which surround each case; but no proposal will be sanctioned which may by any means contravene the objects of the original foundation. *In re the Bristol Free Grammar School*, 29 Law J. Rep. (n.s.) Chanc. 514; 28 Beav. 161.

A testator gave the produce of real estate for the maintenance of three boys at one of the universities for three years, who had been brought up at the petty school at Wakefield, which he had founded, until they should be fit to go to the Free School, and from thence to the University. A scheme for the management of the charity declared that the boys should be chosen first from those born in the town of Wakefield, who shall have been three years at the Free School, then from boys born in the parish who have been three years at the Free School, and then from other boys who have been three years at the Free School. Upon a complaint by a candidate that an undue election had been made,—Held, that the three years were not necessarily those next preceding the day of

election, but that a boy born in the town who had been for three years at the Free School was eligible though he had left for five years, and had gone to Shrewsbury School, from which he was elected; and an application to set aside the election was refused, with costs. *In re Storie's University Gift*, 29 Law J. Rep. (N.S.) Chanc. 824.

A charitable foundation established in 1701 for the support and education of boys, was fixed by the founder in the middle of the city of Bristol. The Court on its appearing beneficial, sanctioned its removal to the vicinity outside the city, and authorized the purchase of a site for that purpose, notwithstanding a great opposition. *Re Colston's Hospital*, 27 Beav. 16.

The Court under the circumstances refused to sanction the introduction of a clause into a scheme authorizing the master of a grammar school to take boarders. *Attorney General v. the Corporation of Gloucester*, 28 Beav. 438.

CHARTER.

[See MANDAMUS.]

CHEATING.

[See FALSE PRETENCES.]

If a person knowingly sell as an original a copy of a picture with the painter's name imitated upon it, and by means of the imitated name knowingly and fraudulently induce another to buy and pay for the picture as a genuine work of the artist, he may be indicted for a cheat at common law by means of a false token: but he cannot be indicted for forging or uttering the forged name of the painter, for the crime of forgery must be committed with reference to some document or writing, and does not extend to the fraudulent imitation of a name put on a picture merely as a mark to identify it as the painter's work. *The Queen v. Gloss*, 27 Law J. Rep. (N.S.) M.C. 54; Dears. & B. 460.

CHEQUE.

[See BILLS OF EXCHANGE AND PROMISSORY NOTES.]

CHURCH.

[See RATE; POOR-RATE.]

[Parishioners and others, forming a numerous class, enabled to sell advowsons held by or in trust for them, and to apply the proceeds in providing parsonage-houses, augmenting small livings, and to other beneficial purposes; and other powers given to such persons by 19 & 20 Vict. c. 50.—The powers of the Church Building Commissioners transferred to the Ecclesiastical Commissioners for England by 19 & 20 Vict. c. 55.—The act to facilitate the management and improvement of episcopal and caputular estates in England continued by 19 & 20 Vict. c. 74.—The provisions of 6 & 7 Vict. c. 37, making better provision for the spiritual care of populous parishes, extended and further provision

made for the formation and endowment of separate and distinct parishes by 19 & 20 Vict. c. 104.—The 14 & 15 Vict. c. 104, concerning the management of episcopal and caputular estates in England, as amended by 17 & 18 Vict. c. 116, continued by 20 & 21 Vict. c. 74.—Further amendment of the law relating to the erection and endowment of churches, chapels, and perpetual curacies in Ireland by 21 & 22 Vict. c. 59.—Certain acts and parts of acts which relate to the observance of the 30th of January and other days repealed by 22 Vict. c. 2.—The act concerning the management of episcopal and caputular estates in England continued and amended by 22 & 23 Vict. c. 46.—Certain acts relating to the temporalities of the Church in Ireland further amended by 23 & 24 Vict. c. 50.—Endowment and augmentation of small benefices in Ireland promoted by 23 & 24 Vict. c. 72.—The acts relating to the Ecclesiastical Commissioners, and the act concerning the management of episcopal and caputular estates in England, further amended by 23 & 24 Vict. c. 124.—Better provision for the union of contiguous benefices in cities, towns and boroughs, made by 23 & 24 Vict. c. 142.]

(A) PRESENTATION AND INSTITUTION.

(B) APPOINTMENT AND DISMISSAL OF CLERK.

(C) DISTRICT CHURCH.

(A) PRESENTATION AND INSTITUTION.

It is a prerogative of the Crown to present to a benefice in England which becomes vacant by the promotion of the incumbent to a bishopric in England. But the Crown has no prerogative right to present to a benefice in England, becoming vacant by the promotion of the incumbent to a colonial bishopric within the Queen's dominions which has been erected and constituted solely by the exercise of the prerogative of the Crown. *The Queen v. the Provost and Fellows of Eton College, and the Rev. John Alexander Clarke*, 27 Law J. Rep. (N.S.) Q.B. 132; 8 E. & B. 610.

Quere—Whether the prerogative of the Crown extends to a benefice in England which becomes vacant by the promotion of the incumbent to a bishopric in Ireland, or to a colonial bishopric constituted under the powers of an act of parliament. *Ibid.*

R, a clerk in holy orders, who had lately held a benefice and cure of souls in the diocese of M, was presented to a vacant living in the diocese of E. R, not having been ordained by the Bishop of E, and being wholly unknown to him, was required by the latter, before institution, to produce a testimonial from the Bishop of M as to his, R's, "honest conversation, ability and conformity to the ecclesiastical laws of England." R having failed to procure such testimonial within due time, the Bishop of E collated his own clerk by lapse:—Held, that the Bishop of E had no right to refuse to institute R on the ground that he had not produced such testimonial from the Bishop of M. *Marshall v. the Bishop of Exeter*, 29 Law J. Rep. (N.S.) C.P. 354; 7 Com. B. Rep. N.S. 655.

The 48th canon, A.D. 1603, has no application to the institution of clerks to livings, but only to the service of cures, and in churches and chapels by

curates and ministers who are not the incumbents. *Ibid.*

Semble, that the Canons, A.D. 1603, do not bind the laity by their own force and authority, nor are in any case binding on the patrons of livings seeking to enforce their common law rights. *Ibid.*

In *quare impedit*, the ordinary cannot counterplead the patron's title to present, by setting up title in a third person; and he does so as much by setting up a right in the Queen to present by lapse, as by any other title. *Storis v. the Bishop of Winchester*, 17 Com. B. Rep. 653.

The advowson of a parish in the metropolis was vested in trustees, in trust for the parishioners and inhabitants. The trust had been recognized by judicial decisions of the Court of Chancery. The mode of appointing a clergyman was by an election at a poll, and the successful candidate was then presented to the bishop. By the act, 18 & 19 Vict. c. 120, "for the better Local Management of the Metropolis," all the "duties, powers and authorities" then vested in any body other than the vestry were vested in the vestry under that act; and by the act, 19 & 20 Vict. c. 112, to amend the former act, "all the duties, powers and privileges" which might then be performed by any open or elected vestry were to be deemed to be transferred to the vestry appointed under the former act. After the passing of these acts the new vestry elected a clergyman. A bill was filed by two parishioners and inhabitants, on behalf of themselves and all other parishioners and inhabitants, to restrain the trustees and the vestry from presenting him to the Bishop:—Held, overruling a decision of one of the Vice Chancellors, that neither of the acts had the effect of interfering with the right of appointment under the deed; and that the duties, powers and privileges mentioned in the amendment act related to the same matters as the duties, powers and authorities mentioned in the original act, and did not apply to the right of presentation to a church. *Carter v. Croyley*, 26 Law J. Rep. (N.S.) Chanc. 246.

A testator devised and bequeathed all his real and personal estates to trustees, upon trust to sell the same as soon as conveniently might be after his decease, except his advowson of the rectory of C and certain hereditaments in the same parish, the sale of which he directed should be postponed until after the death of his eldest son W, who was then incumbent. The proceeds of the sale were to be held in trust for his children therein named, as tenants in common.—Held, (affirming the decision of the Master of the Rolls,) that the right of presentation previous to the sale passed by the will and did not descend to the heir of the testator. *Johnstone v. Baber*, 25 Law J. Rep. (N.S.) Chanc. 899; 6 De Gex, M. & G. 439; 22 Beav. 562.

Held, also (overruling a decision of the Master of the Rolls), that if the children could not agree whom to nominate for presentation by the trustees, the question was to be decided by lot, and that, being tenants in common, they were not entitled to present successively according to seniority, as in the case of co-parceners. *Ibid.*

(B) APPOINTMENT AND DISMISSAL OF CLERK.

A chapel at P was built by private persons. By the statute 28 Geo. 3. c. 10. certain persons were appointed trustees for the purpose of pulling down

and rebuilding the church of St. James's, Clerkenwell. By the statute 30 Geo. 3. c. 69. the said trustees were authorized to purchase the chapel at P so that it might be in the nature of a chapel-of-ease to the church, and, amongst other things, to provide for the care of the chapel, so that divine service should be performed therein, and to pay the officiating minister, clerk and organist of the chapel reasonable stipends, all of whom were to be nominated and appointed by the minister of the church for the time being. The defendant C and the plaintiff were accordingly appointed respectively as minister and clerk by F, the minister of the church. By the statutes 59 Geo. 3. c. 134. s. 16. and 2 & 3 Vict. c. 49. s. 3, in April 1854, a district was assigned to the chapel by an Order in Council. By the 29th section of 59 Geo. 3. c. 134. the clerk of every church and chapel erected, built or acquired or appropriated under the provisions of that act or of the 58 Geo. 3. c. 45. was to be annually appointed by the minister of the church or chapel. The plaintiff had never received from the defendant C any express appointment as clerk, but had always served in that capacity up to August 1855, when he received a notice of dismissal from the defendant C. On the 28th of September the plaintiff went to the vestry to discharge his duties as clerk, when the defendant C ordered him to leave, and, on his refusal, had him turned out of the vestry-room:—Held, in an action by the plaintiff for an assault, for turning the plaintiff out of the vestry-room, that the power of annual appointment to the office of clerk was in the defendant under the 59 Geo. 3. c. 134. s. 29, and that the continuance of the plaintiff in the office in successive years without an express re-appointment should be construed to amount to a re-appointment in each year. *Jackson v. Courtenay*, 27 Law J. Rep. (N.S.) Q.B. 37; 8 E. & B. 8.

Held, also, that the defendant had no power to dismiss the plaintiff from office during the year of office without cause. *Ibid.*

Held, also, that the possession of the vestry-room was in the defendant, so as to make the entry and remaining of the plaintiff, after a prohibition of the defendant, a wrong which justified the defendant in removing the plaintiff. *Ibid.*

(C) DISTRICT CHURCH.

Where a chapel (with a cemetery) has been constituted a district chapel of ease (under 59 Geo. 3. c. 134. s. 16), and the consecration deed has provided that the curate and clerk may take for themselves such fees for baptisms and burials, &c. as the vicar and clerk of the mother church have taken, and also pay to the vicar and parish clerk the like fees, and the chapel is afterwards created a "district chapel" by Order in Council, there being nothing in the later Church Building Acts (2 & 3 Vict. c. 49. and 14 & 15 Vict. c. 97.) to take away the right of the vicar and parish clerk to the like fees received for baptisms and burials, &c. at such chapel,—Held, that, whether or not, as between the chapel clerk and the parishioners, he would have a right to take double fees under the consecration deed, he is bound to pay to the parish clerk the old accustomed fees, in all cases in which the like sums are received as fees at the chapel or cemetery; and the parish clerk may recover such sums from the chapel clerk as money had and

received. *Aulton v. Roberts*, 26 Law J. Rep. (N.S.) Exch. 380; *nom. Roberts v. Aulton*, 2 Hurl. & N. 432.

The church of St. Bartholomew, Moor Lane, was built within the limits of the parish of St. Giles, Cripplegate, and by an Order in Council, made in 1850, under the Church Building Act, 59 Geo. 3. c. 134, a particular district was assigned to it within such parish, with authority to publish banns of marriage, and to solemnize marriages, baptisms, churchings and burials therein, the fees for which were to be paid to the incumbent:—Held, that the church of St. Bartholomew, Moor Lane, being a church to which a district had been assigned within the limits of St. Giles, Cripplegate, was capable of receiving, under 1 & 2 Will. 4. c. 45. s. 21, an annexation, by the Vicar of St. Giles, Cripplegate, of part of his annual revenues, although the district had for ecclesiastical purposes become by virtue of 19 & 20 Vict. c. 104. s. 14. a distinct and separate parish. *Hughes v. Denton*, 28 Law J. Rep. (N.S.) M.C. 140; 5 Com. B. Rep. N.S. 765.

By a local act, the tithes of the parish of St. Giles, Cripplegate, were extinguished, and a certain annuity payable quarterly was secured to the vicar in lieu of such tithes:—Held, that the substitution of such an annuity for tithes did not prevent the legal annexation of a portion of such annuity by the vicar, under 1 & 2 Will. 4. c. 45. s. 21, as that section authorizes the annexation of any part of the tithes or "other annual revenues" of the vicarage. *Ibid.*

By the said local act the said vicar of St. Giles, Cripplegate, was enabled to enforce payment of the annuity in lieu of tithes by a summary proceeding before a Justice of the Peace:—Held, that after an annexation of a portion of such annuity had been made to the District Church of St. Bartholomew, Moor Lane, under 1 & 2 Will. 4. c. 45. s. 21, the incumbent of such district church had the like power of enforcing payment, by summary proceeding, of the portion so annexed. *Ibid.*

CHURCH RATE.

[See RATE.]

CHURCHWARDENS AND OVERSEERS.

(A) ELECTION OF.

(B) RIGHTS AND LIABILITIES.

(A) ELECTION OF.

On the 6th of April notice was posted on the church-door for a vestry meeting to appoint churchwardens on the 10th of April, which was Easter-Tuesday. On that day A and B were elected churchwardens. Doubts having arisen as to the sufficiency of the notice, it not having been published in church on the Sunday, another notice was duly given and read during service on the following Sunday that a vestry meeting would be held to elect churchwardens on the ensuing Thursday, on which day A and B were again elected:—Held, that A and B were duly elected churchwardens, as one or the other of the two elections was valid. *In re*

the Churchwardens of St. Faith, 25 Law J. Rep. (N.S.) Q.B. 168.

(B) RIGHTS AND LIABILITIES.

There is no general unqualified right on the part of the ratepayers to inspect and take extracts from the churchwardens' books of accounts. To entitle a ratepayer to a mandamus to compel such inspection some special and public ground must be shewn. Therefore, where the affidavit stated that the application had been made *bond fide*, and for the purpose of enabling the applicant and other parishioners and ratepayers to take part in the proceedings of the vestry, and that he and they might properly understand and act upon the business to be brought before it, and not for any unlawful or improper purpose or object,—Held, that a mandamus commanding the churchwardens to permit the applicant to inspect and take extracts from the churchwardens' books of accounts ought not to be granted. *Ex parte Briggs*, 28 Law J. Rep. (N.S.) Q.B. 272.

The defendant, who was the vestry clerk of a parish of which the plaintiffs were the two churchwardens, had for several years, as such vestry clerk, collected both the church and poor rates, and applied part of the former to parochial purposes. Such application of the church-rate had been the practice in the parish before the defendant was such vestry clerk, and one of the plaintiffs knew of it and sanctioned such application:—Held, that the plaintiffs could not recover back from the defendant the proceeds of a church-rate which had been so applied, as the inability of one of the plaintiffs to sue affected the right of the other, the action being by them in their individual character, and not as churchwardens. *Cooper v. Law*, 28 Law J. Rep. (N.S.) C.P. 282; 6 Com. B. Rep. N.S. 502.

Quære, whether, from the above facts, an employment of the defendant as the plaintiffs' agent to collect and pay over the church-rate could be implied. *Ibid.*

One of the plaintiffs being a member of the vestry, the parish books, though relating to vestry meetings and transactions before he was such member, were held to be admissible in evidence against him as to the practice of such parish. *Ibid.*

CINQUE PORTS.

[The Cinque Ports Act, 18 & 19 Vict. c. 48. s. 5, amended by 20 & 21 Vict. c. 1.

CLERGY.

[The Retirement of the present Bishops of London and Durham provided for by 19 & 20 Vict. c. 115.—Ecclesiastical Persons in Ireland enabled to grant Building Leases of Glebe Lands in certain Cases, by 20 & 21 Vict. c. 47.—Certain temporary Provisions concerning Ecclesiastical Jurisdiction in England continued by 21 & 22 Vict. c. 50; and 22 & 23 Vict. c. 45.]

(A) PROCEEDINGS AGAINST UNDER THE CHURCH DISCIPLINE ACT.

(B) LIABILITY FOR DILAPIDATIONS AND REPAIRS.

(A) PROCEEDINGS AGAINST, UNDER THE CHURCH DISCIPLINE ACT.

An appeal lies to the Court of Arches, under section 15. of the Church Discipline Act, 3 & 4 Vict. c. 86, from a judgment of a diocesan Court, presided over by the Archbishop of Canterbury, under section 24. of the same act, in consequence of the bishop of the diocese being the patron of the preferment held by the party proceeded against. *The Queen v. the Judge of the Court of Arches, ex parte Denison*, 26 Law J. Rep. (n.s.) Q.B. 178; 7 E. & B. 315.

The 24th section of the 3 & 4 Vict. c. 86. puts the archbishop of the province in the place of the bishop, for the purpose of doing any act or exercising authority under that statute, where the bishop is the patron of the preferment held by the clerk proceeded against. In such cases the archbishop must proceed in the same manner as the bishop would have proceeded, and therefore he is bound under section 9. to require the accused party to appear before him at a place within the diocese of the bishop by whom the case has been sent by letters of request. *The Queen v. the Archbishop of Canterbury*, 25 Law J. Rep. (n.s.) Q.B. 346; 6 E. & B. 546.

Upon an appeal to the archbishop, under section 98. of 1 & 2 Vict. c. 106, against the revocation, by the bishop, of a curate's licence, such curate has a right to be heard if he wish for a hearing. *The Queen v. the Archbishop of Canterbury*, 28 Law J. Rep. (n.s.) Q.B. 154; 1 E. & E. 545.

Therefore, where in such a case the archbishop confirmed the revocation of a licence, upon the facts which appeared upon the petition of appeal, without giving a hearing to the curate, though a hearing was requested, this Court granted a mandamus to compel the archbishop to inquire into and hear the appeal, and decide the merits thereof. *Ibid*.

G, a clerk in holy orders, residing in the city and diocese of O, and having no connexion with the parish of W and diocese of C (in which W was situate), applied to the Bishop of C to issue a commission, under the Church Discipline Act (3 & 4 Vict. c. 86.) s. 3, to inquire into certain charges against the rector of W of offences against the laws ecclesiastical. The Bishop, having made inquiries, and thinking it inexpedient, refused to issue a commission; G having obtained a rule nisi for a mandamus to the Bishop commanding him to issue a commission, the Court discharged the rule—*Wightman, J.* holding that, under the above section, it was in the discretion of the Bishop whether or not he would issue a commission; *Lord Campbell, C.J.* and *Erie, J.* concurring in this opinion; *Hill, J.* doubting as to this, but holding that, as it was in the discretion of the Court to grant the writ, they ought not to grant it on the application of a mere stranger to the parish and diocese. *The Queen v. the Bishop of Chichester*, 29 Law J. Rep. (n.s.) Q.B. 23.

(B) LIABILITY FOR DILAPIDATIONS AND REPAIRS.

A rector erected in the garden belonging to a rectory-house two hothouses. They consisted of a brick wall, two feet from the ground, upon which were placed the frames and glass-work, the frames

being bedded in the mortar on the wall. The glass-work was made to slide up and down by pulleys, and was in no way fixed. After the death of the rector, his executors removed the frame and glass-work, doing no damage beyond that necessarily done to the mortar in the removal; but the succeeding rector took possession of them under a claim of right, and the executors thereupon brought an action to recover their value:—Held, that the deceased rector in his lifetime might have removed the frame and glass-work, and, *semble*, the brick wall also, or might have left the same out of repair, without rendering his personal representatives liable to dilapidations. *Martin v. Roe*, 26 Law J. Rep. (n.s.) Q.B. 129; 7 E. & B. 237.

Held, also, that the frame and glass-work being removable without injury to the freehold, passed as a personal chattel to the executors, and were removable by them within a reasonable time. *Ibid*.

An incumbent may borrow money upon mortgage under the provisions of the act, 17 Geo. 3. c. 53, for the purpose of enlarging and adding to the parsonage-house, as well as for "building, rebuilding and repairing," if such additions are considered necessary; and there is no objection to the incumbent advancing the money himself upon mortgage for such a purpose. *Boyd v. Barker*, 28 Law J. Rep. (n.s.) Chanc. 445; 4 Drew. 582.

A vicar choral of the Cathedral Church of Wells is a corporation sole, and therefore liable to an action for dilapidations of the house which he held as vicar choral, at the suit of his successor. *Gleaves v. Parfitt*, 29 Law J. Rep. (n.s.) C.P. 216; 7 Com. B. Rep. N.S. 838.

Held, also, by *Erie, C.J.*, that even if such vicar choral be not a corporation sole, yet he still takes such a sole estate in the house as to make him liable to the action. *Ibid*.

CLERK OF THE PEACE.

[See SESSIONS.]

COAL.

[Coal Club, see FRIENDLY AND OTHER SOCIETIES. Coal Mine, see LEASE—MINE. And see COLLIERY.]

COAST GUARD.

[The government of the Coast-Guard transferred to the Admiralty by 19 & 20 Vict. c. 83.]

COIN.

Having a large quantity of counterfeit coin in possession, many of each sort being of the same date and made in the same mould, and each piece being wrapped in a separate piece of paper, and the whole distributed in different pockets of the dress, is some evidence that the possessor knew that the coin was counterfeit and intended to utter it. *The Queen v. Jarvis*, 25 Law J. Rep. (n.s.) M.C. 30; Dears.C.C. 552.

The prisoner, with the intent of coining counterfeit half-dollars of Peru, procured dies in this country for stamping and imitating such coin. He was apprehended before he had obtained the metal and chemical preparations necessary for making counterfeit coin:—Held, that the procuring the dies was an act in furtherance of the criminal purpose sufficiently proximate to the offence intended, and sufficiently evidencing the criminal intent, to support an indictment founded on it for a misdemeanor, although the same facts would not have supported an indictment for attempting to make counterfeit coin. *The Queen v. Roberts*, 25 Law J. Rep. (n.s.) M.C. 17; Dears. C.C. 539.

The jury also found, that the prisoner intended to make only a few counterfeit coins in England, with a view merely of testing the completeness of the apparatus before he sent it out to Peru:—Held, that even to make a few coins in England with that object would be to commit the offence of making counterfeit coins within the statute. *Ibid.*

COLLIERY.

On an information, under the 18 & 19 Vict. c. 108, against one of several joint-owners of a colliery, for disobedience of the rules in section 4, after evidence had been gone into on the merits, the Justices dismissed the complaint on an objection taken by the defendant, that the proceedings should have been against all the joint-owners:—Held, first, that the decision was wrong. Secondly, that it was on a point going to the magistrates' jurisdiction only, and that this Court could, therefore, rule them to hear and adjudicate. *The Queen v. Brown*, 26 Law J. Rep. (n.s.) M.C. 183; 7 E. & B. 757.

By the 18 & 19 Vict. c. 108. s. 4, certain general rules are to be observed in all collieries by the agent and owner; by rule 1, "an adequate amount of ventilation shall be constantly produced at all collieries, so that the working places shall, under ordinary circumstances, be in a fit state for working;" and by section 11, "if a colliery be worked," and any of the general rules be neglected by the agent or owner, he is made liable to penalties:—Held, that a colliery was "being worked," although actual work was temporarily suspended from Saturday afternoon till Monday morning, and that in order to a due observance of the rule, the "adequate ventilation" ought to be kept up during those hours of suspended work. *Knowles v. Dickinson*, 29 Law J. Rep. (n.s.) M.C. 135.

COLONY AND COLONIAL LAW.

[The 15 & 16 Vict. c. 72, for granting a Representative Constitution to the Colony of New Zealand, amended by 20 & 21 Vict. c. 53.—The Legislature of Canada empowered to make Laws regulating the Appointment of a Speaker of the Legislative Council by 22 & 23 Vict. c. 10.—The 22 & 23 Vict. c. 12, repeals as regards the Colony of Victoria, and to enable other Colonial Legislatures to repeal, certain Provisions of the Imperial Acts, 54 Geo. 3. c. 15, and 5 & 6 Will. 4. c. 62.—Her Majesty enabled to confirm an Act passed by the Legislature of Antigua,

intituled An Act to extend the Operation of the Laws of Antigua to the Island of Barbuda, by 22 & 33 Vict. c. 13.—The Act, 6 Vict. c. 13, intituled An Act to enable Her Majesty to provide for the Government of her Settlements on the Coast of Africa and in the Falkland Islands amended by 23 & 24 Vict. c. 121.—The Legislatures of Her Majesty's Possessions abroad enabled to make Enactments similar to the Enactment of the Act, 9 Geo. 4. c. 51. s. 8, by 23 & 24 Vict. c. 122.]

By an act, passed in India, a banking company at Calcutta were to be sued in the name of their secretary, and a judgment against him was to have the like effect against the property of the bank, as if recovered against all the members thereof as parties on the record; provided that if an execution issued against the property of the bank were ineffectual, execution should issue against the members successively; and if that were ineffectual, then against any person who was a member at the time the contract sued upon was entered into; but no execution was to be issued against any other person than the actual party to the suit without leave first granted in open court and notice to the person sought to be charged. The plaintiff having recovered judgment in India against the secretary for a breach of contract entered into by the company there, took no further proceedings in India, but sued the defendant (who was a member of the company at the time the contract was entered into and judgment recovered) in this country on the judgment and on the contract:—Held, that the plaintiff was entitled to recover on both causes of action. *Kelsall v. Marshall*, 26 Law J. Rep. (n.s.) C.P. 19; 1 Com. B. Rep. N.S. 241.

It is no answer to a rule for a mandamus to examine witnesses, that it is moved whilst issues in law are pending for argument. *Ibid.*, 1 Com. B. Rep. N.S. 266.

A plea of judgment recovered in an action properly brought by the plaintiff against the defendant in one of the consular courts abroad, established under the 6 & 7 Vict. c. 94, and payment of the sum so recovered is a good plea in bar to a subsequent action in England for the same cause of action. *Barber v. Lamb*, 29 Law J. Rep. (n.s.) C.P. 234; 8 Com. B. Rep. N.S. 95.

COMMISSION TO SET OUT BOUNDARIES.

By agreement dated in 1685, the Earl of P, owner of the R estate, reciting that certain lands belonging to the poor of the parish, containing six acres and a half, lay dispersed within his estate of R, agreed to pay to the churchwardens and overseers a yearly rent of 6*l.* for such lands, and to set out sufficient land of a better value for the performance thereof, which he should either tie for the said yearly rent, or otherwise assure and convey to such persons as should be nominated feoffees in trust for the same. The R estate consisted of 350 acres, and the successive owners continued to pay the yearly rent of 6*l.*, the conveyances assuming the whole estate to be subject to the payment of the 6*l.* In course of time the estate became greatly subdivided, and in 1786 the remaining portion, consisting of thirty-one acres, was conveyed to the person under whom the defendant derived title. The conveyance of 1786 recited that the annual pay-

ment of 6l. was due to the parish of P, and it contained a covenant by the purchaser to indemnify the owners of the other portions of the R estate against the payment thereof. The 6l. were regularly paid by the defendant and his predecessors, and the receipt for the money was expressed to be "for rent," or "for rent of parish lands." Upon an information by the churchwardens and overseers of the parish, praying for a commission to set out the boundaries of the six acres and a half, &c.,—Held, upon appeal, reversing the decision of the Court below, that the information must be dismissed, the relators not having shewn that the portion of the R estate in the possession of the defendant included the six acres and a half mentioned in the agreement of 1636. *Attorney General v. Stephens*, 25 Law J. Rep. (n.s.) Chanc. 888; 6 De Gex, M. & G. 111: reversing 24 Law J. Rep. (n.s.) Chanc. 694; 1 Kay & J. 724.

Held, also, that though the defendant had from time to time paid the 6l. "for rent of parish land," he was not estopped thereby from saying he did not hold the land; but that he was at liberty to refer to the conveyances to himself and his predecessors in title, to shew the *animus solvendi* and to rebut the presumption arising from the form of the receipts for such payments. *Ibid*.

Testatrix by her will appointed the manor of W, (over which she had an equitable power of appointment) to uses under which the plaintiff became entitled as tenant in tail in possession, and devised her residuary real estate to trustees upon trust to sell; the trustees sold (*inter alia*) a field, part of which was shewn by the abstract to be parcel of the manor, and procured the legal estate in the whole to be conveyed to the purchaser:—Held, that notwithstanding the fault of the confusion lay with the party through whom the plaintiff claimed, the plaintiff was not precluded from establishing in this Court a claim to his portion of the land, and to a proportional part of the rents from the time when he came of age. And an inquiry was directed in what part of the field the plaintiff's portion was situate. *Hicks v. Hastings*, 3 Kay & J. 701.

COMMISSIONERS OF SUPPLY.

[All legally qualified persons in Scotland constituted Commissioners of Supply without being named in an Act of Supply by 19 & 20 Vict. c. 93.]

COMMON.

In replevin for taking the plaintiff's cattle, to an avowry damage feasant, the plaintiff pleaded in bar, under the stat. 2 Will. 4. c. 71, a user for thirty years as of right, and also for sixty years as of right, of common of pasture over the *locus in quo*. At the trial, the fact of user by the plaintiff and other occupiers of his farm was proved; but it appeared that S, from whom the plaintiff and the defendant derived their title, was for more than sixty years before, and until within sixty years, seised in fee of the plaintiff's farm, and during the same period had an estate for life in the land over which the right of common was claimed, but never had actual possession of the dominant tenement except by tenants. More than thirty years

before the action he joined a remainderman, in a conveyance of the servient tenement, to make a tenant to the *præcipe*, for the purpose of suffering a recovery, in order to raise money on mortgage; but no recovery was suffered, and S continued possessed until twenty-eight years before the action, when the property was sold, and all community of title ceased:—Held, that although there was no unity of seisin to extinguish an easement or prevent its existence, the facts precluded an enjoyment *as of right* within the meaning of the statute. *Warburton v. Parke*, 26 Law J. Rep. (n.s.) Exch. 298; 2 Hurl. & N. 64.

By section 13. of 15 & 16 Vict. c. 79, power is given to Justices upon application by the valuer acting in the matter of an inclosure, to order that possession shall be given to him of any encroachment or inclosure which, under the 8 & 9 Vict. c. 118, "shall be deemed to be part of the land subject to be inclosed":—Held, that the Justices are not precluded from inquiring into the circumstances of the encroachment or inclosure by reason of the piece of land sought to be recovered being included in the map and provisional order made by order of the Commissioners. Therefore, in such a case the Justices were held to be justified in refusing to order possession to be given up to the valuer, where they found that the land had been inclosed more than twenty years next preceeding the day of the first meeting for the examination of claims; for that by section 52. of the last-named act such land would be deemed and taken to be an ancient inclosure over which the valuer and Commissioners would have no jurisdiction. *Chilcote v. Youldon*, 29 Law J. Rep. (n.s.) M.C. 197.

COMPANY.

[For Banking Companies, see **BANKER AND BANKING COMPANY**—Canal Companies, see **CANAL AND CANAL COMPANY**—Mining Companies, see **MINE**. And see **DAMAGES**—**LANDS CLAUSES CONSOLIDATION ACT**—**LIBEL**—**NEGLIGENCE**—**PLEADING**—**PRACTICE**—**PRODUCTION AND INSPECTION OF DOCUMENTS**—**WILL, Probate Duty**.]

[The Constitution and Incorporation of Joint-Stock Companies and other Associations, and their Management, Administration and Winding-up, provided for by 19 & 20 Vict. c. 47.—The Joint-Stock Companies Act, 1856, amended by 20 & 21 Vict. c. 14.—The 7 & 8 Vict. c. 111, for facilitating the winding up the Affairs of Joint-Stock Companies unable to meet their pecuniary Engagements, and also the "Joint-Stock Companies Winding-up Acts, 1848 and 1849," amended by 20 & 21 Vict. c. 78.—"The Joint-Stock Companies Act, 1856," amended by 20 & 21 Vict. c. 80.—The Joint-Stock Companies Act, 1856 and 1857, and the Joint-Stock Banking Companies Act, 1857, amended by 21 & 22 Vict. c. 60.—The Law relating to Cheap Trains amended, and the Exercise of certain Powers by Canal Companies being also Railway Companies, restrained by 21 & 22 Vict. c. 75.—Railway Companies enabled to settle their Differences with other Companies by Arbitration, by 22 & 23 Vict. c. 59.—The 23 & 24 Vict. c. 97. amends and makes perpetual the Railways Act, Ireland (1851).]

1.—RAILWAY AND OTHER INCORPORATED COMPANIES.

- (A) STATUTES, CONSTRUCTION OF.
- (B) CHARTER OF INCORPORATION AND SUBSCRIPTION CONTRACT.
- (C) SHARES.
 - (a) Register and Registration of Shareholders.
 - (b) Liability of Shareholders to pay up their Shares.
 - (c) Transfer of Shares.
 - (d) Forfeiture of Shares.
- (D) CALLS.
- (E) POWERS, DUTIES AND LIABILITIES OF COMPANIES.
 - (a) As to Shareholders generally.
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2.—JOINT-STOCK COMPANIES.

- (A) PROMOTERSHIP DEED AND MEMORANDUM OF ASSOCIATION.
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- (F) SHAREHOLDERS.
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- (D) OFFICIAL MANAGER.
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- (7) Allottee of Shares.
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- (10) Transferee of Shares.
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- (b) Extent of Liability.
- (c) Creditors' Representative.
- (L) CALLS.
- (M) PRACTICE.
 - (a) Monies abstracted from Funds of the Company.
 - (b) Service of Order.
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4.—SCIRE FACIAS AND EXECUTION AGAINST SHAREHOLDERS.

- (A) RAILWAY AND OTHER INCORPORATED COMPANIES.
- (B) JOINT-STOCK COMPANIES.

1.—RAILWAY AND OTHER INCORPORATED COMPANIES.

- (A) STATUTES, CONSTRUCTION OF.

Where purchases of land are made under the compulsory powers of an act of parliament, the purchasers on the one hand, and the vendors on the other, have a right to confine the exercise of the ownership to the specified purpose; therefore, in a case in which a company had become purchasers of land, under the powers of their act, which authorized them to construct a certain canal, and supply the same from the springs in their neighbourhood, to make and at all times to maintain a reservoir in a certain locality, and to cut a trench from the reservoir for supplying water from the reservoir to their canal and branches, and to and for no other use and purpose whatsoever, the Court, at the instance of the owner of part of the land so purchased, restrained the company from using the reservoir which had been constructed by them over such land, for the purpose of letting out pleasure-boats for hire thereon, or for the exhibition of a regatta thereon, or for any other purpose than to supply water to the canal. *Boatock v. the North Staffordshire Rail. Co.*, 25 Law J. Rep. (N.S.) Chanc. 325; 3 Sm. & G. 283.

A company, formed for the purpose of executing certain works, obtained an act, with which the Companies Clauses and the Lands Clauses Consolidation Acts were, but the Railways Clauses Consolidation Act was not, incorporated, and by which power was conferred upon them to make and maintain certain cuts and works in the line and upon the lands, delineated in certain plans and described in certain books of reference, with authority to take and use such of the said lands as might be necessary for that purpose. A proviso stated that the company should not deviate from the line of a "New Cut" laid down

in their plan beyond the limits of deviation on the plan, nor to a greater distance than 100 yards from the line. The company completed the "New Cut," and afterwards claimed a right to take, under the compulsory powers of their act, land lying within the limits of deviation, but beyond the 100 yards. The purpose of taking the land was in order therefrom to obtain materials for executing other parts of their works at a distance from the land.—Held (affirming a decision of one of the Vice Chancellors), that the company were not empowered to take lands wanted, not for the purpose of forming their works, but for the purpose of digging materials for their construction. *Bentinck v. the Norfolk Estuary Co*, 26 Law J. Rep. (N.S.) Chanc. 404.

A company was formed to establish a harbour, and the proprietors had power by their acts to borrow money and to mortgage their freehold and leasehold property, and the expected tolls, &c. Money was borrowed from private individuals, and mortgages given to secure repayment of the loans with interest. By several statutes the Exchequer Loan Commissioners were authorized to advance money to complete public works and to take mortgages as security for repayment of principal and interest; and by one of these statutes four-fifths of any individual creditors were authorized by writing to consent to give to the Commissioners priority over themselves, and such consent was to be binding on all creditors of a like description. The creditors of this harbour executed a consent of that kind, giving the Commissioners priority over themselves, first, in respect of the interest of the loan, and then (after satisfaction of the interest due to themselves) in respect of the principal. By another statute the Commissioners were empowered to enter and sell, and the purchaser was to hold the property free and discharged from all liability to the harbour proprietors, and all who claimed under them. The produce of the sale was to be applied in discharge of the claims of the Commissioners, but nothing in the statute contained was to prejudice the rights of the other creditors to any surplus. The interest on all the loans fell into arrear. The Commissioners entered and sold:—Held, that the memorandum of consent was valid and binding; and that after the Commissioners had taken from the purchase-money the amount of interest due to them, the other creditors were entitled to come on the surplus for their interest, but that no bill for any account could be sustained against the purchaser. *The South-Eastern Rail. Co. v. Jortin*, 27 Law J. Rep. (N.S.) Chanc. 145; 6 H.L. Cas. 425; reversing 24 Law J. Rep. (N.S.) Chanc. 343; 6 De Gex, M. & G. 270; 2 Sm. & G. 48.

By an act obtained by the Regent's Canal Company they were empowered to make and maintain an enlargement of a certain reservoir in the lines and upon the lands delineated in the plans of such enlargement, deposited with the clerk of the peace, shewing the lines, with a section shewing the levels thereof:—Held, that the sections, as well as the plans, were incorporated in the act, and prescribed a vertical as well as a lateral limit within which the works were to be kept. *Ware v. the Regent's Canal Co.*, 28 Law J. Rep. (N.S.) Chanc. 153; 3 De Gex & J. 212.

By act of parliament a canal company were

empowered to construct a reservoir, raising the water to a certain height. If by exercising their powers to the extreme limit, the effect would have been to cover with water other lands than those the company had taken,—*semble*, that the landowner might compel the company to purchase these lands, if the company's compulsory powers have not expired; but that if the compulsory powers have expired, the company will be restrained by injunction. *Ibid*.

Where, however, a company having power by act of parliament to raise an embankment to a certain height exceeds that height, a neighbouring landowner is not, on account of the possibility of injury to his lands, entitled to an injunction against the company; but the right to such injunction is in the Attorney General on behalf of the public. *Ibid*.

Where a local statute gave to the navigation company of a river, among other powers, a power to appoint and set out towing-paths alongside the river, but the language left it in equal doubt whether the soil of the towing-paths was to vest in the company or only the easement of the right of way for towing; though it was necessary for other purposes of the company, that the company should have the fee of certain parts of the land adjoining the river,—Held, that the company did not acquire the fee in the towing-paths, but only such a use of the soil or easement as was necessary for the purposes of the navigation. *Badger v. the South Yorkshire Railway and River Don Navigation Co. (Ex. Ch.)*, 28 Law J. Rep. (N.S.) Q.B. 118; 1 E. & E. 347.

By an act of parliament it was enacted, that it should be lawful for any shareholder who should have paid up one-half the amount of any share or shares of the G N R Company, to require each share to be converted into two half-shares, whereof the one half which should be so fully paid up should be denominated deferred half-share, and the other half of such share should be denominated guaranteed half-share; and thenceforth in respect of each whole share so divided, the whole of the interest and dividends which would in each year have accrued should be applied in or towards payment, in the first place, of interest or dividend after the rate of 6l. per cent. per annum on the amount paid upon the half-share so denominated "guaranteed," and the remainder, if any, should alone be payable to the half-share so denominated "deferred," provided that the company should not pay any other or greater amount of interest or dividend upon the two half-shares than was for the time being paid on each undivided share:—Held, upon the construction of this section, that the owners of guaranteed half-shares were entitled to be paid their 6l. per cent. in each year not only out of the dividends accruing in that year, but out of all subsequent dividends; and, therefore, if in any year the dividends were more than sufficient to pay 6l. per cent. on the guaranteed half-shares, the surplus must be applied in payment, in the first place, of all arrears due on those half-shares in respect of past deficiencies before any dividend could be declared on the deferred half-shares. *Matthews v. the Great Northern Rail. Co.*, 28 Law J. Rep. (N.S.) Chanc. 375.

The holders of the guaranteed half-shares having in a former year acquiesced in the declaration of a dividend on the deferred half-shares, whilst there was an arrear of dividend due on the guaranteed half-shares,—Held, that although they had pre-

cluded themselves from making any claim in respect of those particular arrears, they had not thereby renounced their rights in respect of subsequent arrears." *Ibid.*

An act empowering a company to contract for purposes of public advantage ought not to receive a narrow construction. Therefore, in construing a gas company's act, which, after requiring the consent of certain local Commissioners to breaking up the pavements, provided that where any consent was required and should be obtained by the company to break any pavement, to lay down pipes, or for any other purpose which might be required under the act, nothing in the act contained should (after such consent obtained, and after twenty-four hours' notice), prevent the company from breaking up the pavement for the purpose of laying down pipes, or for any other purpose which might be required under the act:—Held, that a construction, "*reddendo singula singulis*" was not the correct one, and that the power to break the pavement was not to be confined to the particular purpose to which the consent had been expressly given. *The Dover Gaslight Co. v. the Mayor, &c. of Dover*, 7 De Gex, M. & G. 545.

(B) CHARTER OF INCORPORATION AND SUBSCRIPTION CONTRACT.

The C P Company was incorporated by royal charter, one of the conditions of which was, that no person should be admitted to the building or grounds on the Lord's-day, in consideration of any money payment, whether made directly or indirectly, unless the express sanction of the legislature should have been obtained. By a private act of parliament subsequently passed, power was given to the directors of the company to agree with any proprietor absolutely entitled to shares or stock in the company, for the conversion thereof into a ticket of admission into the building and grounds for such proprietor or his nominee for life or term of years as might be determined on, provided that nothing therein contained should invalidate the charter or relieve the company from any conditions contained therein, excepting in so far as the same were thereby expressly varied. In pursuance of this act, it was proposed to give in exchange for each share a ticket entitling the owner to a certain number of admissions, and which should be available on Sundays as well as other days:—Held, that such a proposal, if carried into effect, would be an infringement of the condition in the charter, and was not authorized by the act. *Rendall v. the Crystal Palace Co.*, 27 Law J. Rep. (N.S.) Chanc. 397; 4 Kay & J. 326.

By a subscription contract each of the subscribers covenanted with the plaintiffs to the extent of his subscription, that each had subscribed the sum set opposite to his name for the purpose of establishing a company, and of applying to parliament for an act to incorporate it, and undertook that in the event of the application not being successful they would pay all the expenses incurred with a view to the establishment. The subscribers thereby acknowledged certain of the subscribers as a committee, and empowered them (*inter alia*) to manage and dispose of the capital raised in pursuance of the above covenant, and to pay and allow all such salaries and recompenses as the committee should deem right; and they also covenanted with the plaintiffs

to pay the full amount subscribed in such sums and at such place and times as should from time to time be required or appointed by the committee:—Held, that the covenant with the plaintiffs was an absolute covenant to pay the expenses of the application if unsuccessful; and that it was no answer to say, that the subscribers had not been required or appointed by the committee to pay. *Millett v. Browne*, 27 Law J. Rep. (N.S.) Exch. 256; 2 Hurl. & N. 837.

The defendant executed the subscription contract required for the purpose of getting a railway act, and by it covenanted that he had subscribed the sum set opposite to his name, for the purpose of establishing a railway company, and for enabling the company to make the railway and necessary works; and he authorized the provisional directors to abandon the scheme if they thought fit, and he covenanted to pay the sum subscribed. To an action on the covenant for not paying part of the sum subscribed, the defendant pleaded, secondly, by way of an equitable plea, that the sum sued for was in respect of a deposit to be paid on shares in the intended company, and that the directors had wholly abandoned the scheme, and the intention of applying for an act of parliament:—Held, that the plea was no answer, as it did not aver that the directors sought to recover the money for any purpose contrary to the deed, or for any other purpose than the payment of the preliminary expenses, which would be a proper application of the money under the deed. *Aldham v. Brown* (Ex. Ch.), 29 Law J. Rep. (N.S.) Q.B. 33—affirming the judgment below, 7 E. & B. 164.

The defendant pleaded, fourthly, that the company was not provisionally or completely registered at the commencement of the suit, and that the directors sought to enforce payment of a deposit on shares in the capital of the company:—Held, that the plea was bad, as the sum claimed was not a deposit prohibited from being recovered within the meaning of section 23. of the statute 7 & 8 Vict. c. 110; and as it was not alleged that the company was not provisionally registered when the contract was made and the defendant called upon to pay, it was immaterial whether the provisional registration had expired before the commencement of the suit. *Ibid.*

The defendant further pleaded, fifthly, that the company had never obtained a certificate of complete registration, and that the sum sought to be recovered was a call in respect of shares in the intended company:—Held, by the majority of the Court, that the plea was bad, as the calls prohibited from being made by the 23rd section of the above-mentioned act were calls other than those contemplated by the 7th section, and that the plea did not shew that the call in question partook of the forbidden character. Held, by *Cockburn, C.J.* and *Crowder, J.*, that the plea was a good answer, as it alleged the demand in the declaration to be for a call, and that section 23. forbade the making any calls before complete registration. *Ibid.*

(C) SHARES.

(a) Register and Registration of Shareholders.

In order to be a shareholder within the meaning of the 27th section of the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16.), which defines

the proof required in an action for calls, it is not necessary that the name of the holder of the shares should be on a register of shareholders, sealed at an ordinary meeting of the company, but there must be a register, whether properly sealed or not, with the name of such holder inserted therein as the holder of shares numbered and specifically appropriated to him; and a sheet of paper containing a list of names, and sealed as a register of shareholders, but not having any of these essentials, is not a register within the meaning of the statute, and is therefore no evidence of proprietorship. *The Wolverhampton New Waterworks Co. v. Hawkesford*, 29 Law J. Rep. (s.a.) C.P. 121; 7 Com. B. Rep. N.S. 795.

The time within which a register of shareholders is directed, by the 8 & 9 Vict. c. 16. s. 9, to be made is not an essential condition, and therefore a register made after that time may be valid. *Ibid.*

A company was incorporated by royal charter, which required that provision should be made in the deed of settlement for the due registration of shareholders; the deed accordingly provided that the directors of the company should cause a register of shareholders to be regularly kept, and that the personal representatives of a deceased shareholder should be entitled to be registered as the owners of the deceased shares on performing certain conditions. The plaintiff, being the administrator of a deceased shareholder, and having performed the conditions, brought an action for damages against the company for not registering him as a shareholder, and also claimed in his declaration, under the Common Law Procedure Act, 1854, section 68, a mandamus to the company to register him:—Held, that this was a case in which, before the act, a mandamus would have been granted, and that the plaintiff was therefore entitled to claim it under the act. *Norris v. the Irish Land Co.*, 27 Law J. Rep. (s.a.) Q.B. 115; 8 E. & B. 512.

Scambo—that the 68th section is not to be strictly confined to cases in which the writ would have been granted before the act. *Benson v. Paul* commented on. *Ibid.*

The defendants, a railway company, by their acts of incorporation, were to keep a register of the proprietors for the time being of stock in the company, each shareholder being entitled to transfer his stock by a form of transfer given by the act, to be executed by the vendor and vendee; and the transfer was to be registered by the company, and the vendee's name entered on the register of proprietors. In May 1857 the defendants obtained a judgment against Mary Anne Irving, and she, in October 1857, employed a married woman, named Dunlop, to purchase for her 900*l.* stock in the defendants' company; the stock was purchased by Dunlop, representing herself to be Anne Watson, widow, and a transfer was duly made of the stock to "Anne Watson, widow." Dunlop signed the transfer in that name; and an entry of the transfer and of the name of Anne Watson as proprietor of the stock was made by the defendants in their books. The defendants believed the transaction to be *bond fide*; and Dunlop and Irving acted in collusion to prevent the defendants from realizing their judgment against Irving out of the stock purchased by her. In August 1858, at the request of Irving, Dunlop, in the name of "Anne Watson," transferred 600*l.* of

the stock to the plaintiffs, Irving receiving the purchase-money. In the above transactions Dunlop acted without her husband's knowledge. On the 6th of September 1858 Irving petitioned the Insolvent Court; and on the 7th of September a vesting order was made. On the 10th of September, the plaintiffs and the defendants both believing the transfer to be *bond fide* by "Anne Watson, widow," the defendants registered the transfer and the names of the plaintiffs as proprietors of 600*l.* stock. On the 17th of September the defendants became aware of the true state of facts; and on the 21st of October they cancelled the entry in their books of the transfer to the plaintiffs, and transferred the 600*l.* to the name of the person who had been appointed Irving's assignee. The plaintiffs thereupon brought an action against the defendants, claiming a mandamus to them to register the plaintiffs as proprietors of the 600*l.* stock:—Held, on a case, after writ without pleadings, stating the above facts, that the plaintiffs were entitled to be registered. *Ward v. the South-Eastern Rail. Co.*, 29 Law J. Rep. (s.a.) Q.B. 177.

(b) *Liability of Shareholders to pay up their Shares.*

A company was formed for insurance on lives and survivorship, and during sickness, and for granting annuities. The capital of the company was advertised as 50,000*l.*, in shares of 50*l.* each. Under the deed of settlement it was provided, that the proprietors should not be answerable, indirectly or directly, further or otherwise than as to their respective shares in the company. The full amount of the shares had not been paid up when the company suspended business:—Held, that each proprietor was liable to the persons insured, to the extent of the unpaid portion of his share in the capital of the concern, but not to the full extent of the sum advertised as the capital of the company. *Evans v. Coventry*, 25 Law J. Rep. (s.a.) Chanc. 489.

The plaintiffs were eleven of the insured, who had effected insurances for payment of a sum of money upon death or during sickness. Some had received policies, and others had only free tickets entitling them to demand policies after paying their premiums for six months:—Held, that the interests of the plaintiffs were identical with the rest of the insured; and that they might represent the whole body, amounting to about 2,000*l.* *Ibid.*

The defendants were ten out of eighteen of the shareholders or proprietors of the company:—Held, that there being evidence of great difficulty in ascertaining the names of other proprietors, and the defendants themselves being unable to designate them, the plaintiffs were entitled to relief against those defendants who could be brought before the Court to the extent of their unpaid share of the capital. *Ibid.*

One of the defendants held shares as the legal personal representative of the original owner of the shares:—Held, that he was only liable to the extent of the assets of the person he represented. *Ibid.*

The directors had declared a dividend, which was not warranted by the state of the funds of the society:—Held, that those directors who had been parties to declaring the dividend were liable to make good the amount of the dividend. *Ibid.*

The directors having bought up a number of shares with the funds of the society, it was held that

they were liable for the amount so applied, this being a dealing with the funds altogether at variance with the scope of the deed of settlement. *Ibid.*

(c) *Transfer of Shares.*

The act incorporating a joint-stock company provided for a register of proprietors being kept; and by section 90. prescribed a form of conveyance of shares, which was that of an absolute transfer, and enacted that such deed, when executed by both parties, should be kept by the clerk of the company, who was required to enter a memorial of it. Section 96. provided for the transmission of shares by death or marriage, and enacted that in all other cases than as before mentioned, where the right of property in shares passed from one proprietor to another by any other legal means than by a transfer and conveyance executed as before directed, an affidavit should be made of the way in which the shares had passed or been transferred, and the name of the new proprietor was to be entered on the register-book of the company, who were not bound to see to the execution of trusts:—Held, that under this act the company were not bound to register the name of a person to whom shares had been conveyed by way of mortgage by deed not purporting the form given in section 90. *The Queen v. the General Cemetery Co.*, 25 Law J. Rep. (N.S.) Q.B. 342; 6 E. & B. 415.

(d) *Forfeiture of Shares.*

By the Van Diemen's Land Company act of parliament it was provided that if any shareholder shall neglect to pay a call for three months after the time appointed for payment, he shall absolutely forfeit his shares; "but no advantage shall be taken of such forfeiture of any share or shares until after thirty days' notice shall have been given by the directors of the said company under the hand of the clerk of the said company to the owner or owners thereof, by notice in writing left at his, her, or their usual or last place of abode, nor unless the same shall be declared to be forfeited at some general or special general meeting of the said proprietors, which shall be held not earlier than three calendar months next after the said forfeiture shall happen." C, a shareholder in the company and a member of the firm of C, L & Co., which became bankrupt, neglected for three months to pay calls which were due. The shares were declared forfeited at a general meeting of the company duly held. The last place where C resided in England was at the house of a relative in the country. He afterwards went abroad. The directors caused a notice in writing of the forfeiture of C's shares to be taken to the house of business of C, L & Co. in the city, where C had usually received notices connected with the company before the bankruptcy. This was found to be shut up, and no one in it, but there was a direction affixed to the premises notifying that all papers for the firm of C, L & Co. were to be taken to one C in another street. It was not shewn that C knew of or authorized the putting up this notification. The written notice of forfeiture for C was taken to D and left with him, but was not left at the house of business of C, L & Co. or anywhere else:—Held, that the mere non-payment of calls for three months produced only an inchoate forfeiture of the shares, and that the forfeiture would not be complete until thirty days after notice thereof in

writing had been left at the shareholder's usual or last place of abode, nor until the shares had been declared forfeited at a general meeting of the company held as prescribed by the act. Held, further, that no notice of the forfeiture had been left for C at his usual or last place of abode, within the meaning of the statute. *Cockerell v. the Van Diemen's Land Co.* (Ex. Ch.), 26 Law J. Rep. (N.S.) C.P. 203; nom. *The Van Diemen's Land Co. v. Cockerell*, 1 Com. B. Rep. N.S. 732.

The charter of the Van Diemen's Land Company provided, that "there shall be held in each year one general meeting of the said company, that is to say, on the first Tuesday in the month of March in each year, or within fourteen days next after." It further stated, that special general meetings might be called by notice, and that no business was to be transacted at any meeting except the business for which it was called. The company's act of parliament prescribed that the names of the shareholders should be entered in a book, and that a certificate of such entry should be evidence of title to the shares; that when shares passed (among other ways) by bankruptcy an affidavit shewing how the persons claiming the shares became entitled should be delivered to the clerk of the company before such persons could sell the shares or claim dividends. By section 14, in case a shareholder neglect to pay calls for three months such person shall absolutely forfeit his shares, but no advantage shall be taken of such forfeiture until after thirty days' notice in writing shall have been given by the directors to the owner, nor unless the same shall have been declared to be forfeited at some general or special general meeting. R, the registered proprietor of certain shares, became bankrupt in 1847. Calls were made on his shares, and were not paid either by himself or by the plaintiffs (his assignees), though they had notice thereof. In a notice for the annual general meeting, to be held on the 31st of March, the directors stated that one of the purposes of the meeting would be to declare the forfeiture of certain shares, and that the meeting would be made special for the purpose of electing directors. At the meeting on the 31st of March R's shares were declared forfeited, and due notice was given to him, but none was given to the plaintiffs, though the company knew of the bankruptcy. The plaintiffs afterwards made the necessary affidavit, and claimed to be registered as owners of R's shares. The company refused to register them, on the ground that the shares were forfeited:—Held, that the meeting of the 31st of March 1851 was a special general meeting competent to declare the shares forfeited, and that giving notice to the bankrupt of the forfeiture was giving notice to the owner of the shares within the meaning of the statute, as he at the time was the registered owner; consequently, that the shares were duly forfeited. *Graham v. the Van Diemen's Land Co.* (Ex. Ch.), 26 Law J. Rep. (N.S.) Exch. 73; 1 Hurl. & N. 541.

(D) CALLS.

[See *ante* (B), *Aldham v. Brown*.]

To a declaration for calls against the defendant as a holder of shares in a joint-stock company, in the form given by the 7 & 8 Vict. c. 110. s. 55, a plea that the defendant was induced to become a shareholder by the fraud of the plaintiffs is bad, for not averring that the defendant had repudiated the con-

tract, and had done nothing to make himself liable as a shareholder after he became aware of the fraud. *The Deposit and General Life Assurance Co. v. Ayscough*, 26 Law J. Rep. (N.S.) Q. B. 29; 6 E. & B. 761.

To be liable under the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16), in an action for calls by the company, a person must be a shareholder, and not merely a subscriber to the undertaking. *The Wolverhampton New Waterworks Co. v. Hawkesford*, 28 Law J. Rep. (N.S.) C.P. 242; 6 Com. B. Rep. N.S. 336.

Quare—Whether, in order to be such shareholder, a person must be on the register of shareholders. *Ibid.*

In an action for calls by a company regulated by the Companies Clauses Consolidation Act, the declaration alleged, that the defendant subscribed a certain sum towards the undertaking, and that divers portions thereof were called for by the plaintiff, being the said company; that the plaintiffs appointed places and times for payment thereof, and the defendant had due notice of the premises, and the times elapsed, and the plaintiffs did all things necessary to entitle them to have the said sums paid to them by the defendant. Breach, non-payment:—Held, that the declaration, notwithstanding the general averment of performance, disclosed no cause of action, as it did not shew that the defendant was a shareholder when the calls were made. *Ibid.*

(E) POWERS, DUTIES AND LIABILITIES OF COMPANIES.

(a) *As to Shareholders generally.*

The stock in the Great Northern Railway Company consisted of ordinary and preference stock, the latter being created in pursuance of different acts of parliament, and entitling the holders to preference dividends at different rates per cent. per annum. An officer of the company, from time to time, during a period of some years, fraudulently issued fictitious stock of both kinds, which amounted in the whole to 220,000*l.* before the fraud was discovered. It not being possible to distinguish the genuine from the fictitious stock, an act of parliament was obtained in 1857, by which the fictitious stock was declared valid, and it was enacted that the directors should apply a sum of 243,000*l.*, which was applicable for profits up to December 1856, in purchasing and cancelling stock equivalent to that which had been fraudulently created. It was then enacted, that it should be lawful for the directors to apply the balance of the 243,000*l.*, so far as the same would extend, in paying to the proprietors of the several classes of preference stock or shares the dividends to which they would have been entitled out of the said sum, if the same had been declared and apportioned as dividend, &c. The preference shareholders not having received the full amount of their dividends in 1856 claimed to be paid the deficiency out of the first half-year's profits in 1857; but this claim was resisted by the directors and the ordinary shareholders: and thereupon a bill was filed to obtain an injunction to restrain the declaration of a dividend on the ordinary stock, without regard to the prior right of the preference shareholders to be paid the full amount of their dividend, to be computed from June 1856:—Held, (affirming the decision of one of the Vice Chancellors) that the preference shareholders were entitled to the injunction, it being considered that the right of the prefer-

ence shareholders was to have the full amount of their respective dividends before any payment in respect of dividends on the ordinary stock, and that the act of 1857 had not deprived them of that right. *Henry v. the Great Northern Rail. Co.*, 27 Law J. Rep. (N.S.) Chanc. 1; 1 De Gex & J. 606; 4 Kay & J. 1.

If a company acts upon a deed, forged by one of two joint proprietors of stock, registers it, and transfers the stock to a purchaser, it will be bound to replace it, though there is no person by law entitled to sue the company in respect of the stock. *Taylor v. the Midland Rail. Co.*, 29 Law J. Rep. (N.S.) Chanc. 731; 28 Beav. 287.

A railway company issued certificates of preference stock, purporting to carry "interest" at 6*l.* per cent. per annum, in perpetuity. Afterwards they obtained an act of parliament, which (after reciting that preference stock had been created, whereby priority was assigned in the payment of "dividends" to the extent of 6*l.* per cent. per annum,) enacted that the railway company should pay "dividends" to the holders of such stock at the rate aforesaid, before they should pay any dividend to the holders of any other shares in the company. By a subsequent act, the company was empowered to issue other shares called "debenture shares" bearing "interest" at 5*l.* per cent. per annum; and was directed to apply the annual profits in payment, first, of interest on mortgages; secondly, of interest on the debenture shares; thirdly, of the "interest or dividend" on the guaranteed or preference shares and the arrears of such interest or dividends; and, fourthly, as therein mentioned. A subsequent act referred to the preference shares as bearing "a preferential interest or dividend":—Held, that the provision as to payment of "dividends" in the first-mentioned act must be construed with reference to the recital in it and to the subsequent acts, and did not mean a share of current profits merely, but entitled the holders of the preference shares to resort to a subsequent division of profits to make their dividend up to 6*l.* per cent. *Sturge v. the Eastern Union Rail. Co.*, 7 De Gex, M. & G. 158.

Semble—that the recital alone, having regard to the purport of the certificates, would have been sufficient to give this meaning to the word "dividend." *Ibid.*

Whether it is competent to companies to create preferential shares under the general powers contained in ordinary railway acts, *quare*. *Ibid.*

A preferential shareholder is entitled to file a bill to restrain the company from making a dividend prejudicial to his rights without waiting until there are funds to make a dividend. *Ibid.*

(b) *As to Persons generally.*

A bill was applied for to parliament to enable an intended company to do certain works interfering with lands. A landowner, Colonel W, opposed the bill, but on a promoter of the bill agreeing to pay him a certain sum before commencing the works, he withdrew his opposition, and the bill passed. Colonel W commenced legal proceedings against the promoter who signed the agreement, and the company consented to a Judge's order, against themselves, for the amount claimed in the action, and then proceeded with the works before the whole money due on the agreement was paid. Thereupon Colonel W filed a bill to enforce payment of the remainder:—Held, that the company had adopted the agreement by submit-

ting to the Judge's order, and were precluded from objecting that the promoter had no authority to bind the company, or that the consideration for the agreement was partly illegal. *Williams v. the St. George's Harbour Co.*, 27 Law J. Rep. (N.S.) Chanc. 691; 2 De Gex & J. 547; 24 Beav. 889.

A company, registered under the Joint-Stock Companies Act, 1856, was established for the purpose of purchasing lands and rights of an existing railway company in a colony, the lands being held by grant from the Crown, and the title to which was declared by an act of the Colonial Legislature to be void, if the line were not completed to a given point by a stated day. The directors in London made reports, on the faith of which C, in August 1858, applied at the office, and was informed by the secretary that Class A were preference shares, entitling the holders to a fixed preferential dividend of 6l. per cent., and to an allotment of four acres of land under the grant; and received from the same office the last two preceding reports, dated the 31st of December 1857 and the 29th of July 1858, which contained statements leading to the inference that the land was vested indefeasibly in the company, and of matters relating to the expenditure, the amount of traffic and the periodical settlement of accounts, parts of which statements were originally true when the report was made, other parts of which were only partially true, and as to the lands were untrue. The whole of the acts of parliament affecting the company, contained in a book, were shewn to C; but his attention was not called to the act by which the grant was rendered void in the event before mentioned. C agreed to buy 200 shares (which had been forfeited to the company and were offered for sale by them), and it was agreed that upon his paying all calls in advance on the shares he should be elected a director, and the whole arrangement was completed in the month of November 1858. In his capacity of director he discovered that the land grant was not indefeasible, and proposed to rescind the contract, which was not agreed to; and he filed his bill, praying relief from his purchase and repayment by the company of his money, with interest. At the hearing, it was proved that the directors, before C had applied for any shares, had consulted their conveyancing counsel, and had been advised by him that the lands held by the company were liable to forfeiture in a certain case, and that this opinion was not shewn to or even mentioned to C. One of the Vice Chancellors decided that, in order to avoid a contract on the ground of misrepresentation, it is necessary that the misrepresentation should be one of fact, and not as to a doubtful question of law, and dismissed C's bill; from which decision he appealed:—Held (reversing this decision), that the secretary, as agent of the company, having made untrue representations, the company was bound thereby; and the plaintiff having purchased shares on the faith of the same, he was entitled to have the purchase set aside, and his money repaid by the company. *Conybeare v. the New Brunswick and Canada Rail. and Land Co. (Limited)*, 29 Law J. Rep. (N.S.) Chanc. 435; 1 De Gex, F. & J. 570; 1 Giff. 339: reversed 31 Law J. Rep. (N.S.) Chanc. 297.

Directors are not justified in using reports which were true at the time they were made, as inducement to persons to buy shares, at a time when they have become untrue. *Ibid.*

A purchaser is excusable for not exercising great caution in examining an act of parliament shewing a title to land to be defeasible, if the act is placed before him in connexion with an absolute grant and reports of directors treating the title as indefeasible; and if there were a doubt upon this point of title, the directors were bound to have stated that doubt. *Ibid.*

(c) *Acts of Servants.*

In an action against a corporation, (who were incorporated for the purpose of driving omnibuses,) for interfering with the plaintiff's business of a carrier of passengers, by driving the omnibuses of the corporation in such a manner as to molest him in the use of the highway, the declaration set out various acts of such interference, which were all connected with the driving of such omnibuses, and were alleged to have been wrongfully and maliciously committed by the corporation:—Held, on demurrer to the declaration, that the action would lie against the corporation, although the acts complained of were done wilfully, since they were done within the purposes of the incorporation, and in such a manner as to constitute an actionable wrong, if done by an individual. *Green v. the London General Omnibus Co. (Limited)*, 29 Law J. Rep. (N.S.) C.P. 13; 7 Com. B. Rep. N.S. 290.

(d) *Contracts generally.*

The determination, by a general meeting, of the remuneration of the secretary of a railway company, whose special act incorporated the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 91. of which enacts that such determination shall be exercised only at a general meeting of the company, is not a condition precedent to the right of the secretary to recover for his work and services; and therefore to such an action a plea that no determination as to the remuneration of the plaintiff had ever been exercised at any general meeting of the company, is bad. *Bill v. the Darwent Valley Rail. Co.*, 26 Law J. Rep. (N.S.) Exch. 81; 1 Hurl. & N. 305.

The deed of settlement of the Electric Telegraph Company, incorporated by royal charter, empowered the directors to manage the affairs of the company, and to exercise all the powers of the company at large; but contracts, the considerations for which did not exceed 50l., were required to be signed by at least three individual directors, or sealed with the seal of the company under the authority of a special meeting, or a resolution of the directors. The chairman of the company made a parol agreement with the plaintiff, by which he was to be allowed 50l. per cent. on messages sent and received through the company's lines, and with his own hand entered a memorandum of the agreement in the minute-book of the company. The agreement was afterwards referred to and recognized in a correspondence between the plaintiff and the secretary of the company, and accounts were rendered and payments received by the plaintiff under the agreement by cheques; but there had not been a contract signed by three directors or under the seal of the company:—Held, that, assuming the agreement to be *ultra vires* of the chairman, it had been ratified and adopted by the company so as to render them liable. Held, also, that the allowance to the plaintiff under the agree-

ment could not be considered as a violation of the provision in the charter "for the sending and receiving of messages by all persons alike without favour or preference, and subject to such equitable charges and reasonable regulations as may from time to time be made by the said company." *Reuter v. the Electric Telegraph Co.*, 26 Law J. Rep. (N.S.) Q.B. 46; 6 E. & B. 341.

The plaintiff was employed by one R, one of the promoters of a railway company, to make surveys and reports, &c. as to a mine he proposed to assign to the company. Afterwards, by resolution of the promoters, before registration, it was agreed that the plaintiff should be the manager of the company's mines, at a salary, not to begin until the "completion" of the contract with R. That contract was afterwards, and before registration or memorandum of association, signed and entered into by G and two others of the promoters, on behalf of the company. The articles of association authorized the directors to carry it out; but it was never carried out, and the company, which was subsequently registered, never had any mines. The articles empowered the directors to "elect" a manager. After registration (R not being a director), prospectuses were published by the company, in which the plaintiff was named as "manager," and reports from him in that capacity were printed. There was no other evidence of any actual election of the plaintiff as manager, and two of the directors were called to prove that there never had been:—Held, nevertheless, that there was evidence from which a jury might presume an election; and that an action against the company for salary was maintainable. *Browning v. the Great Central Mining Co.*, 29 Law J. Rep. (N.S.) Exch. 399; 5 Hurl. & N. 856.

In 1841 a lease of coal mines was made to the trustees of a company for forty years at a fixed rent, and an additional taleage rent; and there was a provision for the determination of the term every three years by a year's previous notice to be given by the lessees. The company entered and worked the mines until November 1842, when they were abandoned as unprofitable, and no rent was ever paid in respect of them. In 1850 the company was ordered to be wound up; and in 1852 the official manager gave notice to determine the term, at the same time protesting against the validity of the lease. In 1852, just before the expiration of the term, the representative of the lessor filed his bill against the company, seeking to recover the arrears of rent as an equitable debt due from the company:—Held, upon appeal, affirming the decision of the Court below, that no relief could be given in equity, and the bill was dismissed. *Walters v. the Northern Coal Mining Co.*, 25 Law J. Rep. (N.S.) Chanc. 633.

The relation between the occupiers and the lessee, as *cœtus que trust* and trustees, cannot give any equitable right to the lessor, who claims by a title paramount. *Ibid.*

To render an agreement binding upon a company formed under the Companies Clauses Consolidation Act, 1845, the formalities required by the 97th section of that act must be complied with. Therefore, where, in pursuance of an arrangement between the promoters of the S and H Railway and the L Canal Company, made before the passing of the S and H Railway Act, an act of parliament was obtained by

which the S and H Railway Company were authorized and required, with the consent of three-fifths of the proprietors of the same company present at a meeting specially held for the purpose, to purchase the L Canal upon such terms as should be or might have been agreed upon between the said companies; and at a meeting, held in pursuance of the last-mentioned act, the directors were duly authorized to complete the purchase, but without referring to the agreement: the directors having failed to take any further steps towards the completion of the purchase, —Held, that, there being no agreement signed by two of the directors, as required by the 97th section of the Companies Clauses Consolidation Act, specific performance could not be decreed. *The Company of Proprietors of the Leominster Canal Navigation v. the Shrewsbury and Hereford Rail. Co.*, 26 Law J. Rep. (N.S.) Chanc. 764; 3 Kay & J. 654.

Semble—the proper remedy would be by *mandamus*. *Ibid.*

The London and North-Western Railway Company brought a bill into parliament, seeking to authorize that company to take a lease of the Shropshire Union Railway (then in progress). The Shrewsbury and Birmingham Company opposed the bill. In consideration of the withdrawal of that opposition, an agreement was made, by which it was stipulated that an account should be kept of the profits obtained by the traffic on the Shrewsbury and Shropshire lines, and that such profits should be divided in certain proportions; and that during the continuance of the agreement neither the Shropshire Union nor the London and North-Western would convey goods and passengers between two points on the Shrewsbury and Birmingham line, nor use the line of the Shropshire Union "to compete for any traffic which properly belongs to the Shrewsbury and Birmingham Railway." An act was passed, authorizing the London and North-Western Company to take a lease of the other lines as they were completed, and providing for the mode of taking the accounts, &c. in the mean time, and until the lease should be executed. The agreement was made before the whole of the lines to which it related had been completed. The agreement specially provided that the Shrewsbury and Birmingham Company should have a right to put an end to the agreement; but no such stipulation existed in favour of the North-Western Company. A bill was filed, by the Shrewsbury and Birmingham Company, to compel specific performance of the agreement. The whole of the three lines had not been completed when the bill was filed:—Held, that, whether the agreement was or was not a valid agreement, the time for its coming into operation had not arrived; and that, consequently, the Court below had properly refused a decree for specific performance. *The Shrewsbury and Birmingham Rail. Co. v. the London and North-Western Rail. Co., the Shropshire Union Rail. and Canal Co., and Glyn and Cosam*, 26 Law J. Rep. (N.S.) Chanc. 482; 6 H.L. Cas. 113; affirming 22 Law J. Rep. (N.S.) Chanc. 682; 4 De Gex, M. & G. 115; 16 Beav. 441.

A company having powers, unlimited as to time, to purchase land for the purposes of their undertaking, took possession, in 1797, of the lands of an infant, but no effectual steps were taken for fixing the price, an informal award only having been made,

which, upon the infant's coming of age, was repudiated by him, and an annual rent only being from time to time paid. Disputes having arisen in 1854, fifty-seven years after the lands had been taken, it was held (affirming the decision of the Master of the Rolls), that the company could not compel a conveyance of the land, upon the footing of what had already taken place between them and the landowner; but that both parties must, with reference to their respective rights, proceed under the act of parliament. *The Somersetshire Coal Canal Co. v. Harcourt*, 27 Law J. Rep. (N.S.) Chanc. 625; 2 De Gex & J. 596; 27 Law J. Rep. (N.S.) Chanc. 139; 24 Beav. 571.

The plaintiff, a ship-builder, being desirous of having a private communication with the defendants' railway, entered into negotiations with them for the construction of a tunnel at his own expense, and the directors expressed their assent generally to the project. The plaintiff then, with the acquiescence of the defendants and the approval of their engineer, executed the necessary works, and the communication was used by the plaintiff, and tolls received by the defendants for two years and a half; but no formal agreement was ever executed, the parties being unable to agree upon all the terms. At the end of that time the defendants gave notice to the plaintiff, that every agreement between them, if any ever existed, was at an end, and proceeded immediately to stop up the communication. Upon a bill filed for an injunction, and a demurrer thereto, it was held, that the company were as much bound by acquiescence as an individual would be, notwithstanding the want of a formal contract; and that, after all that had taken place, the plaintiff had acquired a right of user which the company had no power to terminate. *Laird v. the Birkenhead Rail. Co.*, 29 Law J. Rep. (N.S.) Chanc. 218; John. 500.

Two railway companies had the same boards of directors, except that one had two additional; but the Finance Committee of each was composed of the same persons. Both companies were, in 1849, ordered to be wound up, E being appointed official manager of one, and C official manager of the other company. In 1845 the E company, though it had no power to lend, transferred from its funds to the C company, which had no power to borrow, a large sum of money, to enable the latter company to purchase a canal. 10,000*l.*, part of this money, was handed over to the Canal Company. A shareholder in the C company filed a bill in 1850, and in that suit the decree made in 1853 directed the 10,000*l.* to be repaid to the C Company, and the greater part was repaid accordingly. E now instituted a suit against C for the recovery of the balance of the money so lent in 1845:—Held, that the loan of the money was a breach of trust, of which the borrowing company was cognizant, and that the money paid back by the Canal Company was still affected with the original trust, and that the balance still due must be refunded, with interest at 4*l.* per cent. from the time when the advance to the Canal Company was recovered. *Ernest v. Croysdill*, 29 Law J. Rep. (N.S.) Chanc. 580.

(c) *Traffic and Working Agreements.*

One railway company, A, made an agreement with another railway company, B, to allow B to carry

passengers and goods over the A line on certain terms. There was a station on the A line towards the increased extent and accommodation of which the B company was to contribute a limited sum. The A company amalgamated with others, obtained several branch lines, and assumed a different name. The B company did the same:—Held (by the House of Lords), that the agreement applied to all traffic coming from the B line upon the A line, however originating, whether only upon the original B line, or in, from, or through any of its amalgamated lines. *The Lancashire and Yorkshire Rail. Co. v. the East Lancashire Rail. Co.*, 25 Law J. Rep. (N.S.) Exch. 278; 5 H.L. Cas. 792.

An Act, 7 & 8 Geo. 4. c. xlii, for making a navigable communication for ships between the city of the Norwich and sea, empowered the Company of Proprietors of the Norwich and Lowestoft Navigation to erect a lock or sluice, with proper stop-gates, to prevent the waters of a broad, and certain navigable rivers flowing into a certain lake, and to make an entrance cut from that lake to the sea. Section 8. provided, that nothing in the act contained should authorize or enable the company to divert or abstract any of the waters of the said broad or rivers for any purpose whatsoever, except for the purpose of supplying certain intended cuts with water, and for the purposes of locking ships or vessels from or into the said lake. This entrance cut from the lake into the sea was constructed under the said act, and the level of the water in the lake was kept lower than the level of the broad and rivers. The lock was made with proper gates in pursuance of the act. By divers acts of parliament, and ultimately by 9 & 10 Vict. c. cxxxii, the said lock and works became vested in the Norfolk Railway Company. By an agreement between the Norfolk Railway Company and the Eastern Counties Railway Company, reciting that the works, including the lock in question, had become vested in the Norfolk Railway Company, it was provided that "The Eastern Counties Railway Company should have, as between themselves and the other company, (but subject to such division and apportionment of gross receipts as is therein mentioned,) the exclusive possession, use, enjoyment and receipt of all the property, rights, &c., of the works respectively in the same manner as the Norfolk Railway have become entitled to the same under or by virtue of the respective acts, &c., or otherwise: That the Eastern Counties Company should at all times repair and keep up the said works with the appurtenances," &c.; and that the powers of the Norfolk Railway Company should be exercised by the Eastern Counties Company. Other clauses provided for the division of the profits in certain proportions after deducting the working expenses, which were to be borne by the Eastern Counties Company. Clause 29 provided for the appointment of a joint committee of directors of the three companies to superintend the working of the railways. By 17 & 18 Vict. c. ccxx. s. 2, the agreement was confirmed; and by section 11, the Eastern Counties Company were to use, work, regulate and manage the five undertakings (in the act mentioned) as if they were one undertaking. By s. 12, "the powers granted to the companies respectively, by virtue of the recited acts, or any of them, with respect to the user, working, regulation and management of their respective railways, works and

undertakings, &c., were to be exercised and enjoyed by the Eastern Counties Railway Company, &c., under the same regulations and restrictions as were, by the recited acts relating to that company, imposed on that company. After the making of the agreement, the Eastern Counties Railway Company entered into possession of the lock and works, and the Norfolk Railway Company were not in possession. At the time of the making of the agreement, the lock had been allowed to become out of repair, and such want of repair continued after the lock and works came into the possession of the Eastern Counties Railway Company; and during all that time large quantities of water escaped from the broad and rivers into the lake:—Held, first, that such water was diverted or abstracted contrary to the prohibition in 7 & 8 Geo. 4. c. xlii. s. 3. Secondly, that the Norfolk Railway Company were not responsible for the diversion or abstraction of the waters subsequent to the making of the agreement, and the passing of the 17 & 18 Vict. c. ccxx, while the lock and works were in the possession of the Eastern Counties Railway Company. *Preston, Clerk to the Commissioners of the Haven of Great Yarmouth, v. the Norfolk Rail. Co. and the Eastern Counties Rail. Co.*, 2 Hurl. & N. 735.

(F) LIABILITY OF PROVISIONAL COMMITTEEMEN.

A railway company was projected in 1845. As but comparatively few shares were taken, it was found impossible to carry the project into effect. A proposal was then made to make a part of the line only, and a report of a committee of investigation was circulated among the shareholders, stating that eleven of the provisional committee and three other shareholders would take additional shares, which would make the capital sufficient to enable them to pay the deposit and comply with the Standing Orders of the House of Lords. A sum of 9,975*l.*, the amount of the deposit on these shares, was borrowed from the bankers of the company. The Standing Orders of the House were in form complied with, but in 1846 the bill was lost, and the project altogether abandoned. The provisional committee then repaid the 9,975*l.* to the bankers in full, and they also repaid in full the deposit on shares made by three other shareholders; they then paid 10*s.* per share to such of the shareholders as would receive it. This was accepted by one of the plaintiffs. No accounts of any receipts and payments were ever rendered to the shareholders. A previous suit was instituted by a shareholder for an account; the solicitors in the present suit acted for the plaintiff in that suit; it was, however, compromised, and in 1853 the present suit was instituted by two shareholders to obtain an account of the receipts and payments made on behalf of the company and for a distribution of the surplus:—Held, that the provisional committee were trustees, and that the relief sought by the plaintiffs was not barred by lapse of time: That the dismissal of the bill against two of the committee had not rendered the suit defective, as it appeared in evidence that they had not sanctioned the repayment of the 9,975*l.*: That there was no misjoinder of the plaintiffs in consequence of one having received the dividend of 10*s.*: That the suit was defective, as three shareholders, who had received back their deposits in full, were not parties; but leave to amend and make them

defendants was given: That the bill must be dismissed, with costs, against such of the defendants who had ceased to be of the committee when the resolution was passed to repay the 9,975*l.*, notwithstanding they were made defendants upon the suggestion and requisition in the answer of the original defendants: and That the plaintiffs were entitled to relief, though their individual interest was small, and though the proceedings were instigated by their solicitor. *Williams v. Page*, 27 Law J. Rep. (N.S.) Chanc. 425; 24 Beav. 654.

(G) LIABILITY OF PROMOTERS.

Certain persons joined together for the purpose of forming a joint-stock company, and with that view purchased property and incurred debts and expenses. The project became abortive, and upon a bill filed for an account, on the footing of a partnership, it was held, that this was not a partnership; and the bill was dismissed. *Hamilton v. Smith*, 28 Law J. Rep. (N.S.) Chanc. 404.

2.—JOINT-STOCK COMPANIES.

(A) PROMOTERSHIP DEED AND MEMORANDUM OF ASSOCIATION.

E B and J B, in 1854, by deed, assigned leasehold premises, and the copyright of a book on life assurance, to trustees, in consideration of a sum of 1,000*l.* and annuities to each, with a view to form a company. E B subscribed for 25,000 shares, and J B for 30,000; each paid such a sum for deposits as would leave 1,000*l.* due from each. In 1855 the directors accepted and confirmed the deed of 1854, and obtained the sanction of a general meeting to a loan to the company from another company. In 1856 H M B, a lawyer, became a shareholder and director. In December in the same year the directors passed a resolution, that E B and J B should be relieved from all liability in respect of 20,000 each of their shares, and that the same should be assigned to trustees for the company. These shares were originally taken to facilitate complete registration. H M B, early in 1858, filed a bill, on behalf of himself and all other shareholders, except the defendants, against the directors and two shareholders, to set aside this transaction. Afterwards, in April 1858, a general meeting of the shareholders was held, at which the directors were authorized to purchase these shares of E B and J B on their giving up the benefit of the deed of 1854. One of the Vice Chancellors decided that the transaction of April 1858 was unimpeachable, either under the statute 7 & 8 Vict. c. 110. (the Joint-Stock Companies Act), or as contrary to the deed of settlement, and dismissed the bill, with costs. On appeal by the plaintiff, it was held, affirming the decision, first, that the plaintiff must be taken to have been all along cognizant of and to have acquiesced in the proceedings complained of; secondly, that as the whole of the transactions of the company were entered in their books, he must be held to have had notice of them; and, thirdly, that whatever rights any of the shareholders, who were not precluded by knowledge and acquiescence from suing, might have, the plaintiff's bill could not be sustained, on account of his own incapacity, by reason of his knowledge and his subsequent

conduct; his suit being similar to one instituted by a plaintiff who had released the defendants. *Burt v. the British Nation Life Assur. Assn.*, 28 Law J. Rep. (N.S.) Chanc. 731; 4 De Gex & J. 158.

Under the Joint-Stock Companies Act of 1856 (20 & 21 Vict. c. 154. ss. 3, 11), provided that the names of seven persons are duly subscribed to the memorandum of association which is registered, it is sufficient that other shareholders have signed printed copies of it, to which the names of those ultimately registered are not subscribed. And although this copy contains the names of more than seven persons as the "past and present directors," and only seven of them signed the memorandum registered, and the remainder have not taken the shares for which they subscribed, this does not invalidate the shareholders' subscriptions to such printed copies, nor does it afford any evidence of fraud, nor rebut the presumption raised by the registry, that the persons whose names appear thereon are the holders of the shares for which they are registered. *The New Brunswick and Canada Rail. and Land Co. (Limited) v. Boore*, 27 Law J. Rep. (N.S.) Exch. 330; 3 Hurl. & N. 249.

(B) REGISTRATION.

(a) When necessary.

To entitle an insurance company to the exemption from registration under the Joint-Stock Companies Act, 20 & 21 Vict. c. 14. s. 27, the company must have been formed for the sole purpose of insurance. A company, therefore, formed for the purpose of lending money, as well as for insurance, must be registered in order to enable it to sue. *The Monetary Advance and Life Assur. Co. v. Smith*, 27 Law J. Rep. (N.S.) Exch. 479; 3 Hurl. & N. 543.

Seemle—the fact that an insurance company lends out its funds, does not necessarily take it out of the exception, such an investment not being a purpose for which the company was formed. *Ibid.*

A company of more than twenty-five members was constituted by a deed of settlement, which stated that the object of the company was to enable each member to become the possessor of a freehold, copyhold or leasehold house of a certain value, as tenant to the company at a rent until its dissolution, and afterwards as absolute owner. The deed provided that the sum necessary for carrying the object of the company into effect should be raised by the aid of monthly subscriptions and rents to be paid by members, and by the sale of superfluous houses and land, and by such other ways and means as thereafter provided. The next clause of the deed stated, that the business of the company should be to take on lease or purchase certain land, and to erect houses thereon, and to take down and rebuild any existing houses on the land so taken or purchased, "and to make and sell bricks, and to purchase and sell all kinds of building materials, and to contract for and perform all kinds of work in the building business and in relation thereto." The deed enabled the company to borrow money to be applied to building houses for the purposes of the society; and all monies received from subscriptions or from any other source were to be paid to the bankers of the company. There were provisions for the allotment of houses to members when a sufficient number for that purpose had been erected; and when

every member had obtained a house answerable to the shares subscribed for, and all subscriptions, rents and fines had been made good by the members, the company was to be wound up and dissolved:—Held, that this was not a company established "for any purpose of profit," within the 7 & 8 Vict. c. 110, and, therefore, that it was not required to be registered under that act. *Moore v. Rawlings*, 28 Law J. Rep. (N.S.) C.P. 247; 6 Com. B. Rep. N.S. 289.

(b) Provisional Registration.

Where the defendant, a promoter of a joint-stock company, provisionally registered under the 7 & 8 Vict. c. 110, entered into a written contract in his own name for rooms for the use of the company, and the rooms were occupied by the company after complete registration,—Held, that, although as against the company this contract was illegal and void, yet that the defendant, who had entered into it in his own name, was liable. *Job v. Lamb*, 25 Law J. Rep. (N.S.) Exch. 87; 11 Exch. Rep. 539.

(c) Certificate of Complete Registration.

The certificate of the registration of a joint-stock company, under the hand of the assistant registrar, is admissible in evidence, without any allegation in the certificate, or proof *abunde*, of the absence of the registrar, although, by section 19. of the statute 7 & 8 Vict. c. 110, the assistant registrar is only empowered to act in the absence of his principal. *Baker v. Cave*, 26 Law J. Rep. (N.S.) Exch. 190; 1 Hurl. & N. 674.

(d) Rectification of the Register.

Under the Joint-Stock Companies Act, 19 & 20 Vict. c. 47. s. 23, the Court declined to order a company to rectify their registry by removing the name of a person from it, and inserting that of another as the holder of certain shares; it appearing that an action by the company against the applicant for calls upon the shares, alleged to have been due before and at the time of the transfer, was pending at the time of the application. *Ex parte Harris, in re the Anglo-Porcelain Co.*, 29 Law J. Rep. (N.S.) Exch. 364; 5 Hurl. & N. 809.

The power given to the Court by the 25th section of the Joint-Stock Companies Act, 1856, to order the register to be rectified was intended to avoid the inconvenience arising from capricious or frivolous objections on the part of the company; but the Court will not entertain such an application where there is an important question to be tried as to the right of the applicant to have the register rectified. *Re the British Sugar Refining Co., ex parte Faris*, 26 Law J. Rep. (N.S.) Chanc. 369; 3 Kay & J. 408.

(C) LIABILITIES OF THE COMPANY.

The deed of settlement of a joint-stock insurance company, established and completely registered under the 7 & 8 Vict. c. 110, provided, "the common seal shall not be affixed to any policy, except by an order signed by three directors and countersigned by the manager":—Held, that a policy, to which the common seal had been affixed by the proper officers, *bond fide* effected by the assured, and otherwise in accordance with the deed of settlement, was not rendered void as against the company for want of an order to affix the seal. *The Prince of Wales Life*

and *Educational Assur. Co. v. Harding*, 27 Law J. Rep. (n.s.) Q.B. 297; E. B. & E. 182.

The plaintiffs and the defendants, two insurance companies, had cross accounts on assurances mutually granted and effected, and by their course of dealing premiums due on policies effected by one company with the other were not paid in cash, but a receipt was given for each premium, as if so paid, within the time limited for the payment, and the premiums were entered as paid in the accounts; the accounts were settled from time to time, and the balance struck, and payment made of the balance. A receipt was thus given for a premium on a policy effected by the plaintiffs with the defendants within the time for payment, and the amount was entered in the account as paid by the plaintiffs. After the time for payment had elapsed, but before the next settlement of the current account, the life died:—Held, that there had been a payment of the premium sufficient to keep the policy alive. *Ibid*.

A joint-stock company, being duly registered under the 19 & 20 Vict. c. 47. with limited liability, a bill of exchange was addressed to the company, as drawee, by their name, omitting "limited," and the defendant, who was secretary to the company, and had authority to accept bills for the company, accepted the bill in his own name, adding "secretary to the said company".—Held, that the acceptance was intended as the acceptance of the company, and the defendant was therefore personally liable to the holder of the bill, under the 31st section of the act, by reason of the omission of the word "limited." *Penrose v. Martyn or Martyr*, 28 Law J. Rep. (n.s.) Q.B. 28; E. B. & E. 499.

Where a company had been registered, under the 7 & 8 Vict. c. 110, as a fire insurance company, and had a common seal by that name, and afterwards embarked in the business of a marine insurance company, and had a seal made as such, and marine policies were issued by their manager with the new seal attached thereto, but not containing a provision imperatively required by the deed (as to the liability of the funds of the company), nor signed by directors pursuant to section 44. of the act,—Held, that the company were not liable on the policies, nor in respect of an adjustment thereon by their manager. *Hambro v. the Hull and London Fire Insur. Co.* 28 Law J. Rep. (n.s.) Exch. 62; 3 Hurl. & N. 789.

(D) DIRECTORS.

(a) Power to Contract.

By the deed of settlement of a joint-stock company, the directors were authorized to borrow, under the common seal of the company, such sums as should, from time to time, by a resolution passed at a general meeting of the company, be authorized to be borrowed, not to exceed a certain sum. At a general meeting, the directors were authorized to borrow such sums and at such interest and for such periods as they might deem expedient, in accordance with the provisions of the deed of settlement and the act of parliament. The directors having borrowed 1,000*l.* on bond, under the common seal of the company, it was held, that the company were liable to repay the amount, whether the resolution was or was not a sufficient authority to the directors to borrow; for though parties dealing with joint-stock companies are bound to take notice of any limitation of the

authority of the directors in the deed of settlement, yet, where the directors, as in this case, have power to borrow, the lenders of the money have a right to presume that the company which put forward their directors as authorized to borrow, have taken every step requisite to empower them to do so. *The Royal British Bank v. Turquand (in error)*, 25 Law J. Rep. (n.s.) Q.B. 317; 6 E. & B. 327: affirming the judgment below, 24 Law J. Rep. (n.s.) Q.B. 327; 5 E. & B. 248.

Where directors of a joint-stock company are authorized by its deed of settlement to draw or accept bills of exchange, a proviso in the deed that such bills shall be so made or accepted, &c. as to be binding on the company and on the shareholders, to the extent of the respective shares held by them in the capital stock of the company and no further, is repugnant and void, and the bills drawn or accepted by the directors in conformity with the provisions of the Joint-Stock Companies Act, 7 & 8 Vict. c. 110. s. 45, bind the company; and in an action by the payee (it not being proved that he had actual notice of the provision in the deed) it was held that he was entitled to recover. *Gordon v. the Sea, Fire and Life Assur. Soc.*, 26 Law J. Rep. (n.s.) Exch. 202; 1 Hurl. & N. 599.

In an action against a joint-stock company, on a debenture, reciting the borrowing of the money which it secured, it is no defence that there was not a resolution come to at a special general meeting authorizing the directors to borrow under the provisions of the deed of settlement—confirming *The Royal British Bank v. Turquand*. *Agar v. the Athenæum Life Assur. Soc.*, 27 Law J. Rep. (n.s.) C.P. 95; 3 Com. B. Rep. N.S. 725.

The 12th section of the deed of settlement referred to borrowing money; the 27th provided that the directors might effect insurances, and sell reversions and annuities, and grant endowments; and the 28th provided that "every policy, endowment, grant of annuity, or other instrument required in the transactions aforesaid, should be under the hands of not less than three directors".—Held, that the 28th section applied only to instruments *ejusdem generis* with those mentioned in the 27th, and not to debentures. *Ibid*.

Quære, per Williams, J., whether the directors had power to provide in their deed of settlement that a deed which would be valid under the 44th section of the Joint-Stock Companies Act, 7 & 8 Vict. c. 110. (requiring the signatures of two directors only), shall not be valid unless signed by three directors. *Ibid*.

The directors of a joint-stock insurance company, registered under 7 & 8 Vict. c. 110, who were authorized by the deed of settlement to draw bills on account of the company only when they were so drawn for the purposes of the company, drew a bill on behalf of the company in payment of a claim due to the plaintiff on a policy effected by him with another company, the business of which was attempted to be assigned to the first-mentioned company by a deed of amalgamation of the two companies. The amalgamation failed, and the deed of amalgamation was illegal and void, but the bill was given to and received by the plaintiff upon the supposition that such deed was valid. The issuing of the said bill was no part of the ordinary business of the said first-mentioned company:—Held, that the plaintiff could

not recover against such company on the bill, as the directors had no authority to draw it, and the plaintiff (being taken to have had knowledge of the contents of the deed of settlement) must be considered to have had notice of the want of such authority. *Balfour v. Ernest, Official Manager of the Sea, Fire and Life Assur. Soc.*, 28 Law J. Rep. (N.S.) C.P. 170; 5 Com. B. Rep. N.S. 601.

The liability of shareholders of a trading company is not limited by the amount of their subscriptions to the joint stock, even among themselves, and though they insisted that the directors had negligently and improvidently spent more than the amount subscribed, had mismanaged the business, had violated the provisions of the partnership deed, and had suppressed important facts, and that no majority at a general meeting could bind a minority for acts done in contravention of the provisions of the partnership deed; and it was held that the shareholders were liable to contribute towards the liquidation of a sum of 32,300*l.*, which the directors had borrowed of the bankers, and had expended for the purposes of the company; and that a call must be made for payment of the amount, with interest at 5*l.* per cent. *In re the Norwich Yarn Co.*, 25 Law J. Rep. (N.S.) Chanc. 601; 22 Beav. 148.

A managing director of a company induced contractors to receive payment for work done in preference shares of 5*l.* each, on which 3*l.* per share had been paid, upon an understanding, which was confirmed by a resolution at a board meeting, that no more than 3*l.* per share would be called, and that they would indemnify them against further calls, and also accept a part of such shares at par in payment of calls, should any be made. The company did afterwards make a further call, but they refused to abide by the contract or the resolution, alleging that it was invalid. Upon a bill by the surviving contractor against the managing director and another to obtain a performance of the agreement,—Held, upon demurrer, that the directors making the contract were not compellable to perform the agreement or to make good the representations made, that they could not comply with any decree or order that might be made for the specific performance of the agreement, and that the remedy was at law in an action for damages. *Ellis v. Colman*, 27 Law J. Rep. (N.S.) Chanc. 611; 25 Beav. 662.

A joint-stock company was registered and incorporated under the 19 & 20 Vict. c. 47. It had a memorandum, but no articles, of association. It was empowered to raise money at interest on debentures for payment of debts contracted in the due working of the company. A bill was filed, by shareholders, to restrain the directors from issuing debentures or other securities whereby the stock and assets of the company might be charged or made liable for the payment of any money borrowed for the use of the company, and also from borrowing money on debentures. A motion for an injunction was refused, by one of the Vice Chancellors, on the ground that the directors had power to do what they proposed, and on appeal the decision was affirmed, and a demurrer, which had been put in pending the appeal, was ordered to stand over, without prejudice, all questions being reserved to the hearing of the cause. *Bryon v. the Metropolitan Saloon Omnibus Co. (Limited)*, 27 Law J. Rep. (N.S.) Chanc. 685; 3 De Gex & J. 123.

A company was incorporated under the Joint-Stock Companies Act, 1856, the objects of which were to purchase a number of vessels and run them between England and Australia, or to let out the same for hire, and generally to transact the business of ship-owners. By the articles of association the business of the company, and all matters relating to the company and the affairs thereof were to be controlled, managed and regulated by the directors, who might exercise and do all such powers, discretions and things which the company might exercise and do as were not by the Joint-Stock Companies Act, or by the articles, declared to be exercisable or done by the company in general meeting. Upon demurrer to a bill to set aside a mortgage of one of the company's ships executed by the directors,—Held, that the directors had power to execute the mortgage, the power not being required either by the act, or by the articles to be exercised by the company in general meeting. *The Australian Auxiliary Steam Clipper Co. v. Mounsey*, 27 Law J. Rep. (N.S.) Chanc. 729; 4 Kay & J. 733.

By the deed of settlement of an incorporated joint-stock company the directors were empowered to effect assurances on lives on such terms and conditions as they should think proper; and it was provided, that every policy, &c. should be given under the hands of not less than three of the directors and sealed with the common seal of the society, and that there should be contained therein, and in every other contract to be entered into on behalf of the company, in or about the premises, a reference to the deed of settlement; and it was by another clause declared that it should be competent for the directors generally, where the deed did not otherwise provide, to act in the direction of the concerns of the society, and to do all such things as might be requisite in that behalf. Three of the directors having signed a contract, not under seal, to grant a policy of assurance,—Held, that the directors had power to make such contract, and that the same was binding on the company. *In re the Joint-Stock Companies Winding-up Acts*, 1848, 1849; and *In re the Athenæum Life Assur. Co. Ex parte the Eagle Insur. Co.*, 27 Law J. Rep. (N.S.) Chanc. 629; 4 Kay & J. 549.

Debentures purporting to be those of a joint-stock company completely registered under stat. 7 & 8 Vict. c. 110. were issued by the directors of the company, pursuant to a resolution passed by a meeting of the shareholders, but which meeting was not an extraordinary general meeting duly convened and constituted according to the provisions of the deed of settlement of the company, and not a meeting, therefore, having power to increase the capital of the company by the issue of debentures or otherwise. The issue was procured by the contrivance of the chairman of the board of directors, and the debentures were given to P, an intimate friend of his, upon terms which were fraudulent as against the shareholders. P afterwards transferred them to his broker B, to secure the balance of his account current with B, and B subsequently transferred them to L, who being a customer of B took them upon his recommendation as an investment at the price alleged by B to be the price current in the market. L had no notice at the time of the circumstances under which the debentures had been issued, but the debentures had on the face of them a false recital, that they were given to P by the

direction and consent of the proportion of the shareholders empowered by the deed of settlement to issue them. Having paid the purchase-money to B, L at once took the transfers from P to B and from B to himself to the office of the company, and on the next day they were returned to him by the secretary, with the seal of the company affixed, and signed by the secretary, by whom the debentures had been also signed on their issue. L made no inquiry to ascertain the circumstances under which the debentures had been issued; but two half-yearly payments of interest upon the debentures were subsequently made to L by the directors. Neither these payments nor the circumstances of the issue of the debentures were ever made the subject of a report to a meeting of shareholders until they were ascertained and repudiated by a finance committee appointed by the shareholders to inquire into the affairs of the company. Vice Chancellor Stuart decided that the company were entitled to an injunction restraining L from proceeding in an action commenced by him against the company to recover the sums made payable upon the debentures:—Held, on appeal, affirming that decision, that the shareholders were not bound by the debentures, and that the purchaser took them subject to the equities of the first obligee; that a person buying debentures of a joint-stock company is bound to ascertain whether they are tainted with fraud or irregularity; and, lastly, that the facts of the assignment having been registered and of interest having been paid made no difference unless the shareholders could be shewn to have acquiesced. *The Athenæum Life Insur. Co. v. Pooley*, 28 Law J. Rep. (n.s.) Chanc. 119; 3 De Gex & J. 294; 1 Giff. 102.

The directors of a company are trustees for the shareholders; and, therefore, where directors contracted for an amalgamation of their company with another, and without the knowledge of the shareholders contracted for payments to themselves of sums of money as a compensation for their prospective interest in their fees, they were, upon a bill filed by a shareholder for an account, compelled to pay such monies into court. *Gaskell v. Chambers*, 28 Law J. Rep. (n.s.) Chanc. 385; 26 Beav. 360.

The directors of a company, in contravention of their deed of settlement, drew bills of exchange to secure a debt incurred in building a music-hall, and at the same time mortgaged the building to secure the payment of the bills of exchange. In a suit by the mortgagee for foreclosure,—Held, that the mortgage was valid, that the legal estate was vested in the plaintiff, and that the company could not, in this foreclosure suit dispute the power of the directors to give such security for a past debt. *Scott v. Colburn*, 28 Law J. Rep. (n.s.) Chanc. 635; 26 Beav. 276.

A company was established by a memorandum of association, pursuant to the requirements of the Joint-Stock Companies Act of 1856 (19 & 20 Vict. c. 47), which stated the object to be "the purchase of land for the erection, furnishing, and maintenance of an hotel, the carrying on of the usual business of an hotel and tavern therein, and the doing of all such things as are incidental or otherwise conducive to the attainment of those objects." Land having been purchased, a building was erected, but whilst it was undecorated and unfurnished, the directors, with the concurrence of a majority of shareholders, entered into an agreement with a department of Government

to let a large portion of the building for a period of three years certain, with power to lessees to extend the term to five years, at an annual rent of 6,000*l.*, power being reserved to the lessors to supply all provisions, wines and liquors. A shareholder, dissatisfied with this agreement, filed his bill for an injunction to restrain the granting of the lease, and the application of the funds of the company to such purposes. It was proved that 2,000*l.* of the company's funds would be required to adapt the part proposed to be let to the purposes of the lessees, and after their occupancy to restore it for hotel purposes, and that the available funds of the company were nearly exhausted. One of the Vice Chancellors refused the injunction, and dismissed the bill, with costs. On appeal to the Lords Justices, this decision was confirmed: *Lord Justice Knight Bruce* being of opinion that, as no fraud was imputed, and the business of the company had not commenced, and as a considerable portion of the building would still remain for hotel purposes, the directors were justified in entering into the agreement, and, therefore, the decision of the Vice Chancellor was confirmed. *Lord Justice Turner*, however, dissented, and thought the injunction ought to have been granted, being of opinion that the purposes contemplated by the proposed lease were neither "the usual business of an hotel and tavern," nor were "things which are incidental or otherwise conducive to the attainment of the above objects," and that the constitution of the company did not authorize the directors and shareholders to carry the proposal into effect. *Simpson v. the Westminster Palace Hotel Co. (Limited)*, 29 Law J. Rep. (n.s.) Chanc. 561; 2 De Gex, F. & J. 141.

By the deed of settlement of a joint-stock company power was given to a meeting, consisting of two-thirds in number and value of the shareholders, to authorize the directors to borrow money upon debentures; and at a meeting of shareholders holding less than two-thirds of the shares it was resolved that the directors should be authorized to borrow money on debentures. The directors accordingly borrowed on debentures divers sums of money, which were applied in discharging the debts and liabilities of the company. The debenture debts regularly appeared in the report of the directors, which were confirmed at the annual general meetings of the shareholders, and interest was regularly paid with the consent of the shareholders until the winding up of the company, a period of two years:—Held, that though the debentures were clearly improperly issued, yet, as the money had been raised and applied for the benefit of the company, and the shareholders had acquiesced for two years, it was too late now to dispute their validity. *Re the Magdalena Steam Navigation Co.*, 29 Law J. Rep. (n.s.) Chanc. 667; John. 690.

The plaintiff agreed to sell a colliery to a joint-stock company for 8,000*l.* in paid-up shares; but there was a private arrangement, not communicated to the shareholders, that 2,500*l.* of these should be given as a bonus to the directors:—Held, that the plaintiff could not sustain a bill for specific performance. *Maxwell v. the Port Tennant Patent Steam Fuel and Coal Co.*, 24 Beav. 495.

(b) Rights and Liabilities.

The defendant and others, forming the board of management of a joint-stock company, for the pur-

pose of getting the shares of the company inserted in the Official List of the Stock Exchange, through their secretary, untruly represented that two-thirds of the scrip had been paid upon. The shares being in consequence of that representation inserted in the Official List, the plaintiff, knowing the requirements of the Stock Exchange, on the faith that two-thirds of the scrip had been paid upon, purchased shares in the company. The jury having found that the representation was made fraudulently,—Held, that the defendant was liable to the damages sustained by the plaintiff, although the representation was not made to him directly. *Bedford v. Bagshaw*, 29 Law J. Rep. (N.S.) Exch. 59; 4 Hurl. & N. 538.

The defendants, directors of a registered joint-stock company, at a meeting of the directors, ordered E, the secretary, to accept a bill of exchange in favour of a shareholder to whom the company was indebted for work done. The secretary accepted the bill (which was drawn on the company) "by order of the directors, on behalf of the company." The company's deed prohibited the directors accepting bills. The plaintiffs, indorsees of the bill, in one count alleged that the defendants accepted the bill by E, their agent, and in a second count alleged that they, assuming to be directors of the company, falsely pretended that they had authority to accept and to order E to accept on behalf of the company, whereby the plaintiffs, relying upon the acceptance, believed that it was duly authorized by the company, and took the bill for value:—Held, that the defendants were not liable on the first count, the acceptance not being by E on their behalf; also, that on pleas to the second count, of not guilty and a traverse of the allegation that the plaintiffs took the bill in reliance upon the acceptance as being authorized by the company, the defendants were entitled to the verdict, there being no evidence that the plaintiffs gave value for the bill, or that they were otherwise injured. *Eastwood v. Bain*, 28 Law J. Rep. (N.S.) Exch. 74; 3 Hurl. & N. 738.

Quære—Whether, if the plaintiffs had given value, the action was maintainable. *Ibid*.

A promissory note in this form, "Three months after date we jointly promise to pay F S, or order, 600*l*. for value received in stock on account of the London and Birmingham Iron and Hardware Company, Limited," was signed by three of the directors of the company:—Held, that this was a note made in the name of the company within the Joint-Stock Companies Act, 19 & 20 Vict. c. 47. s. 43, and was therefore binding on the company, and not on the directors individually, who signed it. *Lindus v. Melrose* (Ex. Ch.), 25 Law J. Rep. (N.S.) Exch. 326; 2 Hurl. & N. 293; 3 Hurl. & N. 177.

The defendants, being two directors of a joint-stock company, incorporated under the 7 & 8 Vict. c. 110, signed a promissory note in this form: "Three months after date we, two of the directors of the A L A Society, by and on behalf of the said society, do hereby promise to pay to M or order the sum of 67*l*. value received," and which note was sealed with the seal of the society, but was not countersigned by the secretary or officer of the company in accordance with section 46. of the act:—Held, that the defendants could not be sued individually on the note. *Aggs v. Nicholson*, 25 Law J. Rep. (N.S.) Exch. 348; 1 Hurl. & N. 165.

Semble—the note might be enforced against the company, the counter-signature being merely directory. *Ibid*.

In winding up a company the directors will, as against the shareholders, be allowed their fees for attendance at board and other meetings, when the same have been sanctioned at the general annual meetings of the shareholders, though in the result the dealings of the company were unfavourable. *In re the Commercial and General Life Assur., Annuity, Family Endowment and Loans Assoc., ex parte Johnson*, 27 Law J. Rep. (N.S.) Chanc. 808.

Directors of a company subscribed for a large number of shares in their respective names, but they paid the deposit upon a small number only. At a board they resolved to cancel the shares upon which they had paid no deposit, and they also purchased the shares of another director, who desired to retire, and paid for them out of the funds of the company. At a general meeting the shareholders confirmed the resolution. Upon a bill of some of the shareholders, alleging that these acts were not authorized either by the constitution of the company or by the deed of settlement, and that they were a fraud upon the shareholders,—Held, at the Rolls, upon demurrer, that the allegations were sufficient to support the bill, and that the demurrer must be overruled; and this decision was affirmed on appeal. *Hodgkinson v. the National Live Stock Insur. Co.*, 28 Law J. Rep. (N.S.) Chanc. 676; 4 De Gez & J. 422; 26 Beav. 473.

Where a person, although not properly appointed a director of a joint-stock company, sits at the board and acts as such, the Court will, under the 29th section of the 7 & 8 Vict. c. 110, so far treat him as a director as to disallow his claim under a contract for executing works for the company. *Re the South Essex Gaslight and Coke Co., ex parte Sears*, 29 Law J. Rep. (N.S.) Chanc. 43; John. 480.

A company being desirous of raising money for carrying on their business, passed a resolution authorizing some of their directors to procure a loan from an insurance office. Two of the directors obtained the money upon giving their personal security, and effecting an insurance of their lives and assigning the policy to the insurance office. It was well known to all parties that the money was borrowed expressly for the benefit of the company, and the transaction was approved of at the next general meeting, but no formal confirmation was then adopted:—Held, that this contract came within the 29th section of the 7 & 8 Vict. c. 110, as being one in which a director was interested, and could not therefore be enforced against the company; but, nevertheless, the director was entitled to a claim against the company for so much of the money borrowed by him as should have been properly applied for the purposes of the company. *In re the Patent Steam Fuel Co., ex parte Baker*, 29 Law J. Rep. (N.S.) Chanc. 409; 1 Dr. & Sm. 55.

The directors of a company are trustees, and they have attached to them, for the benefit of the shareholders, all the liabilities and duties which attach to a trustee and agent. If, therefore, a director enter into a contract for the company, he can derive no personal benefit from it. *The Great Luxembourg Rail. Co. v. Magnay*, 25 Beav. 586.

A railway company furnished a director with a

large sum of money to enable him to purchase the "concession" of another line. He purchased it, as it turned out, from himself, he being the concealed owner of it:—Held, that the transaction could not stand, but that the company must adopt or repudiate the transaction altogether; and, the company having sold the concession pending a suit impeaching the transaction, held, also, that they could have no relief either as to the application of the money or otherwise. *Ibid.*

The directors of a loan company were empowered to borrow money; but directors, who were "concerned in or participated in the profits of any contract with the company," vacated their offices. The chairman lent money to the company at high interest, which was afterwards lent out at a profit:—Held, that this was warranted by the rules. *Bluck v. Malahue*, 27 Beav. 398.

Discounting the bills of a director is a lending of money within a clause prohibiting loans to shareholders. *Ibid.*

Decree to compel directors in a joint-stock company to take shares subscribed for by them, and which were transferable, refused. *Ibid.*

A director of a joint-stock company proposed to his co-directors that for the benefit of the company each of them should take a certain number of shares, to be held in trust for the company; and, to set the example, he signed the deed for 2,000 shares. No note of the proposal was entered on the minutes, nor were the shares handed over to him. No other director followed his example; but subsequently, he being still a director, his name was returned to the Stamp Office, for the shares. Afterwards, having ceased to be a director, and having reason to know that the company was in failing circumstances, he procured the shares to be cancelled by the directors:—Held, upon the terms of the company's deed of settlement, that it was *ultra vires* on the part of the directors, they having no power to cancel or diminish the capital, but only to forfeit shares for the benefit of the company, and was a fraud on the part of the shareholder, and he was accordingly held to be a contributory in respect of those shares. *In re the Athenæum Assur. Soc.; Richmond's case and Painter's case*, 4 Kay & J. 305.

(c) Contracts between.

An agreement appointing a director of a life assurance company to select agents and medical referees for the company, the director to be paid a commission on policies effected, is not a contract of service within the exception to section 29. of the Joint-Stock Companies Act, 7 & 8 Vict. c. 110, which enacts, that if any contract or dealing ("except a policy of assurance, grant of annuity, or contract for the purchase of an article, or of service, which is respectively the subject of the proper business of the company") shall be entered into, in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose, and that no such contract shall have force until approved and confirmed by the majority of votes of the shareholders present at such meeting. Therefore, where the directors of a joint-stock life assurance company, by resolution, appointed the plaintiff a director, to select agents and medical

referees, the plaintiff to be allowed a commission of 3l. per cent. on the premiums of all policies effected through such agencies, but the resolution was not submitted to, or approved and confirmed by, a meeting of the shareholders, it was held that, the contract being void, the plaintiff could not maintain an action for the commission. *Poole v. the National Provincial Life Assur. Soc.*, 27 Law J. Rep. (n.s.) Exch. 219; 2 Hurl. & N. 687.

In consequence of disagreements between the directors of a joint-stock company (the plaintiff and four other directors differing from the defendants, six other directors,) a deed was executed between the defendants of the first part, and the plaintiff and his set of directors of the second part; which recited that the parties of the second part were desirous of retiring from the direction of the company, and that it had been agreed that they should give up all interest which they had therein, whether as directors or shareholders; that it had been further agreed that the parties of the first part (the defendants) should immediately cause all the shares held by those of the second part to be transferred into the names of the defendants, and that no further shares should be issued until the said shares should have been transferred to other persons applying for shares; and it was witnessed, that in consideration of the premises, and of the covenant by the defendants, the parties of the second part, and each of them, did relinquish and release to and in favour of the company all their rights and interests in the company, and in the funds and effects thereof; and in consideration of the premises and of such relinquishment, the defendants covenanted with the parties of the second part, their executors, administrators and assigns, that they would, on the execution of the deed, cause all the shares held by those parties to be transferred into the names of the defendants, and that the company should not issue any fresh shares until such shares had been transferred to the names of other persons, and that they would cause the transfer of such shares to be duly registered under the provisions of the Joint-Stock Companies Registration Act for the protection of retiring shareholders, and would do all such other acts as might be necessary under the act for terminating the liabilities of the retiring directors, and would pay to them, their executors, administrators and assigns, all money advanced by them to the company, and would at their own costs and charges save harmless and indemnified the parties of the second part, their executors, administrators and assigns, from all future actions, payments, damages, claims and demands, in respect of the company or of the shares, or in any way relating to the premises. There were two other directors, between whom and the defendants a similar deed was executed. Each of the retiring directors, on executing the deed, received a cheque (which was paid out of the funds of the company) for the amount payable to him under it, the plaintiff thus receiving 50l., the amount of deposits paid on the shares which he held; and each executed transfers of his shares (there being none jointly held by them) to the defendants. There were other shareholders of the company, who were not informed of the deed, or of the proceedings under it, and neither the deed nor the proceedings were ever brought before a general meeting of the shareholders. The shares were re-issued to the public on account

of the company. The company was afterwards wound up, and the plaintiff was put on the list of contributories in respect of the shares which he had transferred to the defendants, on the ground that the transfer was invalid, and he was compelled to refund the 50*l.*, and to pay calls amounting to 300*l.* The other retiring directors were similarly treated. The plaintiff having brought an action alone against the defendants, for a breach of the covenant of indemnity in the deed,—Held, that the deed was not void as a fraud on the company, as it did not prejudice the company in any way; and was not invalid as *ultra vires*, as it did not profess to bind the company, but was merely a deed between the several directors as individuals. *Haddon v. Ayers*, 28 Law J. Rep. (N.S.) Q.B. 105; 1 E. & E. 118.

Held, also, that the interest of the parties of the second part appeared to be several, and the covenants might be treated as several also; and that the action was well brought by the plaintiff alone for the damage he had separately sustained, and that he could recover the whole of the 350*l.* Ibid.

(E) SHARES.

(a) Acceptance of.

The defendant having received a prospectus of a company, with a printed form of application for shares, filled it up and signed it, requesting to be allotted a certain number of shares, and agreeing to accept such shares, and to pay the future calls. He paid a deposit on the shares to the company's bankers, and received a receipt for the same. Shares were allotted to him; and a copy of the memorandum of association, with articles of association indorsed, were subsequently sent by the company to the defendant, with a form appended, to be filled up by him, stating that he accepted the shares in the company, and consented to be registered as a shareholder. The defendant did not return or sign the form in question, but subsequently applied for interest warrants and share certificates, which were not delivered to him by reason of his omission to return the form of acceptance filled up and signed. His name, however, was entered on the register by the company, and notice of calls was given to him:—Held (affirming the judgment below, 28 Law J. Rep. (N.S.) Exch. 193; 4 Hurl. & N. 160), in an action, against the defendant as a shareholder, for calls, that, as he had not signed the written form of acceptance of shares sent him by the company for that purpose, he could not be said to have accepted the shares: for the statute 19 & 20 Vict. c. 47. in the Schedule provides that "no person shall be deemed to have accepted any share in the company unless he has testified his acceptance thereof by writing under his hand in such form as the company from time to time directs." The defendant, consequently, had not become a shareholder, as under section 19, acceptance of shares is necessary to constitute him a shareholder. He, therefore, was not liable to pay calls. *The New Brunswick and Canada Rail. and Land Co. (Limited) v. Muggeridge* (Ex. Ch.), 28 Law J. Rep. (N.S.) Exch. 365; 4 Hurl. & N. 580.

A bill by a company alleged that the defendant had agreed to accept shares. The articles of association were silent as to the mode of acceptance, and the Joint-Stock Companies Act, 1856, section 9, and Schedule (B.) applied, by which the acceptance

must be in writing signed. Defendant had never signed an acceptance. This fact and the statute were set up by plea:—Held, 1, the plea was bad in form, as it raised no fact not raised by the bill; 2, the agreement was a good agreement to do that which the statute required; 3, the decree would not be nugatory, as in a joint-stock partnership a partner cannot put an end to the partnership, but only to his own quality of shareholder: he must remain shareholder, or constitute another person shareholder in his place. *The New Brunswick, &c. Co. v. Muggeridge*, 4 Drew. 686.

(b) Transfer of.

Railway stock was purchased for the plaintiff, and paid for by him. By a mistake of the broker the transfer was executed by the vendor to a wrong transferee. The name of the transferee was afterwards struck out, and the plaintiff's name interlined; the initials of the vendor being placed, without his authority, opposite to the correction. The transfer so altered was executed by the plaintiff, and registered by the company in ignorance of the fact that the initials were not written by the vendor; the vendor made no claim to the stock, and the plaintiff afterwards instituted a suit on behalf of all the shareholders to set aside a traffic agreement between the company and certain other railways. The company, after the institution of the suit, being informed by the vendor that the initials were not in his handwriting, retransferred the stock into the name of the vendor, and pleaded that the plaintiff was not a shareholder:—Held, that the plaintiff was not a shareholder, and had no interest to entitle him to maintain the suit, and that this would have been so even if the company had abstained from striking his name off the register; and the bill was dismissed accordingly. *Hare v. the London and North-Western Rail. Co.*, John. 722.

The purchase of shares in a company for the purpose of instituting a suit to restrain the carrying out of an agreement alleged to be illegal, is not maintenance or anything savouring of maintenance. Ibid.

(F) SHAREHOLDERS.

(a) Execution of Deed by.

Three persons who had taken shares in a joint-stock company proved, that when they signed the company's deed it contained a false sheet (which had been fraudulently inserted, and to all appearances formed an integral part of the instrument), limiting the liability of the shareholders to the amount of their shares; whereupon, in winding up the company and settling the list of contributories, they were released:—Held, that their release did not affect the liability of those who executed the deed after the false sheet had been removed, and the deed restored to the form in which it was originally registered, notwithstanding the latter had executed the deed upon the faith of those three persons being shareholders. *In re the Athenaeum Life Assur. Soc., Richmond's case and Painter's case*, 4 Kay & J. 305.

Distinction in this respect between joint-stock companies and private partnerships. Ibid.

(b) Acquiescence by.

The capital of a joint-stock company was fixed at 10,000*l.*, but with power for a general meeting of

the shareholders, duly convened according to certain forms, and by a majority of two-thirds of the then shareholders, to increase that amount to 100,000*l*. No such meeting was held, but a false entry was made by the chairman in the minute-book of the company, stating that at an extraordinary general meeting of the company it had been resolved to increase the capital from 10,000*l*. to 100,000*l*. The capital having been *de facto* increased, new shares had been issued and taken, profits having been made upon the increased capital, and dividends paid on such profits among all the shareholders for four years:—Held, that the shareholders must be taken to have acquiesced, and could not now object to the irregular manner in which the shares had been increased. *In re the Athenæum Life Assur. Soc., Richmond's case and Painter's case*, 4 Kay & J. 305.

(G) CALLS.

[See *ante*, (E) (a).]

Action by a joint-stock company against a shareholder for a call on shares. Plea, that the defendant was a director, and before the call was made agreed with the other directors to retire and transfer his shares to the secretary for the benefit of the company; that he retired and transferred his shares, and that the transfer was duly registered and accepted by the company:—Held, that the plea was a good equitable defence, as "duly accepted by the company" must be taken to mean an acceptance valid under the statute 7 & 8 Vict. c. 110; and that sections 27. and 29. did not apply to such a contract. *The Plate-Glass Universal Insur. Co. v. Sunley*, 26 Law J. Rep. (N.S.) Q.B. 316; 8 E. & B. 47.

Second plea, that after the call was made the plaintiffs sold their business to another company, on the terms that the other company should take all the plaintiffs' liabilities, which they did, including the liabilities in respect of which the call was made; and that the plaintiffs' claim against the defendant was by such sale, with the consent of the defendant and the plaintiffs, satisfied and discharged:—Held, that the plea was bad. *Ibid*.

Under the Joint-Stock Companies Act, 1856, seven persons, including the defendants, signed the memorandum and articles of association for an intended company, the capital of which was to be 12,000*l*. in 240 shares, and which was thereupon duly registered. By the articles, the number of directors was to be five, of whom three were to be a quorum; and the first directors were to be determined on by the subscribers. At a meeting of three of the subscribers (the defendants not being present), five persons, including the defendants, were appointed directors, and one of the defendants afterwards acted as a director, and was present at a meeting of shareholders approving of the resolution and appointment. Before seventy shares were taken, the three directors made a call, the defendants not being present at the meeting, nor afterwards assenting to the resolution:—Held, that the company could not sue them for the call upon their shares, the directors not having been duly appointed. And, *semble*, that they could not be competent to make calls until the whole capital was subscribed: and that, therefore, the defendants were not liable at all. *Honbeach Coal Co. v. Teague; the Same v. Bennett*, 29 Law J. Rep. (N.S.) Exch. 137; 5 Hurl. & N. 151.

By the articles of association of a joint-stock company a call was to be deemed to have been made at the time when the resolution authorizing it was passed; but notice of it was to be given to every shareholder, notifying that it had been made, and in any action for a call it should be sufficient to prove that the defendant was holder of the shares, and that such notice had been given; and should not be necessary to prove any other matter. And further it was provided that minutes should be made of all resolutions of directors, and any such minutes, if signed by any person purporting to be chairman of any meeting of directors, should be receivable in evidence without further proof. The minute of the resolution for a call was not signed, but at a subsequent meeting a minute was signed (not by the same chairman) confirming the former one. In an action for a call, this second minute being the only evidence that the call was made,—Held, that the articles did not dispense with proof of the call, and that the proof was not sufficient. And, *semble*, that there was no valid call, the minute of it not having been signed. *The Cornwall Great Consolidated Lead and Copper Mining Co. v. Bennett*, 29 Law J. Rep. (N.S.) Exch. 157; 5 Hurl. & N. 423.

It is not competent to a shareholder in a completely registered joint-stock company, who has executed the deed of settlement, with a recital therein that the whole number of shares has not been subscribed for, to defend himself against a claim for calls, on the ground that the directors have proceeded to carry on business with less than the stipulated amount of capital subscribed. *The London and Continental Assur. Soc. v. Redgrave*, 4 Com. B. Rep. N.S. 524.

(H) MEETINGS; NOTICE OF.

At an adjourned general meeting of the shareholders of a company, of which adjournment notice was given by circulars sent to the several shareholders, but not by advertisement, as required by the deed of settlement, a proposition for a call was carried. A shareholder, who was present and voted at the adjourned meeting, held not entitled to take advantage of the irregularity of the notice. *In re the British Sugar Refining Co., ex parte Saris*, 26 Law J. Rep. (N.S.) Chanc. 369; 3 Kay & J. 408.

Semble—if the shareholders had, in effect, notice of the meeting, the want of compliance with the provisions of the deed by advertisement would not invalidate the proceedings at the meeting. *Ibid*.

The deed of settlement provided that in every notice convening a general meeting of the shareholders the object of the meeting should be specified. The transaction of the business at the meeting foreign to the objects specified in the notice will not make the whole meeting irregular. *Ibid*.

(I) CONTRIBUTION TO LOSSES.

In the case of a mutual marine insurance company, where the members are numerous, the Court has jurisdiction, on a loss, to enforce contribution and payment of it, either where the amount has been already ascertained under the rules, by arbitration, or where it has not been so ascertained. *Taylor v. Dean*, 22 Beav. 429.

3.—DISSOLUTION AND WINDING-UP OF COMPANIES.

(A) JURISDICTION.

Where a company has been registered under the Joint-Stock Companies Acts of 1843 and 1849 as an unlimited company, and subsequently registered under the 19 & 20 Vict. c. 47. as a limited company, the Court of Chancery has power to make an order for the winding up of the whole transactions of the company. *Ex parte the Plumstead, Woolwich and Charlton Water Co.*, 28 Law J. Rep. (n.s.) Chanc. 163.—See next case.

A joint-stock company had been registered as an unlimited company, and was afterwards registered as a limited company, and one of the Vice Chancellors made an order for the winding up of the company, and also appointed an official manager. The official manager filed a bill at the Rolls, and that bill was dismissed on the ground that when a joint-stock company, other than a mining company, is registered as a company with limited liability, the Court of Bankruptcy, and not the Court of Chancery, is the proper jurisdiction in which the winding up is to be prosecuted, and therefore that the appointment of official manager was erroneous, and he had no title to sue:—Held, on appeal from that decision, that the dismissal was correct; and, on appeal from the orders of the Vice Chancellor for winding up and for the appointment of the official manager, that both those orders were null, as having been made without jurisdiction. *In re the Plumstead, Woolwich and Charlton Consumers Pure Water Co., and the Plumstead, Woolwich and Charlton Consumers Pure Water Company (Limited); The same Company v. Davis; Ellis v. the same Company*, 29 Law J. Rep. (n.s.) Chanc. 741; 28 Beav. 545; 2 De Gex, F. & J. 20.

(B) WHEN AND TO WHAT COMPANIES THE WINDING-UP ACTS APPLY.

Iron works carried on by trustees under a deed of arrangement for the benefit of creditors whose debts were to be paid out of the profits, are not within the operation of the Winding-up Acts, and no order will be made for winding up the affairs. *In re the Stanton Iron Co.*, 25 Law J. Rep. (n.s.) Chanc. 142; 21 Beav. 164.

Upon a petition for winding up a benefit building society, which had been duly enrolled under the provisions of the act, 6 & 7 Will. 4. c. 32, it was held, that such societies came within the operation of the Winding-up Acts. *In re the St. George's Benefit Building Society*, 27 Law J. Rep. (n.s.) Chanc. 96; 4 Drew. 154.

A shareholder in a joint-stock company presented a petition (against the approval of the majority of the shareholders) for the winding up of the company, alleging the loss of three-fourths of its capital (under section 67. of the act, 19 & 20 Vict. c. 47); but the Court, being satisfied of the bad faith of the petitioner, and not being satisfied of the loss of capital as alleged, dismissed the petition. Under the 72nd section of the above-named act, the order to be made upon a petition to wind up is entirely in the discretion of the Court. *Ex parte Hawkins, in re the Metropolitan Saloon Omnibus Co. (Limited)*, 28 Law J. Rep. (n.s.) Chanc. 830.

(C) PETITION AND ORDER FOR WINDING UP.

Shareholders alleged that the company was insolvent and unable to meet its debts and liabilities. They also alleged that the acts of the directors were not *bona fide*, and that a proper contribution could only be obtained through the Court. They supported the allegation by balance-sheets prepared by an accountant, and made an affidavit stating their belief that the allegations were true:—Held, at the Rolls, and affirmed by the Lords Justices, without any affidavit being made by the respondents, that the company could enforce the liabilities arising from the subscription to the deed; that, with these facts, it did not appear that the company was insolvent. The petition and the appeal were dismissed, with costs. *In re the National and Provincial Live Stock Insur. Soc.*, 27 Law J. Rep. (n.s.) Chanc. 669; 26 Beav. 153.

A B, the assignee of a debt from a joint-stock company to an amount under 50*l.*, upon which judgment had been obtained and execution issued, petitioned in his own name, and as attorney of the original creditor, for a winding-up order under the Joint-Stock Companies Acts, 1856, 1857. The Commissioner dismissed the petition as the debt was under 50*l.*, and the petition was not presented by the legal creditor; but, upon appeal, this was reversed, the Lord Chancellor considering that there having been execution, the amount of the debt was unimportant, and that the petition was regular, it being presented in the name of the original creditor. *Re the London and Birmingham Flint Glass and Alkali Co.*, 28 Law J. Rep. (n.s.) Bankr. 17; 1 De Gex, F. & J. 257.

An order to wind up a company does not prevent the Statute of Limitations from running against a creditor of the company. *In re the Royal Bank of Australia, ex parte Forest*, 29 Law J. Rep. (n.s.) Chanc. 295; 2 Giff. 42.

In May 1849 an order was made to wind up a company, and in the ensuing October the solicitors, who had acted for the company, carried in a claim against them for costs. In November 1850 the solicitors, on the application of the official manager, delivered to him the company's books and papers, on which they had a lien for their costs, upon the official manager at the same time undertaking, in writing, to pay them the amount of their bill out of the first funds which might come into his hands. That undertaking received the sanction of the Master. In 1859 the official manager recovered a sum of money, and the solicitors subsequently thereto sent in to him a larger bill of costs against the company:—Held, that having regard to the undertaking of the official manager of November 1850, the solicitors' claim was not barred by the Statute of Limitations; and an order was made to tax their bill of costs, without prejudice to the question whether they were entitled to have a call made to pay the same when taxed. *In re the Gloucester, Abergystwyth and Central Wales Rail. Co.*, 29 Law J. Rep. (n.s.) Chanc. 383; 2 Giff. 47.

A telegraph company obtained an act of incorporation. It laid down about 400 miles of wires, but had spent the whole subscribed capital of 26,000*l.* and 16,000*l.* beyond, and judgments to the extent of 1,800*l.* had been entered up against the

company. On the petition of a shareholder, it was ordered to be wound up, though opposed by a director, on behalf of the holders of one-eighth of the shares, who objected that the act of parliament would thereby become void, and stated that the materials would sell for very little; that the works might be completed for a small sum; and that there was some prospect of obtaining further pecuniary assistance; the Court considering that, under the circumstances, the petitioner ought not to be compelled to go on with an undertaking which might possibly double his present liability. *In re the Electric Telegraph of Ireland*, 22 Beav. 471.

A person claiming to be a creditor of a limited company served a demand, under section 68. of the Joint-Stock Companies Act, 1856, and the company not having paid, secured or compounded for the sum claimed, he presented a petition for winding up. It did not appear that there was any ground for supposing the company unable to pay its debts, and the company disputed the debt, there being unsettled accounts between the company and the petitioner, so that it could not, on the materials before the Court, be ascertained whether anything was due to the petitioner or not:—Held, that the petition ought not to be dismissed; but it was ordered to stand over till it had been ascertained by proceedings at law whether the petitioner was a creditor or not. *In re the Rhydydefd Colliery Co. (Limited)*, 3 De Gex & J. 80.

The directors of a company transferred all its assets, liabilities and business to another company under a deed of amalgamation, by which it was provided that the shareholders in the old company should exchange their shares for shares in the new company; and that the new company should indemnify the old company in respect of all its debts and liabilities. Some only of the shareholders in the old company executed the deed of amalgamation, and became shareholders in the new company. The new company disputed their liability to carry out the arrangement for the amalgamation, and did not pay the debts of the old company, and actions were brought against the old company. The new company subsequently assigned their business, but not their assets, to another company. Upon a petition for the winding up of the old company, presented by a shareholder in the new company, who had originally been a shareholder in the old company, and which was supported by the shareholders of the old company who had executed the deed of amalgamation, but opposed by those who had not, the Court refused to order the old company to be wound up, and dismissed the petition, with costs, as against those shareholders who had been served, but without costs as against those shareholders who had voluntarily appeared. *In re the Anglo-Australian, &c. Co., ex parte Smith*: *In re the British Provident, &c. Soc., ex parte Collins*, 1 Dr. & Sm. 118.

A shareholder in the new company gave notice to a third company, to whom the new company had assigned its business, not to pay certain monies due from them to the new company, in consequence of which litigation ensued. The shareholder then presented his petition to wind up the new company:—Held, that the existence of suits against the company was not *per se* proof of its insolvency; and the petition was ordered to stand over, with liberty to apply. *Ibid.*

Digest, 1855–60.

(D) OFFICIAL MANAGER.

The Joint-Stock Companies Winding-up Act, 1848 (11 & 12 Vict. c. 45.) s. 73, enacts, that after the appointment of an official manager no creditor shall have power to commence or to proceed with any action against the official manager, &c. until after proof, or exhibiting such proof as he may be able of his debt or demand before the Master, as thereafter mentioned; section 74. directs that proof shall be made by deposition or affidavit, as in bankruptcy:—Held, that a creditor, who, having made an affidavit of his debt, has been required by the Master to attend personally, but has neither attended nor given any reason for not attending, has no power to commence an action against the official manager; and if he does so, the proceedings will be stayed. *Hutchinson v. Harding*, 25 Law J. Rep. (N.S.) Exch. 171; 11 Exch. Rep. 561.

The trustees of a freehold land society instituted a suit against the defendant, and pending the proceedings the society became insolvent, and a winding-up order having been obtained, the official manager was substituted as plaintiff by an order of Court; but he was refused leave, by the Court making the winding-up order, to prosecute the suit. Upon a motion by the official manager to the Court, which had substituted him as plaintiff, asking that the suit might be stayed on terms, or that some order might be made for its future prosecution,—Held, that insolvency was no ground for staying a suit or preventing its being dismissed, and that the official manager must pay the costs of the motion personally. *Caldwell v. Ernest*, 28 Law J. Rep. (N.S.) Chanc. 810; 27 Beav. 39.

An official manager appointed under an order made to wind up a company was by an order of course substituted as plaintiff in a suit instituted by the trustees of the company. He applied to the Court asking either that the suit might be stayed or that direction might be given for its prosecution. The application was refused, and he was ordered to pay the costs personally. Upon a motion by the defendant, which was served on the original plaintiffs and on the official manager,—Held, that the bill must be dismissed, with costs. *Caldwell v. Ernest*, 28 Law J. Rep. (N.S.) Chanc. 811; 27 Beav. 42.

Held, also, that the application made by the official manager was not an adoption of the suit, and that he was not personally liable to pay the costs, but that they must be paid by the original plaintiffs. *Ibid.*

(E) LIQUIDATORS.

Liquidators appointed to wind up a company, under the Joint-Stock Banking Companies Act, 1857, ought, as a general rule, to be disinterested persons, and neither creditors nor shareholders. *In re the Northumberland and Durham District Banking Co.*, 2 De Gex & J. 508.

(F) RECEIVER.

A banking company was ordered to be wound up, and was afterwards adjudicated bankrupt. Some of the creditors petitioned that an application might be directed to be made to the Court of Chancery, for the appointment of a receiver under the 7 & 8 Vict. c. 111. s. 20, to receive such sums of money as might

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be found necessary and proper for the purpose of paying all the debts and liabilities of the company, and the costs of winding up and finally settling the affairs of the company. It not having been found what sums would be necessary for the purpose, it was held, that the Court could not interfere under this section, even if the section was not repealed by the Winding-up Acts. *Ex parte Shore v. the Royal British Bank*, 26 Law J. Rep. (N.S.) Bankr. 17.

(G) COMPROMISE.

A company was being wound up compulsorily, after an abortive attempt to wind it up voluntarily, and the official liquidators agreed with thirty-five shareholders to compromise their liability for a fixed sum, those shareholders insisting as a condition that the data upon which the compromise was founded should not be divulged. The compromise was sworn to be founded upon details of property and circumstances which if made known would operate detrimentally to the thirty-five shareholders and to the interests of the company. The official liquidators applied to the Court to sanction the compromise under that condition, in pursuance of the 19th section of the Joint-Stock Companies Amendment Act, 21 & 22 Vict. c. 60. Some of the creditors opposed on the ground of the data not being stated, and the application was refused, with costs: and, on appeal, the decision was affirmed. *Ex parte Totty, in re the Northumberland and Durham District Banking Co.*; and, on appeal, *Ex parte Bartleman in re the same Co.*, 29 Law J. Rep. (N.S.) Chanc. 702; 1 Dr. & Sm. 273.

Notice to creditors is given in winding-up cases, though it is not imperative that notice should be given. *Ibid.*

(H) IN BANKRUPTCY.

A banking company stopped payment, and a petition to wind up its affairs was presented and answered under the statute 11 & 12 Vict. c. 45. A creditor afterwards filed an affidavit of debt, and served the secretary with a writ of summons under the 7th section of the statute 7 & 8 Vict. c. 111. The company was then dissolved, under a provision in the deed of settlement. Subsequently the order to wind up was made absolute; an interim manager was appointed; and the proceedings under the winding-up were registered as a *lis pendens*. At the expiration of a calendar month from the service of the writ of summons the company was adjudicated bankrupt, and an official assignee was appointed. Ultimately, an official manager was appointed by the Court of Chancery. A creditor petitioned to annul the adjudication, which was dismissed by one of the Commissioners:—Held, upon appeal of the creditor, that the non-payment of the debt for which the writ of summons was issued constituted a valid act of bankruptcy, notwithstanding the previous petition to wind up, and the appointment afterwards of an interim official manager; and that the adjudication could not be disturbed. *Ex parte Marcus, in re the Royal British Bank: Atchison v. Lee*, 26 Law J. Rep. (N.S.) Bankr. 1; 8 Drew. 637.

A company was formed in 1853, and carried on upon the cost-book principle until 1857, when it was registered as a limited company, under the act

of 19 & 20 Vict. c. 47, and an order was subsequently obtained for winding up the affairs in bankruptcy. An order was now made upon petition that the company should be wound up in Chancery, under the acts of 1848 and 1849, in respect of such transactions as occurred prior to the date of registration as a "limited company." *In re the Joint-Stock Companies Winding-up Acts, 1848 and 1849; and in re the Welsh Pottery Mining Co.*, 27 Law J. Rep. (N.S.) Chanc. 311.

A banking company, registered under the 7 & 8 Vict. c. 113, was ordered to be wound up, and official managers and a creditors' representative were appointed, the latter appointment being on the 18th of January. Some creditors of the company brought an action against the company on the same 18th of January, and on a summons by the official managers to stay proceedings, it was ordered that the plaintiffs should be at liberty to proceed, but the judgment was not to be available for any other purpose than to make the company bankrupt. Judgment was accordingly entered up, and a notice requiring payment was served. One of the Vice Chancellors having refused an injunction to stay the proceedings, the company was, on the 22nd of April adjudged bankrupt. On an appeal from the Vice Chancellor's judgment, and an application to annul adjudication,—Held, that the bankruptcy was valid, the 20 & 21 Vict. c. 78. not preventing a company being made bankrupt under the 7 & 8 Vict. c. 111, but that the bankruptcy was of no further avail than to clothe the assignees with authority to concur with the official manager in the proceedings in the winding-up. *Re the London and Eastern Banking Corporation*, 27 Law J. Rep. (N.S.) Chanc. 457; 2 De Gex & J. 484; 4 Kay & J. 278.

(I) SUITS AGAINST THE COMPANY.

Where, at a general meeting of the subscribers to an abortive railway scheme duly convened, the directors' accounts had been adopted by the great majority of the subscribers present, and in pursuance of a resolution passed at the meeting the balance remaining in the hands of the directors of the funds arising from deposits paid up by the shareholders had been applied in repaying a considerable dividend upon their deposits to the subscribers, a bill filed three years afterwards by one of the shareholders who had not chosen to receive a dividend upon his deposit, but who had not otherwise objected to the proceedings at the meeting, praying a general account of the dealings and transactions of the directors, was dismissed, with costs, the evidence failing to establish a case of fraud or mistake against the directors. *Stuart v. Arrowsmith*, 25 Law J. Rep. (N.S.) Chanc. 153; 3 Sm. & G. 176.

After a joint-stock company had been adjudicated bankrupt, and an order in Chancery had been pronounced for winding up its affairs, a creditor of the company obtained a judgment against the official manager, and then, having first obtained leave by a Judge's order, sued out a writ of *elegit* against the property and effects of a shareholder of the company, under which the lands of the shareholder were delivered to him by the sheriff. He then filed his bill as tenant by *elegit* to redeem a mortgage upon the lands prior in point of date to the execution:—Held, upon demurrer, that the bill was not within the pro-

hibition of the 7th section of the Joint-Stock Companies Winding-up Act, 1857, which act had passed since the filing of the bill. *Barnes v. Thrupp*, 27 Law J. Rep. (n.s.) Chanc. 183.

An assurance for 300*l.* was effected with a company registered under the 7 & 8 Vict. c. 110; the policy was afterwards adopted by another company. After the death of the assured, his executrix brought an action to recover the 300*l.* Judgment was obtained, but it was unproductive. An order to wind up the company was afterwards obtained, and an official manager was appointed; but no advertisement was issued under the 20 & 21 Vict. c. 78, calling upon the creditors to appoint a representative. The executrix proved her debt before the Judge, and then filed a bill against the official manager to obtain payment. Upon a demurrer, it was held, that the suit was rightly instituted. *Robson v. McCreight*, 27 Law J. Rep. (n.s.) Chanc. 471; 25 Beav. 272.

A railway company having been projected in 1845, 700 persons signed the subscribers' agreement and parliamentary contract, by which it was stipulated that the majority of the managing committee should have power to bind all the members as to payment of solicitors and others employed by them. No act of parliament was obtained, and this inchoate company amalgamated with two other companies in the same position, at which time it was agreed that a specific sum should be set apart for payment of the expenses incurred by the original company. The solicitors of this company, who had been employed by the committee of management, applied to the amalgamated company for payment of their bill of costs. The liability was denied, and upon the winding up of the company in 1849, the solicitors carried in their claim before the Master. No decision having been then come to, the matter stood over, and the solicitors after the expiration of six years sought for payment of their debt from the general body of shareholders, the fund set apart upon the amalgamation having been already expended:—Held, that all the members of the inchoate company who had signed the subscribers' deed and parliamentary contract were liable for the debt, and that as the claim had been carried in before the Master within six years, the solicitors were not barred by the Statute of Limitations. *In re the Warwick and Worcester Rail. Co.*, 27 Law J. Rep. (n.s.) Chanc. 735.

(K) CONTRIBUTORIES.

(a) Persons liable to be made Contributories.

(1) Directors.

A transfer of all shares in a company by a retiring director to the continuing directors is invalid, and will not relieve the retiring director from his liabilities as a shareholder, even in respect of shares allotted to him for services performed on behalf of the company, and accepted only as shares on which no call was to be made. *In re the Universal Provident Association, ex parte Daniel*, 26 Law J. Rep. (n.s.) Chanc. 563; 1 De Gex & J. 372; 22 Beav. 43; 23 Beav. 568.

Directors of a company cannot allot shares in a company irrespective of the liabilities attaching to them. *Ibid.*

Lord Justice Turner, on appeal, concurred with

the Master of the Rolls in the above decision, *Lord Justice Knight Bruce* doubting. *Ibid.*

A joint-stock company was in difficulties, and the directors came to an arrangement with an actuary experienced in such matters for the purpose of "resuscitating" the company. One of the directors, disagreeing with his co-directors in this and other matters, transferred his shares to a nominee of the actuary, and the transfer was executed with all the formalities required by the deed of settlement. Soon afterwards the company was ordered to be wound up, and one of the Vice Chancellors being of opinion that the arrangement to "resuscitate" the company, however beneficial, was not warranted by the deed of settlement, and was beyond the powers of the directors, and that the transfer of the shares, though formally executed, was invalid, and that, therefore, the director who made the transfer did not get rid of his liability, and must be placed upon the list of contributories; but,—Held, upon appeal, that although the arrangement with the actuary might have been beyond the powers of the directors, the transfer of the shares having been made *bond fide*, the decision of the Vice Chancellor must be reversed, and the name of the director removed from the list of contributories. *Ex parte Jessop, in re the London and County Assurance Soc.*, 27 Law J. Rep. (n.s.) Chanc. 757; 2 De Gex & J. 638.

A B became a shareholder and director of a company, on the representation of one of the directors that it was in a flourishing condition, whereas it was on the verge of insolvency:—Held, that the misrepresentation did not relieve A B from being a contributory. *Holt's case, re the Universal Provident Life Assc.*, 22 Beav. 48.

(2) Holders of Scrip.

A company was formed without any deed or act of incorporation. Scrip certificates alone were issued; these were passed by delivery, without any other transfer. A stockbroker bought several on the Stock Exchange; he received dividends and paid calls, and he was the holder of certificates when a winding-up order was made against the company:—Held, that he must be placed on the list of contributories. *In re the Mexican and South American Mining Co., ex parte Barclay*, 27 Law J. Rep. (n.s.) Chanc. 660; 26 Beav. 177.

A party about to be put on the list of contributories is entitled to question the regularity of the winding-up order. *Ibid.*

A merchant held shares in a scrip company, some in his own right and others on behalf of parties abroad; he received dividends and paid calls on all the shares in his own name, without disclosing that any of the shares were held on behalf of other parties. Upon an order to wind up the company,—Held, that he must be put on the list of contributories for his own shares, but that as agent or trustee he was not responsible to the company on the shares of his *cestui que trust*, or liable to be put on the list of contributories. *In re the Mexican and South American Mining Co., ex parte Findlay, Hodson & Co.*, 27 Law J. Rep. (n.s.) Chanc. 664; 26 Beav. 182.

A company was established for working mines in a foreign country, without a deed of settlement, but

according to the prospectus, and by the custom of the company the shares passed by mere delivery of the certificates, and the affairs of the company were wholly managed by the board of directors. After several years the company was ordered to be wound up, by an order dated the 24th of November 1857. Messrs. G and S purchased shares a few days before the date of the winding-up order, and the scrip certificates of some of them were thereupon delivered to them, and the remaining scrip certificates after the date of the order. Messrs. De P being the holders of shares, and being aware of the failing state of the company, and desiring to get rid of the responsibility, sold the scrip certificates absolutely and unconditionally, for a nominal price, to one of their clerks a few days before the order for winding up was made. The names of Messrs. G and S and of Messrs. P were placed upon the list of contributories, and the Master of the Rolls refused to remove them; and, upon appeal, it was held, that Messrs. G and S were liable in respect of all their shares, whether the certificates were delivered before or after the date of the order for winding up, but that Messrs. De P were not, for that the sale by them was valid; wherefore the former would remain upon, but that the latter would be removed from, the list of contributories. *Ex parte Grisewood and Smith, in re the Mexican and South American Co.; Ex parte De Pass, in re the same Co.*, 28 Law J. Rep. (n.s.) Chanc. 769; 4 De Gex & J. 544.

The holders of shares, bought in open market, although they may have been fraudulently issued by the directors, cannot on that ground claim relief against the other shareholders, whatever may be their rights and remedies against the directors. *Ibid.*

Every person purchasing shares in such a company as that described above, takes them subject to the liability of the company at the time of the purchase. *Ibid.*

A number of partners trading as a company, on the terms that their shares shall pass by delivery, does not necessarily shew that they are assuming to exercise the powers of a corporation, or render the company illegal. *Ibid.*

If a company not otherwise illegal was rendered so by the 4th section of the statute 19 & 20 Vict. c. 47, the acts done and debts incurred by it in the interval of time between the passing of that act and the passing of the statute 20 & 21 Vict. c. 14. (repealing the 4th section of the former act) are valid and binding on the company, and are not the mere acts and debts of individual shareholders. *Ibid.*

Directors of a joint-stock company, upon an arrangement for the discharge of G, a debtor of B's, from prison, agreed with B to hand to him scrip certificates in the company originally allotted to G, upon the understanding that he (B) should not be liable for the debts and engagements of the company, but should participate in the profits as a shareholder. The Master of the Rolls placed the name of B upon the list of contributories under the winding up of the company, but, upon appeal, the order was discharged, the agreement being *ultra vires*. *The Electric Telegraph Co. of Ireland v. Bunn*, 29 Law J. Rep. (n.s.) Chanc. 913.

(3) Husband and Wife.

Mrs. L, upon the death of her first husband,

became entitled to certain shares held by him in a banking company registered under the act of 1856, and the shares were transferred into her name. She married a second husband, and thereupon the shares were settled to her separate use. No notice of the marriage was given by her to the company, and the shares remained standing in her former name. There was evidence, however, to shew that the company must have been aware of the marriage. The company failed, and a winding-up order was obtained. One of the Vice Chancellors decided that, having regard to the circumstances of the case, and the different Joint-Stock Companies Acts, the second husband ought not to be placed upon the list of contributories, and that the married lady was alone liable "in respect of her separate estate;" but, upon appeal, —Held, reversing His Honour's decision, that the act of 1856 (19 & 20 Vict. c. 47.) had no effect to alter the common law as to the liabilities of a husband for the obligations of his wife, and that, as the lady's name was on the register, the calls would properly be made on her, and her husband must be liable in respect of them. The Lords Justices, therefore, directed the Vice Chancellor's order to be varied by striking out the words "in respect of her separate estate," and directed that the names of husband and wife should be placed upon the list of contributories, he being placed upon it in right of his wife. *In re the Northumberland and Durham District Banking Co., ex parte Luard*, 29 Law J. Rep. (n.s.) Chanc. 269, 185; 1 De Gex, F. & J. 583.

(4) Trustees.

"Accepting trustees" under the Scotch law, to whom shares in the bank had been on express terms assigned by the testator, —Held, to be properly placed on the list of contributories. *Re the Royal Bank of Australia, ex parte Drummond*, 2 Giff. 189.

(5) Executors.

A person in 1844 bought shares in a banking company, and had them transferred to him. The company afterwards registered under the 20 & 21 Vict. c. 49. so as to come within the Winding-up Act, 1856. He was never entered on the list of shareholders under that act, but had received dividends, and after his death his executors received dividends, and then sold the shares:—Held, that as he would have been a contributory under the said acts, so following *Luard's case*, his executors were now contributories. *Re Northumberland and Durham District Banking Co., ex parte Dixon's Executors*, 1 Dr. & Sm. 225.

(6) Applicant for Shares in Another's Name.

A father applied for shares in a company in the name of his son, and he paid the deposit; the company, however, refused to allow him to execute the deed on behalf of the son. Having done no further act,—Held, that the father was not a contributory. *Macwell's case, In re the Electric Telegraph Co. of Ireland*, 24 Beav. 321.

(7) Allottee of Shares.

By the prospectus of a proposed mining company, the capital was advertised to consist of 30,000*l.*, to be paid up in full on allotment, and the printed form of application for shares contained an undertaking

by the applicant to conform to the rules of the company. H applied verbally for shares in the company, which were allotted to him, and he received the scrip certificates. The certificates contained a statement that the shares were to be held subject to the rules and regulations of the company, one of which was, that no person should be recognized as an adventurer until he had signed the rules. H never signed the rules, and never interfered with the management of the company. Proceedings having been taken under the Winding-up Act,—Held, that H was liable as a contributory. *Re the Great Cambrian Mining and Quarrying Co., ex parte Hawkins*, 25 Law J. Rep. (n.s.) Chanc. 221; 2 Kay & J. 253.

A joint-stock company was projected, and issued its prospectus under the title of "The Amazon Life Assurance and Loan Company and Sickness Benefit Society." The company was registered as "The Amazon Life Assurance and Loan Company." A B applied for shares, which were allotted to him, and he paid the deposit. The form of application was headed with the addition of "and Sickness Benefit Society," while the answer was headed "Amazon Life Assurance and Loan Company" only. The company was ordered to be wound up, and A B was placed upon the list of contributories by the official manager, but the Master struck him off. A co-contributory appealed, but one of the Vice Chancellors confirmed the Master's decision, on the ground that the alteration was not merely one of name, but of the objects of the company, upon which the application for shares must be presumed to have been founded.—Held, upon appeal, that as the form used in the answer to the application for shares, and other forms, gave A B notice of the change of name, he must be placed on the list of contributories. *Ex parte Hutchinson, in re Amazon Life Assur. and Loan Co., and in re Blackburn*, 25 Law J. Rep. (n.s.) Chanc. 722; 8 De Gex, M. & G. 177; 3 Drew. 409.

D agreed with the promoters of a joint-stock company to execute works, for which he was to be paid partly in shares. D, to assist the formation of the company, signed the subscription contract for 620 shares, and an act of parliament was obtained. The company failed, and was ordered to be wound up. On the share register D's name appeared as holder of only ten shares, but when that document was settled only one shareholder was present, who held the proxies of two others.—Held, on appeal, affirming a decision of one of the Vice Chancellors, that the name of D was rightly placed on the list of contributories for 620 shares, he having signed the subscription contract for that number. *Ex parte Davidson, in re the North Shields Quay Co.*, 27 Law J. Rep. (n.s.) Chanc. 488; 4 Kay & J. 688.

J T C applied, through an agent, for fifty shares in a joint-stock company provisionally registered, and at the same time paid up the value. He entered into no agreement in writing to take the shares, but they were allotted to him, and when the deed of settlement was tendered to him he refused to execute it; but assigned no reason for his refusal. The deed contained a schedule in which his fifty shares bore distinctive numbers. The company was completely registered, and the name of J T C was inserted in the register of shareholders as T C the holder of fifty shares, but numbered differently from the schedule to the deed. After an order for winding

up the company, J T C was placed on the list of contributories in respect of fifty shares; and upon appeal, the order was confirmed. *Ex parte Cookney, in re the Electric Telegraph Co. of Ireland*, 28 Law J. Rep. (n.s.) Chanc. 12; 3 De Gex & J. 170; 26 Beav. 6.

The alteration in the distinctive numbers of the shares was considered to be unimportant, as was the mistake in the christian name. *Ibid.*

A person may be a contributory in respect of his application for shares, although he signs no written agreement to take shares, and does not, therefore, fall within the description of a "subscriber" mentioned in the 3rd section of the statute 7 & 8 Vict. c. 110. (the Joint-Stock Companies Registration Act.) *Ibid.*

B having applied for shares in a company, and having had 100 shares allotted to him, sold them without having signed the deed of settlement, or attended any meeting of the company. The directors, with the sanction of the shareholders, at a general meeting, declared all the shares to be forfeited where the shareholders had not signed the deed, but no power was given them under the deed to take this course.—Held, that B was not discharged from his liability in respect of such shares, and his name was placed on the list of contributories. On appeal, this decision was affirmed, the directors having no power to declare a forfeiture. *Ex parte Barton, in re the National Steam Fuel Co.*, 28 Law J. Rep. (n.s.) Chanc. 637; 4 De Gex & J. 46; 4 Drew. 535.

W, the partner of a firm, applied for shares in a joint-stock company, on condition that the firm should be employed to supply chains and other things manufactured by them, which the company would require in their business. The company was ordered to be wound up in bankruptcy, under the provisions of the statute 19 & 20 Vict. c. 47. (the Joint-Stock Companies Act, 1856,) and one of the Commissioners placed the name of W on the list of contributories; but, upon appeal, the order was reversed. *Ex parte Wood, in re the Sunken Vessels Recovery Co. (Limited)*, 28 Law J. Rep. (n.s.) Chanc. 399; 3 De Gex & J. 85.

Provisional directors entered into an agreement to give A B, the projector, 2,500l. in money and 2,500l. in paid-up shares. The agreement did not appear in the deed of settlement which A B had executed for 350 of these shares.—Held, that the company were not bound by the agreement, and although they repudiated it, still that A B was liable unconditionally as a contributory in respect of the 350 shares. *Re the Cosmopolitan Assur. Co. (Nickoll's case)*, 24 Beav. 689.

A joint-stock company being in course of formation, under the 19 & 20 Vict. c. 47, W applied for shares by a note in writing, by which he agreed to accept them, and pay the deposit on them if allotted to him. Shares were allotted to him accordingly, and he paid the deposit, but no certificates were given to him. His name was not entered in the register of shareholders, but only in a book in which the names of persons to whom shares had been allotted were inscribed, the shares to which they were entitled not being distinguished therein by numbers as required by the 19th section of the act. An order having been made in the following year for winding up the company,—Held, that the register ought to

be amended by inserting the name of W, and that he ought to be on the list of contributories. *Re the West Ham Distillery Co. (Limited), Whittell's case, 2 De Gex & J. 577.*

(8) *Persons who have Forfeited their Shares.*

A B, a director and promoter of an insurance company, took 500 shares in order to enable the company to obtain registration, upon an understanding that he was not to be called upon to pay anything in respect of those shares. Calls were made, and a resolution was then passed declaring the forfeiture of all those shares upon which the calls had not been paid, but payment of past calls was not required, although the directors had power to enforce such payment. The 500 shares (upon which no calls had been paid) were declared to be forfeited, and were taken up by other parties. The directors subsequently voted a sum of money to A B for his services, and compromised the question of forfeiture for that sum, which was only half the amount of the calls due. Upon the winding up of the company, it was held, that A B was liable to be placed on the list of contributories in respect of the 500 shares. *In re the London and County Assurance Co., ex parte Jones, 27 Law J. Rep. (N.S.) Chanc. 666.*

A shareholder in a company, carried on upon the cost-book principle, relinquished his shares upon paying his *pro rata* portion of the liabilities of the company. All the formalities required for the relinquishment of such shares were regularly complied with and entered in the books of the company, and the correspondence was conducted with the purser, who fixed the amount to be paid by the shareholder without the sanction of the managing committee:—Held, that the purser being the authorized officer of the company to conduct such transaction, the shareholder was exempted from liability in respect of any excess of power on the part of the purser; and upon the winding up of the company it was ordered that such shareholder should not be placed on the list of contributories. *In re the Wrygon Slate Quarrying Co., ex parte Birch, 28 Law J. Rep. (N.S.) Chanc. 894.*

(9) *Transferor of Shares.*

By the deed of settlement and charter of the Royal British Bank it was provided that, upon a transfer of shares taking place, seven days' previous notice in writing of the proposed transfer, specifying the various particulars, should be given to the directors before any transfer could be made; and that after the consent of the directors had been given, the transfer should be executed and delivered to the secretary to be registered, whereupon a new certificate was to be delivered to the transferee. The company had departed from this form; and the usual practice had been for the secretary to deliver out a blank form of transfer without any previous notice, and when returned filled up and executed, it was registered, and new certificates handed to the transferee. Certain shareholders who had executed the transfer, but whose transfers had not been registered, objected to being placed upon the list of contributories, on the ground that the consent of the directors had been practically dispensed with in all previous transfers:—Held, that although the seven days' notice had been waived for the sake of facilitating transfers, the consent of the

directors was necessary, which consent was proved by the registry on the books of the company; and that, consequently, the objecting shareholders were liable as contributories. *In re the Royal British Bank, ex parte Walton and ex parte Hue, 26 Law J. Rep. (N.S.) Chanc. 545.*

In arranging the affairs of a mine, worked on the cost-book principle, a resolution was passed at a general meeting, that a shareholder in arrear surrendering his shares might, within a month, redeem so many as, at 19s. per share (the amount of former calls), would equal the amount paid by him, provided the call of 2s. per share then made be paid upon the redeemed shares. Three shareholders surrendered their shares in the usual form, and sent the documents to the secretary. They took no steps to redeem the shares, neither did they pay the call of 2s. Four months afterwards, the secretary wrote to them, stating that their shares had been reduced, and asking for the call, and also other calls. One of the shareholders, in reply, requested that his shares might be further reduced, as it was inconvenient to pay the calls. Upon its being sought to charge them as contributories,—Held, that the shares were legally surrendered; that the letter by the one shareholder was written under an erroneous idea of his position with regard to the shares; that all right under the resolution was gone; that he was not at the time in the position of a shareholder, and that none of them were entitled to redeem, and ought not, therefore, to be placed on the list of contributories. *In re the Bodmin United Mines, 26 Law J. Rep. (N.S.) Chanc. 570; 28 Beav. 370.*

A chartered banking company were empowered to extend their capital by the issue of new shares. A fraudulent report of the state of the affairs of the bank was made by the directors to a general meeting of the company, and by them adopted. The accounts had been audited by auditors appointed by the shareholders. In pursuance of the desire to have new shares taken, the directors issued a circular, which also contained false and fraudulent representations. N, upon the faith of the report and the circular, and also upon the representation of one of the directors, took shares, and received a dividend upon them. He afterwards employed his broker to dispose of the shares. According to the constitution of the company, the assent of the directors to a transfer of shares was necessary, the evidence of which assent was to be an indorsement on the deed of transfer. The broker employed by the bank purchased these shares, giving the name of E as the purchaser. The transfer to E was executed in the form which had been furnished at the bank, with E's name inserted as purchaser. E was not aware of this transfer, but he had given authority to the principal manager to use his name in transfers, and he had accepted some transfers in which his name had been so used. The purchase-money for N's shares was paid by the bank. The next dividend was treated as part of the assets of the bank, and the shares were subsequently found in the principal manager's possession, and given up by him to the solicitor of the bank as part of their property. The bank having stopped payment, N's name was sought to be placed on the list of contributories; and it was held, that N was not exempted from liability by reason of the false representation in the report and the circular, as the directors were

not agents of the company for the purpose of making fraudulent representations, or beyond the scope of their authority as limited by the charter; but that the assent of the directors to the transfer of the shares by N had been sufficiently shewn, and therefore his name must be removed from the list of contributories. *In re the Royal British Bank, ex parte Nicol*, 28 Law J. Rep. (n.s.) Chanc. 257; 3 De Gex & J. 387.

A B was the holder of shares in a mining company established upon the cost-book principle. In October 1856 it was determined by the shareholders to register the company as "limited," under the 19 & 20 Vict. c. 47, with a view to its being wound up. A delay however occurred, which prevented the registration of the company until June 1857. In January 1857 A B sold his shares, and the transfer was completed, A B's name not being returned as a shareholder on the company's being registered in June 1857. In July the company was ordered to be wound up, and Mr. Commissioner Fane placed A B's name on the list of contributories; but it was held, on appeal, that the name was improperly placed on the list. *In re Welsh Potosi Lead and Copper Mining Co. (Limited), ex parte Left-house*, 27 Law J. Rep. (n.s.) Bankr. 1; 2 De Gex & J. 69.

A holder of 100 shares in a company, transferable by delivery, knowing that the company was in difficulties, and was likely to be wound up, handed his shares to a workman in his employ for 2s. 6d. the lot. Five days afterwards a resolution was passed to obtain an order to wind up the company:—Held, that the transfer could not be supported to the prejudice of other shareholders; and that the vendor, and not the purchaser, must be placed on the list of contributories. *In re the Mexican and South American Co., ex parte Lund*, 28 Law J. Rep. (n.s.) Chanc. 628; 27 Beav. 465.

A company, by whose custom the shares passed by delivery of the certificates, was ordered to be wound up on the 24th of November 1857. On the 10th of November, H, who held shares, sold them, through a broker, to A, a person in his employ, but the purchase-money was, in fact, paid out of H's money. The Master of the Rolls placed H on the list of contributories, and this was affirmed, upon appeal. *In re the Mexican and South American Co., ex parte Hyam*, 29 Law J. Rep. (n.s.) Chanc. 243; 1 De Gex, F. & J. 75.

There being a disagreement between two sections of directors of a joint-stock company, it was agreed that one section should retire, and transfer their shares to the continuing directors. The shares were transferred accordingly, and afterwards again transferred, and at the date of the winding-up order stood in the names of other persons. The Court held, that the first arrangement was invalid, and that the retiring directors were still contributories, notwithstanding the subsequent transfers. *Munt's case, in re the Universal Provident Life Assn.*, 22 Beav. 55.

A father voluntarily transferred shares in an incorporated company to his infant son. The company was afterwards wound up (the son being still an infant):—Held, that the father was a contributory. *Reid's case, in re the Electric Telegraph Co. of Ireland*, 24 Beav. 318.

A shareholder in a company *in extremis* is entitled to transfer his shares to any one out and out; but a duly registered transfer to a trustee for the transferor, executed with the intention of getting rid of liability and reserving the benefit of the shares, does not relieve the transferor from his liability, even where the deed of settlement declares that the trusts shall not be recognized, and that the person on the register shall be deemed the beneficial owner of the shares. *Chinnock's case, re Athenæum Life Assur. Soc.*, John. 714.

(10) *Transferee of Shares.*

Upon the winding up of a company, carried on upon the cost-book principle, it appeared, by their deed, that shares in the company would pass by the delivery of the certificates; but no shareholder was entitled to a dividend unless his name was entered in the share register-book. A shareholder, who had transferred his shares, but whose transferee had not been registered, was held to be liable as a contributory of the company. *In re the Wryegan Slate Quarrying Co., ex parte Humby*, 28 Law J. Rep. (n.s.) Chanc. 875.

(11) *Persons who have taken Shares under Misrepresentation.*

An insolvent company, by misrepresentation, induced a person to take shares, and to authorize the secretary of the company, as his attorney, to sign the deed of settlement on his behalf:—Held, on the company being wound up, that his name ought to be erased from the list of contributories. *In re the Universal Provident Life Assn., ex parte Bell*, 26 Law J. Rep. (n.s.) Chanc. 137; 22 Beav. 35.

A and B were partners, and A, on the faith of representations made to him by the secretary of a company, informed B that the liabilities were limited, and thereupon B consented to shares being taken in the company. A executed the company's deed alone, in the name of the firm. Two calls were paid by the firm, and dividends were received by the firm, as part of the partnership assets. The firm then dissolved partnership, and all the assets and liabilities (the above shares being particularly specified) were transferred from A to B. The company failed, and was wound up under the act. It then appeared that the liabilities of the company were not limited, and B alleged that A alone was liable as a contributory:—Held, the misrepresentation as to the limited liabilities not being wilful, and the company assenting, that B was primarily liable, and A secondarily liable, as contributories. *In re the Protestant Assur. Assn., ex parte Letts*, 26 Law J. Rep. (n.s.) Chanc. 455.

A person who has taken shares in a joint-stock bank upon the faith of representations made by the directors in their periodical reports, which representations are proved to be false and fraudulent, is not liable to be placed upon the list of contributories. *In re the Royal British Bank, ex parte Brockwell*, 26 Law J. Rep. (n.s.) Chanc. 855; 4 Drew. 205.

If a party is induced to subscribe to a company, upon misrepresentation made by it or on its behalf, the shareholders, on the company being wound up, cannot insist upon such party being placed on the list of contributories. *In re the Deposit and General*

Life Assur. Co., ex parte Ayre, 27 Law J. Rep. (n.s.) Chanc. 579; 25 Beav. 513.

Misrepresentations made by a secretary or manager, in the absence of authority, do not bind the company. It cannot be assumed that he was an agent to commit a fraud. *Ibid.*

A judgment in favour of a company at law, for the payment of the deposit on shares subscribed for, will not prevent this Court from giving relief when the subscription was procured by fraud, which was not in evidence when the judgment was obtained. *Ibid.*

If the directors of a banking company, which is in difficulties, make a flourishing report to the shareholders and public of the financial condition of the company, and it induces a person to purchase shares in open market, or of third parties, and it turns out after he is registered in the books of the company that the report was altogether untrue and without foundation, and the company stops payment, still the purchaser is a shareholder and liable as a contributory. *In re the Liverpool Borough Bank, ex parte Duranty*, 28 Law J. Rep. (n.s.) Chanc. 37; 26 Beav. 269.

A B was tenant for life of certain shares in a banking company, under a will of which his uncle was executor. At the request of A B, his uncle, who was a director of the company, transferred these shares into his name for a nominal consideration, in order to qualify him to be a director. A B became a director, and the company failed, and was ordered to be wound up. A B objected to his name being placed on the list of contributories, on the ground that, prior to his taking the shares, the directors had published fraudulent reports of the affairs of the company, and his uncle, being a director, must have known that they were fraudulent; and also that, being only tenant for life of the shares, it was a breach of trust on the part of his uncle to transfer the shares into his name, and that the directors must have been aware of the fact; and therefore that the transaction was a nullity.—Held, that A B must be placed on the list of contributories. *In re the Northumberland and Durham District Banking Co., ex parte Bigge*, 28 Law J. Rep. (n.s.) Chanc. 50.

S took shares in a joint-stock company, and signed the deed, upon the representation made by one of the officers of the company that such deed contained a clause limiting the liability of the shareholders to the amount of their shares. This clause had been fraudulently inserted in the deed after complete registration, and was not contained in the registered deed. S attended meetings of the company and received dividends for three years, when the company was ordered to be wound up.—Held, that S was liable as a contributory. *In the matter of the Athenæum Life Assur. Soc.; Sheffield's case*, 28 Law J. Rep. (n.s.) Chanc. 325; John. 461.

The directors of a company, with the sanction of a general meeting of the shareholders, issued certain preference shares, at 64 per cent. interest, which they had no power to do under their deed of settlement. Some of these shares were taken by one of the directors, who sold a part to W, representing them to be preference shares. W signed the deed of settlement.—Held, that there was no fraud or misrepresentation on the part of the company which would exempt W from the liability incurred as a

shareholder, and that W's name must be placed on the list of contributories. *In re the National Patent Steam Fuel Co., ex parte Worth*, 28 Law J. Rep. (n.s.) Chanc. 589; 4 Drew. 529.

W was induced, on the representation of the secretary of a joint-stock company that there were to be two medical referees, and that he might be appointed one, to take 200 shares, whereupon he was appointed to the office. Soon afterwards W discovered that there were four instead of two medical referees, on which he resigned his office and demanded back the money he had paid for the shares. By the deed of settlement it was provided that if any shareholder did not pay his calls the secretary might send notice requiring payment within twenty-one days, and if the calls were not paid the directors might declare the shares forfeited. W (under the foregoing circumstances) refused to pay his calls, and the secretary sent him the required notice, and added that if the calls were not paid within twenty-one days his shares would be forfeited. W made default, and took no further notice of the matter, and the directors within the twenty-one days declared a forfeiture, but allowed W's name to remain on the share register for more than two years, when the company was wound up. One of the Vice Chancellors decided that there had been no such misrepresentation by the company as absolved W from liability as a shareholder, and that upon the construction of the deed of settlement the forfeiture of the shares had not been completed, and that W's name must be placed on the list of contributories. On appeal, it was held (affirming his Honour's decision) that there was no such misrepresentation or breach of faith as would exonerate W; but (reversing the same decision) that there had been an absolute forfeiture submitted to by W, whose name must therefore be removed from the list. *Ex parte Wallaston, in re the Home Counties and General Life Assur. Soc.*, 28 Law J. Rep. (n.s.) Chanc. 721; 4 De Gex & J. 437.

Their Lordships also held, that whether the directors declared the forfeiture before or after the twenty-one days was a matter of form, and not of substance. *Ibid.*

Under a supplemental charter a banking company, being empowered to issue new shares, a fraudulent report of the company's affairs was made by the directors, and adopted at a general meeting of the shareholders. In June 1856 M, a customer of the bank, took twelve of these new shares, executed the deed, and received the share certificates. In the next return to the Stamp Office his name was not inserted as a shareholder, and in the monthly balance-sheet the sum paid by him for the shares was treated as a debt from the bank. In his pass-book he was credited with interest at 4½ per cent. upon the sum he had paid on account of the shares. M also attended two meetings of shareholders. In September 1856 the bank stopped payment, all the new shares not having been issued, and the affairs of the company were afterwards ordered to be wound up.—Held, that M was a contributory in respect of the twelve shares, and was not entitled to claim as a creditor in respect of the deposit paid for his shares. *In re the Royal British Bank, ex parte Mixer*, 28 Law J. Rep. (n.s.) Chanc. 879; 4 De Gex & J. 575.

Where a banking company, which commenced

business upon a misrepresentation as to the amount of capital paid up, and before the amount required by the 7 & 8 Vict. c. 113. was so paid, was ordered to be wound up, such order was held to have been rightly made, and a shareholder who had taken shares upon this misrepresentation was held by one of the Vice Chancellors to be a contributory, and to be liable to pay the calls made for the discharge of the debts of the company, and this decision was, upon appeal, affirmed. *Re the London and Eastern Banking Corporation, ex parte Longworth's Executors*, 29 Law J. Rep. (N.S.) Chanc. 55; 1 De Gex, F. & J. 17; John. 461, 465.

Semble—that the intention of the Masters in Chancery Abolition Act is not to alter the rights of parties under the Winding-up Acts, so as to prevent the decision of the Judge at chambers being deemed to be an order of the Master. *Ibid.*

Where the appellants had been induced to execute the deed of settlement of a company as shareholders, by a representation made by promoters of the company (who were entrusted with the deed for the purpose of obtaining signatures to it) that two specified individuals would execute it, and this representation, although honestly made, proved erroneous:—Held, that it was not sufficient to exonerate the appellants from liability as shareholders.

Quere, how far directors can be regarded as agents of a company, for the purpose of making false representations, by which the shareholders or the public are deceived.—*Brockwell's case*, 4 Drew. 205, observed upon. *Re Hull and London Life Assur. Co., Gibson's case*, 2 De Gex & J. 275.

(b) *Extent of Liability.*

[*Ex parte Carew, in re the Dover, Hastings and Brighton Junction Rail. Co.*, 7 Law J. Dig. 186; 7 De Gex, M. & G. 43.]

Certain persons, having projected a railway company, formed themselves into a managing committee. The project failed before the subscribers' agreement was signed, but various expenses were incurred, and the projected company was ordered to be wound up. Two of the committee claimed as against the rest of the contributories to be allowed certain sums which they had individually paid:—Held, upon appeal from the Master, that he was wrong in having refused to investigate the claims of each member, and the amount for which each contributory was liable, notwithstanding that such claims might be enforced at law. *In re the London, Birmingham and Buckinghamshire Rail. Co., ex parte Dayrell*, 25 Law J. Rep. (N.S.) Chanc. 165.

A B, a shareholder in a joint-stock banking company, executed the company's deed of settlement, in which was contained a covenant that each of the shareholders should be liable to the losses of the company in proportion to his shares. A B died before the passing of the Winding-up Act of 1848. An order was made in 1850 for winding up the company, and A B's executors were placed on the list of contributories. A call being made by the Master in respect of A B's shares, it was held that the amount of the call was not a specialty, but a simple contract debt only. *In re the Royal Bank of Australia, ex parte Robinson's Executors*, 26 Law J. Rep. (N.S.) Chanc. 95; 6 De Gex, M. & G. 372; 3 Sm. & G. 272.

On the retirement of S, a director of a joint-stock banking company, the board of directors passed a resolution to take back his shares *at par*, and that he should retire and be indemnified in a form thereafter to be prepared. The company was subsequently ordered to be wound up, and the Court decided that the transactions on the retirement of S were invalid, and that he was a contributory. Before the winding up W, another director, had paid money to satisfy the claims of creditors, and the Master made a call upon all the contributories for the payment of this money to the executor of W, but one of the Vice Chancellors discharged that order, so far as respected S:—Held, upon appeal, that the retirement and cancellation of his shares having been declared invalid, S was not entitled to any indemnity, and must contribute towards the call. *Ex parte Walker, in re the St. Marylebone Joint-Stock Banking Co.*, 26 Law J. Rep. (N.S.) Chanc. 261.

(c) *Creditors' Representative.*

A creditors' representative appointed under the 1st section of the Joint-Stock Companies Winding-up Amendment Act, 1857 (20 & 21 Vict. c. 78.) is entitled to attend the Master at the settlement of the list of contributories, he being interested in watching who is put on and who is struck off the list. *In re the Mexican and South American Mining Co.*, 27 Law J. Rep. (N.S.) Chanc. 658; 26 Beav. 172.

(L) CALLS.

A contributory to the liabilities of a joint-stock company in course of being wound up under the Joint-Stock Companies Winding-up Acts, 1848, 1849, was ascertained by the official manager to be the owner of shares standing in her name in the books of another joint-stock company: it was ordered, that such shares should stand charged with the amount due from her in respect of a call made upon her as such contributory, but without prejudice to a claim of lien upon such shares in respect of a debt claimed by the company in whose books the shares were standing from the company in course of being wound up. *In re the Joint-Stock Companies Winding-up Acts*, 1848, 1849; *In re the Royal Bank of Australia, and in re Catherine Wordie Connell*, 25 Law J. Rep. (N.S.) Chanc. 649.

An order having been obtained for winding up a banking company, the Master was applied to to make a call, after the whole amount of the shares had been paid up, for the purpose of satisfying the claims of several of the partners in the concern, who had taken upon themselves to pay off the liabilities. The Master declined to make the call:—Held, that the matter must be referred back to the Master to review his decision, and to administer the equities between the parties. *In re the Marylebone Joint-Stock Bank*, 25 Law J. Rep. (N.S.) Chanc. 650.

The P of W Company effected a cross-insurance with the A Society on the life of J, and the latter society was ordered to be wound up. The life dropped, and the P of W Company having paid the amount assured claimed to prove the amount as a debt against the A Society, and moved that the official manager might be directed to make a call upon the contributories for payment of the same. The policy

of the A Society contained a proviso that the capital and other property of the company remaining at the time of any demand unapplied and inapplicable to any prior claim or demand should alone be liable to answer and make good the claims and demands against the company by virtue of the policy, and that no director or shareholder should be in anywise individually or personally liable or subject to any claim or demand beyond the amount unpaid of his shares in the capital stock of the company. One of the Vice Chancellors refused the motion, and the P of W Company appealed:—Held, affirming the decision, that the liability of the shareholders was expressly limited by the contract in the policy, to which the P of W Company were parties, to the amount unpaid on their shares, and that no call could be made for satisfying a claim on the policy on a shareholder who had already paid up the full nominal value of his shares, or upon any other shareholder to an amount exceeding the sum due from him upon the shares held by him. *Ex parte the Prince of Wales Life and Educational Assur. Co., in re the Athenæum Assur. Soc.*, 28 Law J. Rep. (n.s.) Chanc. 335; 3 De Gex & J. 660; John. 80.

By the subscription contract of a provisionally registered railway company, giving the usual powers to the committee of management, the subscribers covenanted that in the event of the application to parliament being unsuccessful, they would pay and discharge all the costs and expenses which should have been incurred with a view to the formation of the undertaking, and all other costs and charges of every description of and incidental to the undertaking, such costs and charges to be assessed rateably on the sums subscribed by them respectively. On winding up the company under the Winding-up Acts, it appeared that the directors had received from the subscribers more than sufficient to pay all the necessary costs, charges and expenses, but had applied the monies to purposes which were alleged by the subscribers to be unauthorized and improper; and a compromise was come to with the directors, in pursuance of which the directors paid a sum in full of all demands of the contributories upon them. Claims had been admitted to proof as debts against the company under the winding-up order:—Held, that a general call had been properly made for the purpose of paying the demands thus proved, whether the directors could have sued the general subscribers directly or not, as to which—*quære*. *In re the London and Birmingham Extension, &c. Rail. Co., Hopkinson and Underwood's case*, 7 De Gex, M. & G. 193.

(M) PRACTICE.

(a) *Monies abstracted from Funds of the Company.*

Whether monies improperly abstracted from the funds of the company for payment of dividends which had not been earned or other purposes could be required to be recouped in winding up proceedings, and whether debts due to simple contract creditors, as to which there was no limit to the shareholders' liability, could be marshalled so as to make a call *pro tanto* available for the policy holders, *quære*. *Re Athenæum Life Assur. Soc., ex parte the Prince of Wales Life Assur. Soc.*, John. 633.

(b) *Service of Order.*

An affidavit of personal service of an order for payment, under the Winding-up Acts, need not state where the service was effected. *Re Job, re the Nantle Vale Slate Co.*, 27 Beav. 32.

(c) *Costs of Proceedings.*

The fee provided by the Order of the 25th of October 1852 is payable to the Sutors' Fee Fund for sealing writs of attachment, directed by the Master to be issued against contributories under the Winding-up Acts, although the Winding-up Act, 1849, s. 35, substitutes a per-centage on the monies received by the official manager for "all fees to be received or charged in aid of the Sutors' Fee Fund." *In re the Sutors' Fee Fund, and in re the Winding-up Acts, and in re Cameron's Coalbrook Steam and Swansea and Loughor Rail. Co.*, 25 Law J. Rep. (n.s.) Chanc. 288.

If the right to an order to wind up a company is established, the costs of intervening proceedings arising out of an opposition to the order must be borne by the respondents. *In re the Bosworth Mining Co.*, 26 Law J. Rep. (n.s.) Chanc. 612.

A creditor of a joint-stock company (limited) commenced an action against one of the shareholders. A petition for winding up was then presented, and notice given to the creditor of such petition, but the creditor continued proceedings in the action until the advertisement appeared for a creditors' representative:—Held, that the creditor was entitled to his costs of action up to the period of advertisement. *In re the Welsh Pottery Mining Co., ex parte Tobin*, 28 Law J. Rep. (n.s.) Chanc. 44.

4.—SCIRE FACIAS AND EXECUTION AGAINST SHAREHOLDERS.

(A) RAILWAY AND OTHER INCORPORATED COMPANIES.

On an application for a *scire facias*, under the 8 & 9 Vict. c. 16, it is sufficient if, after stating the sheriff's return of *nulla bona* to the writ of *fiery facias*, the deponent distinctly swears that the company have not had since the judgment any goods, chattels, &c. in England, Ireland, or elsewhere, upon which the debt might be levied; and it is not necessary in that case that he should go on to state any inquiries, or any other grounds for his belief, or any other writs issued, nor any facts shewing that due diligence has been used to discover property of the company. *Nixon v. the Kilkenny and Great South-Western Rail. Co., in re Buckley*, 25 Law J. Rep. (n.s.) Exch. 249; 1 Hurl. & N. 47.

On an application for a *scire facias* against a shareholder, upon a judgment against the company, the Court refused to enlarge the rule so as to enable the shareholder to set aside the judgment which he alleged had been obtained by collusion between the plaintiff and the directors of the company. *Edwards v. the Kilkenny and Great South-Western Rail. Co., in re Butterworth*, 26 Law J. Rep. (n.s.) C.P. 224; 2 Com. B. Rep. N.S. 397.

To a *scire facias* against a shareholder in a railway company the defendant pleaded, on equitable grounds, that by the request of the plaintiff he

became a transferee of the shares as the nominee of E and M and for their benefit, and upon the representation of the plaintiff that if he would become such transferee he should incur no responsibility or liability whatever in respect of such shares, and that he never had any other interest in them; that he never was to derive and never did derive or acquire any profit, benefit or advantage from the shares or company; that the company never commenced the railway, and the scheme was abandoned, and no benefit or profit had accrued to the company, and that the plaintiff well knew the circumstances, and was now unjustly and inequitably, and contrary to the said representation, and in fraud thereof, seeking to charge the defendant and to make him responsible as a shareholder to him, the plaintiff:—Held, on demurrer, that the plea was bad. *Bill v. Richards*, 26 Law J. Rep. (n.s.) Exch. 409; 2 Hurl. & N. 211.

A deed called the subscribers' agreement, entered into by persons who agreed to take shares in a proposed railway scheme, stated that the capital was to be 1,000,000*l.*, in 25*l.* shares; that the line should be from K to G; but it gave the directors power to determine how far and to what extent the undertaking should be carried into effect, to abandon the whole or any part of it; and to proceed to obtain an act of parliament for any portion of the line. The defendants respectively executed the agreement for a specified number of shares, and paid a deposit per share. The directors afterwards obtained an act authorizing the making a portion only of the railway originally proposed, and reducing the capital to 225,000*l.*, and altering the shares into 20*l.* shares. The directors put the defendants' names on the register as shareholders in the altered scheme:—Held, that they were authorized in so doing, and that the defendants were liable as shareholders to have execution issued against them on a judgment recovered against the company, the property of the company being insufficient to satisfy it. *Nixon v. Brownlow*; *Nixon v. Green* (Ex. Ch.), 27 Law J. Rep. (n.s.) Exch. 509; 3 Hurl. & N. 607.

Held, further, that a shareholder cannot get rid of his liability to satisfy such a judgment by transferring his shares after a return by the sheriff of *nulla bona* to a *fi. fa.* issued against the company. *Ibid.*

An application under the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16. s. 36, for leave to issue a *sci. fa.* against a shareholder on a judgment against the company, was founded upon an affidavit which stated that two writs of *fi. fa.* had been issued against the company, and returned *nulla bona*; that deponent believed, from inquiries which he had made of the secretary and a shareholder, that the company had not at the time of the recovery of the judgment, or since, any property, goods or chattels, and that any execution against them would be ineffectual; that all due diligence and means had been used to obtain satisfaction; and that the deponent, as clerk to the company's solicitor, had transacted much of their legal business, and thereby became well acquainted with their position and circumstances:—Held, sufficient. *Wyatt v. the Darent Valley Rail. Co.*, 2 Com. B. Rep. N.S. 110.

(B) JOINT-STOCK COMPANIES.

In order to obtain execution against a share-

holder of a joint-stock company on a judgment against the company, under the 7 & 8 Vict. c. 110, which requires that "due diligence shall have been used to obtain satisfaction of such judgment by execution against the property and effects of such company," it is necessary for the plaintiff to shew, *prima facie*, that he has taken all reasonable pains to obtain satisfaction. *King v. the Parental Endowment Assur. Co.*, 25 Law J. Rep. (n.s.) Exch. 18; 11 Exch. Rep. 448.

Where the application to issue execution against a shareholder of an insurance company was founded on the affidavit of a clerk to the plaintiff's attorney, that a writ of *fi. fa.* was issued by the plaintiff against the goods of the company, and placed in the hands of the sheriff, who, on the following day, returned *nulla bona*, and that the chief office of the company was closed, and no business, to the best of the deponent's belief, was carried on there, and that he believed that any writ of execution against the property and effects of the company would be wholly unavailing:—Held, that the facts did not shew that "due diligence" had been used to obtain satisfaction by execution, there being no affidavit of the sheriff's officer to shew what steps he took under the writs of *fi. fa.* *Ibid.*

The shareholders of a joint-stock company against whom execution may be issued by *scire facias* under the 8 & 9 Vict. c. 16. s. 36, on failure of the property or effects of the company, are the shareholders at the time of the sheriff's return of *nulla bona*. *Nixon v. Green*, 25 Law J. Rep. (n.s.) Exch. 209; 11 Exch. Rep. 550.

The 7 & 8 Vict. c. 110. s. 68. authorizes the issuing of execution against a shareholder on a judgment against a joint-stock company, "by leave of the Court, or of a Judge of the Court, in which such judgment has been obtained," provided that ten days' notice of the application is given to the party sought to be charged. Where the notice stated that application to issue execution against a shareholder upon a judgment obtained in this Court would be made to a Judge at chambers, and it was accordingly made to a Baron of the Exchequer in the vacation, who referred the matter to this Court,—Held, that the Baron of the Exchequer had jurisdiction to entertain the application, under the 1 & 2 Vict. c. 45. s. 1, and that a fresh notice of application to the Court was not necessary. *Palmer v. the Justice Insur. Co.*, 26 Law J. Rep. (n.s.) Q.B. 73; 6 E. & B. 1015.

The affidavits in support of the motion stated that F, who was in partnership with T, had executed the deed of settlement of the company for himself and T, in the presence of T:—Held, sufficient *prima facie* evidence of T being a shareholder. *Ibid.*

The Court gave leave for execution to be issued against a shareholder, notwithstanding that an order for winding up the company had been made, under which proceedings had been taken *bond fide*, it not being shewn that there was a reasonable prospect of the creditor being satisfied under the winding-up as speedily as by execution against the shareholder. *Ibid.*

In order to get summary execution against an individual, as a shareholder in a joint-stock company, under the 66th section of the 7 & 8 Vict. c. 110, it is necessary to shew that he is a person who has

actually executed the deed of settlement or some deed referring thereto,—according to the definition of “shareholder” in section 3. *Bailey v. the Universal Provident Assur. Co., re Copeland*, 26 Law J. Rep. (N.S.) C.P. 87; 1 Com. B. Rep. N.S. 557.

Therefore, where shares had been transferred to A, and he had signed a document of transfer, which was not sealed, and had not executed the deed of settlement, the Court discharged a rule for issuing execution against him on a judgment obtained against the company; and he was held not to be estopped from denying that he was a shareholder, although the transfer had been treated by all parties as a deed, and his name had accordingly been put upon the registered returns required by the statute, as a shareholder.—*Moss v. the Steam Gondola Co.* confirmed. *Ibid.*

Under the 8 & 9 Vict. c. 16, s. 36. concurrent writs of *scire facias* may be issued against the shareholders of a joint-stock company, by leave of the Court, as therein mentioned. *Nixon v. Brownlow*, 26 Law J. Rep. (N.S.) Exch. 12; 1 Hurl. & N. 405.

Therefore, to a declaration in *scire facias* against a shareholder, it is no answer to say that, after the execution against a company and return of *nulla bona*, and before motion to issue execution against the defendant, the plaintiff, with the consent of the Court, issued writs of *act. fa.* against the other shareholders, which writs were still pending, and under which the plaintiff could have raised the money due to him. *Ibid.*

Under section 66. of the 7 & 8 Vict. c. 110. an order may be made to issue execution against a former shareholder of a joint-stock company, although no attempt has been made to obtain satisfaction from the existing shareholders, the statute placing former and present shareholders on the same footing in that respect. *Hill v. the London and County Assur. Co.*, 26 Law J. Rep. (N.S.) Exch. 89; 1 Hurl. & N. 398.

It is no objection to issuing such execution that an order had been made for winding up the company under the provisions of the Joint-Stock Companies' Winding-up Act, 11 & 12 Vict. c. 45, no official manager having been appointed. *Ibid.*

It is consistent with due diligence having been used to obtain satisfaction of the debt from the company, that the plaintiff had taken no steps to dispose of the company's interest in certain premises occupied as offices, and held by them under an agreement for a lease. *Ibid.*

To a declaration on a *scire facias* against a shareholder of a completely registered joint-stock company under the 7 & 8 Vict. c. 110, on a judgment recovered against the official manager of the company, the defendant, by his plea, set out the record in the original action, and the bill of exchange on which the action was brought, being a bill drawn by the secretary on behalf of the company, upon the company, and accepted by two directors, and the plea alleging that the company was only authorized by section 44. of the act so to make and accept bills as to bind the shareholders to the extent of their shares, and averred that the defendant had paid up the full amount of his shares:—Held, that the plea was no answer to the action, for if a good defence at all, it might have been pleaded to the original action, and, therefore, was not now available. *Peddell v. Gwynn*, 26 Law J. Rep. (N.S.) Exch. 199; 1 Hurl. & N. 590.

In *scire facias* by a creditor of a railway company, it is sufficient proof (in the absence of fraud) that the defendant was a shareholder at the time the debt was incurred, that he signed the subscription contract, and that his name was on the register of shareholders. And even although it appears that the directors have (the subscription contract authorizing them to abandon the undertaking, or such part thereof as they should think fit) obtained an act merely for making a portion of the line, and the act has reduced the amount of capital and altered the number and value of the shares, and there is no evidence as to the manner in which the defendant's allotment was altered, if at all, still the evidence of the original subscription and registry is sufficient to prove him a shareholder, and render him liable for work done after the passing of the act of parliament. Nor is it enough to rebut the *prima facie* evidence, nor any evidence of fraud on the part of the directors, that in the allotment of the substituted shares they appear to have registered themselves for a smaller proportionate number of shares, in proportion to the number for which they originally subscribed, than the number for which they have sought to hold the defendant responsible. *Nixon v. Brownlow*, 26 Law J. Rep. (N.S.) Exch. 273; 2 Hurl. & N. 455.

A private act of parliament incorporated the shareholders of a joint-stock company, and provided that any judgment obtained against the company might be enforced (after due diligence against the property of the company) against the person, property and effects of any shareholder for the time being, or any former shareholder, in his natural or individual capacity, where such former shareholder was a shareholder at the time of the making of the contract, &c., in respect of which the judgment had been obtained:—Held, that an executor of a person, who was a shareholder at the time a bond was executed by the company, and continued a shareholder till his death, but died before judgment on the bond was obtained against the company, was not liable on a *act. fa.* against the goods of the deceased. *Poole v. Knott*, 28 Law J. Rep. (N.S.) Q.B. 322.

An annuity granted by a joint-stock insurance company to the plaintiffs, contained a proviso that the funds or property of the company should alone be answerable for all claims in respect of the annuity, and that the directors and shareholders should not be personally liable beyond the amount for the time being unpaid on shares, which should not be subject to prior claims or demands. M, a shareholder, had paid all calls. Claims on the company existed, to a considerable extent, prior to the plaintiffs'. Upon these facts the Court refused to issue execution under section 68. of the 7 & 8 Vict. c. 110. against M, after execution against the company and return of *nulla bona*, but allowed the plaintiffs to proceed by *scire facias*. *Hickman v. the Cambrian and Universal Insur. Co., re Merriman*, 28 Law J. Rep. (N.S.) Exch. 379.

A compromise by a shareholder in a joint-stock company, certified under the Joint-Stock Companies Winding-up Amendment Act, 1857 (20 & 21 Vict. c. 78), is binding on a creditor who had obtained judgment on a writ of *scire facias* against the shareholder prior to the passing of the act. *Cleave v. Harwar*, 29 Law J. Rep. (N.S.) Exch. 477.

By the deed of settlement of the A Life Assurance

Company it was provided, that in every policy granted by the company there should be contained a reference to the deed, and a proviso limiting the scope and effect of the contract thereby created, so that the same should take effect and be satisfied only out of such funds and property of the society as should be at the disposal of the directors in that behalf, and negating an unconditional liability; provided, that nothing in the deed or in such contract contained should limit the liability of any shareholder as to the performance of such contract, or prejudice the rights of any person or persons against any shareholder by virtue of the statute 7 & 8 Vict. c. 110. The A Company granted to the P Company a policy of insurance, containing a proviso that the capital stock of 100,000*l.*, and other the property of the society remaining at the time of any claim or demand made, unapplied and undisposed of and inapplicable to prior claims, should alone be liable to make good all claims and demands upon the society, or otherwise, under the policy; and that no director, officer or shareholder of the said society should be in anywise personally liable beyond the amount unpaid of his shares, nor longer than he should retain the same shares. The P Company having recovered judgment against the A Company in an action on the policy,—Held, that they were precluded by their contract from issuing execution against a shareholder personally; and that the clause in the deed did not give them the right. *In re the Joint-Stock Companies Winding-up Acts, 1848 and 1849, and the Athenæum Life Assur. Co., ex parte the Prince of Wales Life Assur. Co.*, 27 Law J. Rep. (n.s.) Chanc. 798; 4 Kay & J. 517.

A creditor obtained a judgment against a company by default; he then proceeded at law against several of the shareholders, among whom was the plaintiff, individually; from some he obtained various sums of money, from others nothing. Upon this bill being filed for an injunction to restrain the proceedings at law,—Held, that the plaintiff, as he had not proved either fraud or collusion, could not question the debt, or the validity of the judgment at law; that a tradesman employed by the directors of a company was not bound to inquire whether they were acting *ultra vires*; that the creditor was bound to give credit to the shareholder for the sums received from the others, but that this Court would not direct any account of such monies, or of the payments made out of them in satisfaction of costs of proceedings against shareholders, from whom nothing was obtained. *Green v. Nixon*, 27 Law J. Rep. (n.s.) Chanc. 819; 23 Beav. 530.

The plaintiff and defendant were shareholders in a company, which was amalgamated with another company, the plaintiff concurring in the amalgamation and signing the deed of settlement, but the defendant dissenting. The defendant brought his action against the amalgamated company for a debt due to him, and obtained judgment; but there being no assets, he was proceeding to issue execution against the plaintiff individually, under the 7 & 8 Vict. c. 110. The plaintiff then filed this bill, and moved for an injunction to restrain this proceeding, on the ground that the defendant was equally a debtor with the plaintiff and liable to contribute, and that a Court of equity was the proper tribunal to decide the question of contribution. The Court refused the injunction.

Harding v. Webster, 29 Law J. Rep. (n.s.) Chanc. 161; 1 Dr. & Sm. 101.

To entitle a creditor who has obtained judgment against a joint-stock company completely registered under the 7 & 8 Vict. c. 110, to an execution against one as a shareholder, under the 8 & 9 Vict. c. 16. s. 36, it must be shewn that the party against whom the application is made comes within the statutory definition of a shareholder, viz. one who has signed the deed of settlement: it is not enough to shew that he has acted as a director of the company. *Moss v. the Steam Gondola Co.*, 17 Com. B. Rep. 180.

Affidavits of a director of the company, stating that, on a certain day, the company discontinued to carry on its business, and was wholly insolvent, and that its funds, property and assets were and had since continued totally exhausted, and that there were no funds, property, or assets of or belonging to the company, or any other means whatsoever for or by which the plaintiff could recover or enforce payment of the judgment debt; and of the sheriff's officer to whom a *fi. fa.* against the company had been delivered for execution, stating that he went to the only place in London where the company had carried on its business, and found the place deserted, and from information and personal inspection ascertained that they had no goods or property there:—Held, sufficient to entitle the judgment-creditor to execution against a shareholder under the 7 & 8 Vict. c. 100. s. 68. *Ridgway v. the Security Mutual Life Assur. Soc.*, 18 Com. B. Rep. 686.

Upon a rule for execution against a shareholder of a joint-stock bank, under the 7 & 8 Vict. c. 113, the question raised presenting some difficulty, the Court declined to decide it upon motion, but directed a special case to be stated. *Powis v. Harding*, 1 Com. B. Rep. N.S. 405.

Service of a rule for an execution against a shareholder of a joint-stock company, must be personal, or by leaving it at his place of abode. Delivering it to his attorney, though at his request, will not do. *Edwards v. the Kilkenny and Great Southern and Western Rail. Co.*, 1 Com. B. Rep. N.S. 409.

In the notice of the intended application against a shareholder under the 7 & 8 Vict. c. 113, the party was described as "John Marshall." In the memorial last filed he was described as "John S. Marshall." There was an affidavit of identity:—Held, that the notice was sufficient. *Thomson v. Harding*, 1 Com. B. Rep. N.S. 555.

Upon a rule for execution against a shareholder of a joint-stock bank, under the 7 & 8 Vict. c. 113, the question raised presenting some difficulty, the Court declined to decide it in a summary way, but directed that a *sci. fa.* should issue and a special case be stated. *Fry v. Harding*, 2 Com. B. Rep. N.S. 407.

COMPENSATION.

[See LANDS CLAUSES CONSOLIDATION ACT—PUBLIC HEALTH ACT—SESSIONS, Clerk of the Peace.]

CONSIGNEE.

[*Morrison v. Morrison*, 7 Law J. Dig. 193; on appeal, 7 De Gex, M. & G. 214.]

CONSPIRACY.

[The 6 Geo. 4. c. 129. amended and explained, and the Laws relating to the Combination of Workmen repealed, and other Provisions in lieu thereof made by 22 Vict. c. 34.]

In order to support a conviction on a count alleging a conspiracy by false pretences and fraudulent devices to cheat the prosecutor of his money, it is not necessary to give in evidence such a false pretence as would, if money had been obtained on it by one prisoner alone, have been sufficient to sustain an indictment against him for obtaining money by false pretences. *The Queen v. Hudson*, 29 Law J. Rep. (N.S.) M.C. 145; Bell, C.C. 263.

It is no bar to a conviction that the prosecutor had the intention of cheating the prisoner if he could. *Ibid*.

The declaration stated that the defendant and S conspired to obtain possession of a portion of the plaintiff's premises, and to set up illicit stills there, and in pursuance of the conspiracy, by falsely pretending to the plaintiff that S wanted the premises for carrying on a lawful trade, persuaded the plaintiff to demise them to S, and to allow him and the defendant to take possession; and in further pursuance, &c., the defendant and S took possession, and set up illicit stills and manufactured illicit spirits, and falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear that it was the plaintiff who had so set up and was the proprietor of the stills and manufactured illicit spirits, whereas the plaintiff was innocent of the offences aforesaid; by means of which grievances an Excise officer found the stills, &c. upon the demised premises, and at the same time discovered the plaintiff there, who, by reason of the premises, appeared to be aiding in the illicit distillation, whereupon the officer arrested the plaintiff, and took him before a magistrate; and by reason of the said devices of the defendant and S the plaintiff was unable to prove his innocence, and was convicted. Special damage:—Held, on demurrer, that the declaration was bad; that if it was a declaration on the case in the nature of a conspiracy, the damage to the plaintiff was not shewn to have been either intended by the defendant, or the legitimate result of his acts; that if it was a declaration for a malicious prosecution, it did not shew that the defendant caused the prosecution to be instituted, nor a termination of the prosecution in the plaintiff's favour. *Barber v. Lissiter, or Lester*, 29 Law J. Rep. (N.S.) C.P. 161; 7 Com. B. Rep. N.S. 175.

CONTRACT.

[Admissibility of parol evidence to explain, see EVIDENCE—Breach of contract to marry, see MARRIAGE—Required to be in writing, see FRAUDS, STATUTE OF—When property passes by, see SHIP AND SHIPPING AND TROVER.—And see COVENANT—CUSTOM—DAMAGES—ESTOPPEL—INSURANCE—MONEY COUNTS—PLEADING, Equitable Pleadings—WARRANTY—WORK AND LABOUR.]

(A) WHAT AMOUNTS TO A CONTRACT.

(B) WHEN VALID OR ILLEGAL.

(a) *Consideration to support the Promise.*

- (b) *Founded on a Mistake.*
- (c) *Contrary to Statute or Public Policy.*
- (d) *In Restraint of Trade.*

(C) CONSTRUCTION OF CONTRACTS.

- (a) *In general.*
- (b) *Joint or several.*
- (c) *Entire Contracts.*
- (d) *Particular Words.*
 - (1) *"As soon as possible."*
 - (2) *"In such manner as shall be ultimately agreed upon."*
 - (3) *"Market Value."*
 - (4) *"Or any less number that may arrive."*
 - (5) *"Say from 1,800 to 2,000 quarters."*
 - (6) *"Any wet, dirty or unmerchantable oil."*
- (e) *Promise implied by Law.*
- (f) *Implied Undertaking for Title.*
- (g) *Conditional Contracts.*
- (h) *Conditions Precedent.*
- (i) *Farming Agreements.*
- (k) *When for the Court.*
- (l) *Time of the Essence of the Contract.*

(D) RESCISSION AND ABANDONMENT OF CONTRACTS.

(A) WHAT AMOUNTS TO A CONTRACT.

The plaintiffs, the owners of a large quantity of acid in barrels, employed certain brokers to sell it. The brokers contracted with B for the purchase of part, and gave him an order on the plaintiffs that they should deliver to him or his order a certain number of tons of acid. B sold his interest in this contract to E, who sold it to L. A bought the same of L, falsely representing himself as agent for V, and thereby, on pretence of inspecting the acid, obtained from L, the brokers' orders on the plaintiffs for the quantity. These orders had been indorsed over and passed from one purchaser to another, and when delivered by L to A were indorsed by L specially deliverable to himself. A presented the brokers' orders to the plaintiffs, and stating that he had purchased the acid of L on his own account, though nominally for V, induced the plaintiffs to give him a transfer or delivery order on the wharfinger on whose warehouse the acid was lying, authorizing the transfer into A's name of certain specific casks of acid, amounting to the quantity in the brokers' orders mentioned. The wharfinger thereupon transferred the specified casks of acid into A's name. A immediately borrowed money of the defendant, and pledged the casks of acid with him as a security for the repayment, handing over to the defendant the warrants which he had had made out, by means of which the defendant obtained possession of the acid:—Held, that, as A obtained the delivery order from the plaintiffs by the false and fraudulent representation that he had purchased acid by a sub-sale from a purchaser from the plaintiffs, there was no privity of contract between the plaintiffs and A; consequently that the latter could not convey a good title in the casks of acid to the defendant, though a *bond fide* pawnee for value, but that the plaintiffs might recover the acid back from him in trover. *Kingsford v.*

Merry (Ex. Ch.), 26 Law J. Rep. (n.s.) Exch. 83; 1 Hurl. & N. 503.

The existence of a contract is a question independent of circumstances which may excuse its non-performance. If terms proposed by two parties to each other, in themselves constitute a complete contract, by which the one party is to do for the other a definite work at a certain time, and to receive a specified rate of remuneration, it is not the less a binding contract, which will subject the party who was to do the work to an action for not doing it, because at the time the terms were accepted something remained to be disclosed (as to the nature of the work, &c.), upon which it might depend whether there might not be a legal justification for refusing to perform it. *Lara v. the General Apothecaries Co.*, 26 Law J. Rep. (n.s.) Exch. 225.

Where a party has agreed to print and publish a certain specified quantity, as a sheet or a page, or a certain number of pages, of printed matter, at a certain time, and at a certain rate per page or sheet, there is a complete contract; and he cannot disclaim or deny the contract merely because, at the time he made it, he had not seen the matter to be printed, and that it might contain indecent, immoral, or libellous matter; for if it did so, though that would be a legal excuse for declining to print and publish it, it would be no ground for denying the existence of the contract, and would be no evidence under non assumpsit, but must be specially pleaded by way of excuse. *Ibid.*

The plaintiff wrote to the defendant, agreeing to accept the appointment of secretary of a joint-stock company at a yearly salary of 300*l.*, "if the company be completely registered and put into operation; if not, I shall be satisfied with any remuneration for my time and labour you may think me deserving of and your means can afford." The defendant replied, by letter, accepting the terms, and adding, "It is distinctly agreed and understood, that if the company is not formed and carried out, that that part of your letter which alludes to your salary be null and void, and that at the expiration of three months it is entirely left to me to give you such sum of money as I may deem right as compensation for labour done, in the event of the company not being carried out." The company was not registered or carried out, but the plaintiff rendered services towards carrying it out:—Held, that there was no contract giving the plaintiff a right of action. *Roberts v. Smith*, 28 Law J. Rep. (n.s.) Exch. 164; 4 Hurl. & N. 315.

The plaintiff, L, holding a dishonoured bill of C for 60*l.*, and another bill for 53*l.* not due, applied, with C's consent, to the defendant B, who was indebted to C in a larger amount, and the following document was thereupon prepared:—"I agree to authorize B to pay L or his order 113*l.*, the amount of two acceptances, towards my account, B to debit my account with the above money. L's receipt to B, I acknowledge shall be binding between myself and B." This was signed by C, and the word "acknowledged" was then added by B, with his signature:—Held, that this amounted only to an authority by C to B, and did not create a contract between L and B so as to give L a right of action against B for the 113*l.* *Liveridge v. Broadbelt*, 28 Law J. Rep. (n.s.) Exch. 332; 4 Hurl. & N. 603.

The plaintiffs' vessel was insured against fire by

the defendant, an insurance broker, under a policy for a year, expiring on the 29th of July 1858. The vessel having arrived safe in port on the 12th of April 1858, the plaintiffs wrote to the defendant on the 15th of April, asking for a return of the premium "for unexpired time; say, from the 12th instant to the date of the expiration of the policy." The defendant, thereupon, sent to the plaintiffs for the policy, "to put forward returns for cancelling." The policy was accordingly handed to the defendant, and on the 21st of April he cancelled it, on the terms of returning the premium from the 30th of April to the 30th of July, there being a custom in such cases for an insurance broker not to reckon broken months. On the 22nd of April the vessel was burnt. Afterwards, on the same day, but before they had received the return premium, or had heard from the defendant that the policy had been cancelled, the plaintiffs wrote to withdraw their letter of the 15th, as they had received, they said, no reply thereto:—Held, that on these facts there had been an acceptance of the plaintiffs' proposal to cancel the policy, although the parties had misunderstood each other as to the terms on which the policy was to be cancelled. *Baines v. Woodfall*, 28 Law J. Rep. (n.s.) C.P. 338; 6 Com. B. Rep. N.S. 657.

C made a written proposal to D (the defendant) for the exchange to him of a new engine for an old one, with 10*l.* and a ton of iron. D afterwards verbally assented to these terms, with the exception of the ton of iron; and in the course of the conversation, advised C to remove the fittings at once, and subsequently told him that he could not allow the engine to remain on his premises beyond quarter-day. Before quarter-day, C sold the engine to the plaintiff; but the defendant refused to let the plaintiff have it, alleging that the bargain was (as the written proposal rather imported), that it was not to be removed until the new engine was completely fitted up, and that this had not been done. In an action against D for conversion of the old engine, the Judge told the jury it was for them to consider, under all the circumstances, whether or not the contract between C and D was for an immediate transfer of the old engine, and if so, to find for the plaintiff, which they did:—Held, as the written proposal had not been accepted *simpliciter*, the real contract was by parol; that the direction was right; and that there was evidence to sustain the verdict. *Stones v. Dowler*, 29 Law J. Rep. (n.s.) Exch. 122.

Differences having arisen between B, a shareholder and the managing director of a duly registered joint-stock company, and the other directors, the board, at a duly constituted meeting, came to the following resolution—"The Board are willing to accept Mr. B's resignation, and to pay him the proportion of salary due, say, in round numbers, 150*l.*, and at the same time the members of the board will jointly relieve him of his shares, and guarantee him against all calls thereon. The directors, being desirous that this matter should be definitively settled, request that Mr. B will reply to the offer now made to him by the next board day, the 4th of September. Unless the terms of arrangement now proposed are accepted by that date, the directors are to be bound no longer by them. (Signed) Thomas Allan, chairman." B replied within the time mentioned—"I accept your offer. It may be

arranged as speedily as you can wish, and, in fact, I accept the offer as one to be at once carried out; and on receiving the guarantie as to the shares, in which, I presume, your chairman, Mr. Cridland, concurs, and advice that the sum fixed is paid in to my account at Lubbock's, my resignation shall be at once forwarded." At a meeting of the directors, the board, by a minute, accepted B's resignation, and requested the secretary to get the guarantie prepared by the solicitor, and to take other steps to carry out the negotiation:—Held, that the resolutions and letters constituted a complete agreement, and bound the directors individually who were present when the offer was made; and that B, having resigned and been compelled to pay calls on his shares, might maintain an action against the directors for not indemnifying him, although no guarantie was tendered for execution. *Barker v. Allan*, 29 Law J. Rep. (n.s.) Exch. 100; 5 Hurl. & N. 61.

A parol addition to an agreement must be established without doubt or ambiguity before equity will assist in carrying the additional provision into effect. *Vouillon v. Stares*, 25 Law J. Rep. (n.s.) Chanc. 875.

Where a person proposing to sell an estate receives an offer, and his estate agent answers "he has authorized us to accept the offer, subject to the terms of a contract being arranged between his solicitor and yourself," the answer does not constitute a complete contract, and the vendor is at liberty to add other terms, and, on their non-acceptance, to break off the treaty. *Honeyman v. Marryat*, 26 Law J. Rep. (n.s.) Chanc. 619; 6 H.L. Cas. 112.

A paper sent to a solicitor as "instructions" to prepare a lease may be treated as the final agreement for the lease, if the evidence shews that it was only so sent to be put into a formal shape; but the act of so sending it is evidence to raise a *prima facie* presumption that it did not contain all that the parties meant, but might afterwards be modified by either of them. *Ridgway v. Wharton*, 27 Law J. Rep. (n.s.) Chanc. 46; 6 H.L. Cas. 238.

C, having contracted with the Government for the conveyance of mails by sea, agreed with H to employ him during the existence of the contract at a fixed yearly salary, payable quarterly, and, in addition thereto, a sum equivalent to 10*l.* per cent. on the profits.—Held, that this was a contract of hiring and service, and not a partnership. *Harrington v. Churchward*, 29 Law J. Rep. (n.s.) Chanc. 521.

Where, under a contract of hiring and service, a salary is to be paid in proportion to the profits, a Court of equity will entertain a bill for an account of the profits, if such account is too complicated to be taken by a jury at common law. *Ibid.*

C having agreed to employ H during the existence of his contract with the Government, afterwards entered into a fresh contract with the Government for the same service, but for a longer period than the first contract; and by the second contract the first contract was annulled. C then gave H notice of dismissal:—Held, that the contract between C and H must be considered in equity as subsisting during the period of the original contract with the Government. *Ibid.*

A sister, in a writing addressed to her brother, after stating, "as you have kindly promised, if I do not make a will, my wishes shall be fulfilled," ex-

pressed her wish that A B and others should have the sums therein specified. She died intestate, and the brother inherited her property. There was some evidence of the brother's having seen the writing in her life, and of his having afterwards expressed an intention to carry his sister's wishes into effect; but he died without having done so. The Court held, that there was not sufficient evidence of a contract on the part of the brother to enable it to enforce the performance of the sister's wishes. *Chester v. Urwick* (No. 3), 23 Beav. 407.

Where an heir-at-law seeks to have a contract, entered into by his ancestor, carried into effect for his benefit, he must shew that there was a binding contract at the death of the ancestor, and one which could be enforced against an unwilling purchaser. *Garnett v. Acton*, 28 Beav. 333.

In 1853 A B agreed to purchase some real estate, but he died intestate before the completion of the purchase; it turned out that part of the property had been held for twenty-seven years, under a parol exchange entered into by a mere tenant for life, but after A B's death the exchange was confirmed by the trustees:—Held, that the contract could have been enforced against A B in his lifetime, and that his heir-at-law was entitled to have it completed for his own benefit at the expense of A B's personal estate. *Ibid.*

(B) WHEN VALID OR ILLEGAL.

(a) Consideration to support the Promise.

Declaration for money due by the defendants to the plaintiff for the payment of 10*s.* per ton by agreement upon and in respect of 500 tons of a substance used in manure, manufactured or sold by the defendants pursuant to the plaintiff's permission or authority, by means of the use of an invention comprised in letters patent granted to the plaintiff. Plea, that at the time of the agreement, and at all times since, the letters patent were void, and the plaintiff had no such right or privilege as supposed; that the defendants were, before and at the time of the agreement entitled as of right, and without licence or permission from the plaintiff, to use the supposed invention and sell the said manure, and the plaintiff never did grant any licence to the defendants, and the same, if given, would have been void, and the defendants had no benefit from the agreement, and there was not any sufficient consideration for making the agreement or paying the money claimed:—Held, upon demurrer, that the plea was no answer to the plaintiff's claim. *Lovels v. Purser*, 26 Law J. Rep. (n.s.) Q.B. 25; 6 E. & B. 930.

A declaration stated that in consideration that the plaintiff would consent to the defendant's retaining possession of two bills of exchange, to which the plaintiff was entitled, the defendant promised, if he should succeed in getting them discounted, to pay the proceeds to S. Averment, that defendant succeeded in getting them discounted. Breach, that he did not pay the proceeds to S:—Held, on motion to arrest the judgment, that a sufficient consideration appeared for the defendant's promise. *Hart v. Miles*, 27 Law J. Rep. (n.s.) C.P. 248; 4 Com. B. Rep. N.S. 371.

The premium stated in an indenture of apprenticeship was 20*l.*, but at the time of execution the

defendant agreed to give the plaintiff (the master) four I O U's for 20*l.* more, for which instruments the defendant, on the application of the plaintiff, who feared that they were void promissory notes, afterwards substituted a single I O U in a proper form; and on that the action was brought. The jury found the deed of apprenticeship, though void, was the very deed which the defendant bargained for:—Held, per *Willes, J.* and *Byles, J.*, that the plaintiff was entitled to recover; *Williams, J. dissente*. *Jackson v. Warwick* distinguished. *Westlake v. Adams*, 27 Law J. Rep. (N.S.) C.P. 271; 5 Com. B. Rep. N.S. 248.

Quere—if the plaintiff could have recovered on the substituted I O U's, supposing he could not on the original instruments? *Ibid*.

A declaration stated that the plaintiff, a single woman, the mother of two bastard children, of whom the defendant was the father, had, at the defendant's request, undertaken the care and nurture of them, and in consideration of the premises and that the plaintiff would continue to take charge of and supply them with such things as should be necessary for their use and benefit, the defendant promised to pay the plaintiff 50*l.* a year, quarterly, for a term not yet expired. Averment, that the plaintiff had done all to entitle her to be paid. Breach, the non-payment of five quarters' arrears. Plea, that after the making the promises, and before the money sued for became due, one of the children died:—Held, on demurrer, that the declaration disclosed a good consideration for the defendant's promise, and that the plea was no answer. *Smith v. Roche*, 28 Law J. Rep. (N.S.) C.P. 237; 6 Com. B. Rep. N.S. 223.

The plaintiffs, lace-merchants in London, employed travellers to visit certain parts of England where they had a business connexion, and to each traveller they assigned a separate journey. A vacancy having occurred on the M journey, the plaintiffs told the defendant of it, he being at the time in their service in another capacity, and he verbally agreed with them to fill the vacancy; it being understood at the time that the agreement between them should be reduced into writing. The defendant accordingly entered their employ as traveller on the M journey, and after he had been travelling for about a month, a list of places and of the customers whom he was to visit was sent down to him, and the written contract, which was as follows—"In consideration of my entering upon your employ, at a salary, &c., I herewith agree to do so with the understanding that, in the event of my wishing to travel, and doing so, for any other house in the same trade, on any part of the same ground, to pay you the sum of 50*l.*" This contract the defendant signed, and after having travelled for the plaintiffs for about a year, he left them and travelled for a rival house in the same trade over the M journey. The plaintiffs having sued him for the 50*l.* penalty under the contract,—Held, first, that a good consideration for the defendant's agreement appeared upon the face of the contract. Secondly, that the circumstances under which the defendant entered the plaintiffs' employ as traveller shewed a good consideration for his part of the agreement, and that the written contract, therefore, which was drawn up in pursuance of the original understanding between him and the plaintiffs, was made on a good consideration. Thirdly, that the

contract was for the entire services of the defendant while in the plaintiff's employ, and that the parties meant therefore that the penalty should attach if the defendant travelled for another house after he left the plaintiffs' employ. Fourthly, that extrinsic evidence was admissible, to identify the particular employment to which the agreement referred, viz. that of traveller; and also to identify the ground over which the defendant agreed to travel, viz. the M journey. Fifthly, that the subject-matter of the contract being identified by the extrinsic evidence, the contract was not unlimited in point of space and so void as being in restraint of trade, inasmuch as the evidence shewed that the restriction as to the same ground was limited to the ground, i.e. the M journey, over which the defendant travelled. Sixthly, per *Erle, C.J.* and *Crowder, J.* (*dubitate Byles, J.*), that the written contract, even without the extrinsic evidence limiting the restriction to the M journey, was not void as being in restraint of trade. *Mumford v. Gething*, 29 Law J. Rep. (N.S.) C.P. 105; 7 Com. B. Rep. N.S. 305.

By an agreement between the plaintiff and the defendant it was agreed, that the plaintiff would give his support to the defendant for obtaining the concession from the Government of the Canton of Neuchâtel of the right to make a certain railway, which the defendant proposed to make in such canton; that payment should be made to the defendant for the works by the issue of shares in an intended company; and that with two-thirds of the capital of such company the defendant should make the railway, and that the remaining third should be remitted in three shares to the plaintiff; and that such shares should cover all that might be due to the plaintiff, as well for his trouble as for certain expenses to be incurred by him. Afterwards, as other persons had also applied to such Government for the same concession, an amalgamation took place of the competing parties, and through the instrumentality of the plaintiff the concession was granted to such persons in conjunction with the defendant. A subsequent agreement between all the parties was then made for constructing the railway, by which, amongst other things, it was agreed that 35,600*l.*, in free shares in the intended company, should be allotted to the plaintiff, "for the care and trouble he had had up to that day, and which he might yet have to take up to the complete organization of the company":—Held, that there was no consideration for a binding promise by the defendant to give the plaintiff the shares; the service of the plaintiff prior to the last agreement not having been rendered for the allotment of shares to be made in the event, which happened, of a joint concession to the defendant and his rivals, and the plaintiff being under no obligation to render the anticipated services subsequent to such last agreement. *Pourtales Gorgier v. Morris*, 29 Law J. Rep. (N.S.) C.P. 208; 7 Com. B. Rep. N.S. 588.

(b) *Founded on a Mistake.*

Declaration, for not delivering 100 chests of tea, "ex the *Star of the East*," which the plaintiff had agreed to purchase at a given price, and the defendants to sell. Equitable plea, that the contract was made by sample, which had been delivered to the defendants as, and which they believed to be, sample

of the tea, "ex the *Star of the East*," whereas, in fact, it was a sample of a totally different tea; that the defendants, immediately on discovering the mistake, and before the plaintiff had in any respect altered his position, gave him notice of the mistake, and that they should treat the contract as void:—Held, that the plea was bad, for that the contract was not simply void in equity at the option of the vendor. *Scott v. Littledale*, 27 Law J. Rep. (N.S.) Q.B. 201; 8 E. & B. 815.

(c) *Contrary to Statute or Public Policy.*

The Court has undoubted jurisdiction to prevent the breach of an agreement not to apply for an act of parliament; but where the agreement was not to apply to parliament for a measure affecting the public benefit, the Court declined to interfere. *The Lancaster and Carlisle Rail. Co. v. the North-Western Rail. Co.*, 25 Law J. Rep. (N.S.) Chanc. 223; 2 Kay & J. 293.

Quere—whether such an agreement is void, as being against public policy. *Ibid.*

The first count of the declaration alleged that the plaintiff and one R were in possession of documents and information which would prove that the plaintiff was entitled to certain property not then in his possession, and which he was not aware of, and that they proposed to give the defendant all the documents and information in their possession on his agreeing to pay them each one-fifth of the value of the property if it should actually come into his possession, to which the defendant assented, and thereupon an agreement was entered into between the plaintiff and R and the defendant, which recited the above facts, and whereby the defendant agreed that if, by the said documents and information, he should actually become possessed of any property not then in his possession, and that he did not know of, he would pay to each of the plaintiff and R one fifth of the value of the said property to be recovered; and it was thereby agreed that the defendant should not be compelled to take any proceedings at law or in equity to recover the said property, and that he would not make known the said documents and information to any person without the consent of the plaintiff and R, and that if the property were recovered he would execute all proper documents to vest in the plaintiff and R the said one-fifth. Provided, that if the defendant did not become possessed of any property he should not be called upon to pay any money; and that if he did not think proper to proceed to recover the property, he would return the papers, and that the agreement should be cancelled. It was then averred, that the plaintiff and R did give to the defendant all the said documents and information, and that the defendant took certain proceedings to recover, and did recover, the said property, which he did not know of: and breaches were assigned of this agreement. There were also counts for work and labour, &c. The defendant pleaded, seventhly, that W T, having died intestate, and without any known relation, and possessed of personal property, administration of his effects was granted on behalf of the Crown to the Solicitor to the Treasury; that the defendant at the time of making the agreement in question had no knowledge that he was next-of-kin to W T, or entitled to the said property; and that the plaintiff and R stated to

the defendant that they would supply such information and evidence, in case it should be necessary that proceedings should be taken by the defendant for the recovery of the said property, that by means of such information and evidence the defendant might successfully recover the said property, provided the defendant would enter into an agreement to pay to the plaintiff and R one-fifth of the property to be recovered, and that such an arrangement was thereupon entered into between the plaintiff and R and the defendant; that proceedings were taken by the defendant for the recovery of the said property, and that information and evidence were supplied by the plaintiff and R in the said proceedings under the said agreement; that the defendant recovered the said property, and that the plaintiff and R were not entitled to or interested in the said property except under the said agreement. The ninth plea alleged that proceedings were instituted against the Solicitor to the Treasury, as such administrator as in the former plea mentioned, by persons (including the defendant) who claimed to be next-of-kin to the said W T for the purpose of obtaining the said property, and that it was agreed between the plaintiff and the defendant that the plaintiff should maintain and support the defendant in the said proceedings and in his said claim by information, by evidence and documents, and that if the defendant recovered the said property as such next-of-kin, he would pay to the plaintiff one-fifth of the property so recovered:—Held, that the agreement disclosed in the declaration was not illegal as being contrary to public policy or the laws against champerty and maintenance, since no suit was depending, nor was it stipulated that any should be commenced; but that the pleas shewed an agreement which was illegal on the above grounds. *Sprye v. Porter*, 26 Law J. Rep. (N.S.) Q.B. 64; 7 E. & B. 58.

The eleventh plea stated that, after the making of the promise in the first count mentioned, and after the accruing of the causes of action in the money counts, the plaintiff petitioned the Insolvent Court, and that a vesting order was made, whereby all his estate and effects, and all debts due and growing due to him were vested in his assignee:—Held, that this plea was a bar to the action, as the plaintiff's interest in the contract was valuable property which vested in the assignee without his interfering to claim it. *Ibid.*

The 12th section of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122.) enacts, that walls shall be constructed of such substances, of such thickness, and in such manner as are mentioned in the 1st schedule, which states, that "every building shall be inclosed with walls constructed of brick, stone or other hard and incombustible substances, and the foundations shall rest on the solid ground, or upon concrete or upon other solid substructure." The act does not define the meaning of the term "building"; but states, in the 8th section, that "a building shall be deemed to be new whenever the inclosing walls thereof have not been carried higher than the footings previously to the 1st of January 1856." The plaintiff, after that date, erected a shop for the defendant all in wood, without footings or any brick-work for a foundation. The structure was about thirteen feet high, and as many wide; it was built on

wooden joists, laid on the ground, without being let into or fastened to the soil, and the whole was capable of being removed in its entirety. The parties originally intended to have had a brick foundation for the structure, and to have excavated the ground in the usual way to receive it; but this plan was abandoned, and, at the plaintiff's suggestion, the shop was made all in wood as above stated, without the use of any brickwork, in order to evade the said Building Act, but with the intention of answering all the purposes which the one originally contemplated was to have done:—Held (*Williams, J. dubitante*), that the shop was a building within the meaning of the Building Act. *Stevens v. Gourley*, 29 Law J. Rep. (N.S.) C.P. 1; 7 Com. B. Rep. N.S. 99.

Held, also, that the 12th section prohibits buildings with walls of wood or other combustible substance; and that the shop being therefore a building in violation of such prohibition, the plaintiff could not recover the price of erecting it. *Ibid*.

Semble (per *Crowder J.* and *Byles, J.*)—that the 8th section applies only to buildings which were commenced before the 1st of January 1856. *Ibid*.

The defendants, a company of British subjects domiciled in England, but working mines in Brazil, agreed to sell certain slaves to the plaintiff, a Brazilian resident, and domiciled in Brazil, where slavery was allowed. The slaves were acquired by the defendants in Brazil after the passing of the statute 5 Geo. 4. c. 113, and before the passing of the statute 6 & 7 Vict. c. 98. A large number of them were purchased. The others were the children and offspring of those acquired by purchase:—Held, by the majority of the Court of Exchequer Chamber (*Bramwell, B., Channell, B., Hül, J.* and *Blackburn, J.*, but *dissentientibus, Pollock, C.B.* and *Wightman, J.*), reversing the judgment of the Court of Common Pleas, that the contract was legal, and might be enforced in this country, on the ground that the statute 6 & 7 Vict. c. 98. s. 5, permitted the sale of slaves, the holding of whom was not prohibited by any act of parliament; and that no statute prohibited the holding of the slaves in Brazil, even though the purchasing of them there might be a felony in a British subject. Held, per *Bramwell, B.*, that the purchasing slaves in Brazil by British subjects was not prohibited by the statute 5 Geo. 4. c. 113. *Santos v. Illidge* (Ex. Ch.), 29 Law J. Rep. (N.S.) C.P. 348; 3 Com. B. Rep. N.S. 861.

(d) In Restraint of Trade.

[See *ante* (a), *Mumford v. Gething*.]

The condition of a bond recited that the obligors were millowners in W, employing many work-people and servants, and that there were societies or combinations existing, whereby persons, otherwise willing to be employed in the said mills, were deterred by a reasonable fear of social persecution from hiring themselves to work there, and whereby the legal control and management by the obligors of their property and establishments were injuriously interfered with; that the said combinations were sustained by funds arbitrarily levied and extorted by way of a rate upon the persons employed by the obligors and receiving wages from them; and that it had become necessary, in the opinion of the obligors, to take measures for vindicating their legal rights to the control and management of their own

property, which would also best sustain the rights of the labourer to the free disposal of his industry, and that the obligors had therefore agreed to carry on their works in regard to the amount of wages to be paid, and the times or periods of the engagement of work-people and the hours for the suspending of work, and the general discipline and management of their works (in conformity to law), for twelve calendar months, in conformity with the resolution of a majority of the obligors present at a meeting to be held for the purpose of carrying the said agreement into effect. The condition was, that if the several obligors should for twelve calendar months carry on, or partially suspend the carrying on of their works in regard to the several matters aforesaid, in conformity with the resolutions in that behalf of a majority of the said obligors, &c., the bond was to be void, in regard only to the persons so performing the condition, but otherwise to remain in force:—Held, that this bond was illegal at common law, as being contrary to public policy and in restraint of trade. *Hilton v. Eckersley* (in error), 25 Law J. Rep. (N.S.) Q.B. 199; 6 E. & B. 47.

(C) CONSTRUCTION OF CONTRACTS.

(a) In general.

Declaration, that the defendant, as executor of J, was liable to pay over to A rents received and to be received by the defendant under the will of J to the use of A; and that in consideration that the plaintiff would lend money to A the defendant promised, on A's giving authority to the plaintiff to receive it, to pay to the plaintiff the money advanced to A out of the first money received or to be received on A's account; that the plaintiff lent A 58*l.*; that A gave the plaintiff an authority to receive it from the defendant, who had due notice; that the defendant afterwards received 20*l.* on account of A, and paid it over to the plaintiff, but before he received any more bought A's interest, and so disabled himself from performing his contract, and never paid the residue of the 58*l.* Plea, that before the defendant bought A's interest he had no knowledge that the plaintiff had advanced more than 20*l.*, and that A had not then given the plaintiff an authority to receive more than that sum:—Held, a good answer to the declaration. *Horlor v. Carpenter*, 26 Law J. Rep. (N.S.) C.P. 136; 3 Com. B. Rep. N.S. 172.

The defendants, having contracted with G to supply stores and fittings-up for government emigrants on board the ship C, at 7*l.* 5*s.* per statute adult, employed the plaintiffs, who contracted to fit up the between-decks of the ship for such emigrants, and provide all materials and labour for plumbers' and joiners' work for 15*s.* per statute adult, the whole to be done to the satisfaction of the Emigrant Commissioners. The plaintiffs fitted up 276 berths, being more than the statute number, part of which were pulled down and altered by the order of the Emigration Commissioners; and the vessel went to sea with only 261, which was rather over the proper number. They also made waterclosets, a ventilator and schoolmaster's cabin by order of the Commissioners:—Held, that the plaintiffs were entitled to recover from the defendants only 15*s.* for each of the 261 berths, and that the extra work done by the order of the Commissioners was either within

the contract, and therefore included in the 15s., or was done without the authority of the defendants; and that the defendants, were, therefore, not liable to pay for it. *Dobson v. Hudson*, 26 Law J. Rep. (N.S.) C.P. 153; 1 Com. B. Rep. N.S. 652.

Where there is a contract for the sale of goods, although described as lying in the possession of wharfingers, carriers, &c., subject to their lien for charges, yet there is an implied undertaking on the part of the seller that they shall be delivered to the purchaser, on his application, within a reasonable time, and readiness to pay the charges thereon; and if, upon such application, the delivery is refused, the seller will be liable for damages to the purchaser. *Buddle v. Green*, 27 Law J. Rep. (N.S.) Exch. 33.

It is questionable whether a dissolution of partnership is, *per se*, a breach of a contract by the firm to employ a person in their service, though a dismissal by a partner remaining would be so; but even assuming that the dissolution would be a breach, yet if the person they have retained accepts, upon the dissolution, an agreement with a new firm, comprising members of the old partnership and also new partners, that will be evidence to support a plea of exoneration, in an action against the members of the old firm on the original agreement, even apart from any express agreement to cancel it; because there cannot be two co-existent agreements by the same person to serve different firms, composed of different parties; and the second agreement is thus an implied surrender of the first. *Hobson v. Cowley*, 27 Law J. Rep. (N.S.) Exch. 205.

An agreement between master printers and journeymen, fixing the amount and mode of calculating the work done and the price to be paid for it, contained the following rule:—"Standing advertisements or stereo blocks, if forming a complete page, or when collected together making one or more complete pages, in a wrapper or advertising sheet of a magazine or review, not to be chargeable: the compositor to charge only for his time in making them up. The remainder of the matter in such wrapper or advertising sheet, including standing advertisements or stereo blocks not forming a complete page, to be charged for by the compositor, and cast up according to the 8th or 20th articles of the scale as they may respectively apply"—Held, that when there were complete pages containing one or several standing advertisements, the compositor was to charge only for time, but that he was entitled to charge according to the scale whenever a page was composed in part of standing materials and in part of new matter. *Hill v. Levey* (Ex. Ch.), 28 Law J. Rep. (N.S.) Exch. 80; 3 Hurl. & N. 702: affirming the judgment below, 27 Law J. Rep. (N.S.) Exch. 259; 3 Hurl. & N. 7.

By the agreement, arbitrators were appointed to decide disputes. On a dispute between A, a journeyman, and B, a master printer, on the construction of this rule, the arbitrator decided in favour of the master. The plaintiff, a journeyman printer, after this decision, came into the employ of the defendant, a master printer, and raised the same question:—Held, that he was not bound by the award between A. and B. *Ibid*.

In an action for not accepting oil, the declaration stated a contract to purchase forty tons of oil, the

last ten tons whereof, "to be delivered in all December, to be paid for on delivery"; with an averment of readiness to deliver "in the month of December," and a traverse of that averment. It appeared that the contract was not for any specific oil, that no particular oil had been appropriated, and that the brokers on each side had arranged for the previous deliveries. On the 11th of December the defendant's brokers wrote to him to know when he would receive the last ten tons; he directed a delivery to certain parties; but this was not communicated to the plaintiff, and on the 22nd of December the defendant stopped payment (towards the end of the month), upon which the defendant's brokers wrote to the plaintiff to the effect that the oil would not be received; and he then, before the end of the month, re-sold at a loss, and wrote to the defendant, demanding the difference:—Held, that he was entitled to recover, the jury finding that he would have been ready to deliver the oil contracted for if the defendant, or his brokers, had required it and offered the money. *Baker v. Firminger*, 28 Law J. Rep. (N.S.) Exch. 130.

The defendants and one N were jointly interested in a cargo of goods, of which the bills of lading were held by B, as security for the payment of the amount of two bills of exchange. At N's request, the plaintiffs gave B their guarantee for that amount, thus obtaining the bills of lading. After one bill was paid, and before the other was due, the defendants, N being then insolvent, agreed with the plaintiffs that the goods should be sold, and that after the account of sales was made up, and the amount guaranteed by the plaintiffs, the defendants would bear and pay one-half of whatever loss might appear on the transaction. The plaintiffs paid the other bill; the cargo failed to realize the amount; they proved on N's estate for the whole amount of the difference, and received dividends on the whole amount, and then claimed from the defendants half of the whole amount of the difference:—Held, that the defendants were not entitled to have credit for the dividends received, and were liable for half of the whole amount of the loss. *The Liverpool Borough Bank v. Logan*, 29 Law J. Rep. (N.S.) Exch. 249; 5 Hurl. & N. 464.

An act of parliament empowered a corporation to scour an inland harbour, and they did so by taking up the mud in barges, and letting it out at the mouth of the harbour, so as to be carried down the river. They employed the plaintiffs to excavate and remove certain estimated quantities of earth, &c., down the river, at certain prices,—the contract (not noticing the scouring process) providing only for extra work ordered by their engineer in writing. In consequence of the cleansing process, which was continued while the plaintiffs were engaged in their work, the quantity of soil they had to remove was vastly increased by great deposits of mud. They applied for and were refused any additional remuneration; and, after their work was completed, sued the corporation for compensation, but their case, as stated at the trial, did not shew that the mode of cleansing adopted by the corporation was unusual or unreasonable; and, on the contrary, it appeared rather to be a proper mode of carrying out the powers of the act:—Held, that, as it did not appear that the process was unlawful or wrongful, it was no cause of action, and a

nonsuit was upheld. *Rigby v. the Mayor, &c. of Bristol*, 29 Law J. Rep. (N.S.) Exch. 359.

By a contract for the building of a borough gaol, it was provided, amongst other things,—“that no alterations should be made without the written authority of the architect, by whom the value of such alterations should be ascertained; and that no allowance for alterations should be made, unless the value of the same was ascertained at the time the work was done, and entered in a book, such entry to be submitted to and approved of by the architect.”—“that no payments should be made to the contractors, except on the production of a certificate from the architect that a certain amount of work had been done; and that the architect should deliver his certificate thereof at the end of every fourteen days,”—and “that the contractors should be entitled to receive at the end of every fourteen days the amount for which the architect should have given his certificate; the amount of such certificate to be less by certain varying proportions than the value of the work done, until 90 $\frac{1}{2}$ per cent. of the whole should be completed; and that no further payments should be made to the contractors until three calendar months after the architect should have certified the completion of the whole work to his satisfaction, when one half of the remainder should be paid, and the balance at the end of twelve months from the date of the architect's certificate of completion:”—Held, that the architect's certificate of final completion was sufficient, without mentioning the amount remaining due. *Pashby v. the Mayor, &c. of Birmingham*, 18 Com. B. Rep. 2.

By agreement in writing, A was appointed surveyor or agent of B, for two years and a half, at a salary of 200*l.* per annum, payable quarterly; and A was in addition to receive a commission of 5 per cent. upon the first year's rent for every house which he should let on B's estate. The agreement contained a stipulation “that under no pretence whatsoever should A contract any debt in the name of B, or be considered as his agent to receive any money on his account,” and a proviso, that, in the event of a breach, the agreement should immediately cease and determine. To an action against B for dismissing A before the expiration of the term, B pleaded (thirdly) that A, whilst he was such surveyor, contrary to the agreement, and without his knowledge and authority, and against his will, received from divers persons divers sums of money then due and payable from them to B, as and under the pretence of being B's agent in that behalf;” &c.:—Held, that the receipt by A of deposit money from persons to whom he had agreed to let houses on account of B, was a breach of the agreement, and a cause of dismissal; and that proof that he had done so sustained the third plea. *Bray v. Chandler*, 18 Com. B. Rep. 718.

A having applied to B, a coachmaker, to build for him a carriage of a particular description, the latter at his request sent him a drawing, which A returned with objections. B thereupon wrote to A expressing his regret that the drawing sent did not meet his approbation, adding,—“if you order, every attention shall be paid to any particulars you may think proper.” A in answer wrote,—“I have duly received your reply to my last, and can only continue to wonder at your disinclination to furnish me with so simple a drawing as I then requested, with the view

of obviating as far as possible the chance of any misconception which might otherwise arise in respect of my order, which I can now of course give in general terms only, and on the assumption that you undertake to execute it in a manner which shall meet my approval, not only on the score of workmanship, but also that of convenience and taste.” The carriage was thereupon built and forwarded to A, who found many faults in it, and rejected it:—Held, that, the order having been given and accepted on the express condition that the carriage should meet the approval of A “on the score of convenience and taste,” the latter was entitled (acting *bond fide*, and not from mere caprice,) to reject it. *Andrews v. Belfield*, 2 Com. B. Rep. N.S. 779.

The plaintiff agreed to build a house for the defendant, who prepared a specification which contained particulars of the different portions of the work. Under the head “Carpenter and Joiner,” there was specified the scantling of the joists for the different floors, the rafters, ridge and wall pieces, but no mention was made of the flooring. The specification stated that “the whole of the materials mentioned or otherwise in the foregoing particulars, necessary for the completion of the work, must be provided by the contractor.” At the foot of the specification the plaintiff signed a memorandum, whereby he agreed with the defendant “to do all the works of every kind mentioned and contained in the foregoing particulars, according in every respect to the drawings furnished or to be furnished, for the sum of 1,100*l.* The house to be completed and fit for the defendant's occupation by the 1st of August, 1858.” The plaintiff prepared the flooring boards, brought them to the premises, and planed and fitted them to the several rooms, but refused to lay them down without extra payment, because the flooring was not mentioned in the specification, whereupon the defendant put an end to the contract, took possession of the work, and proceeding to complete the building used the flooring boards so prepared and fitted by the defendant:—Held, first, that the plaintiff was not entitled to recover for the flooring as an extra, because it was included in the contract, though not mentioned in the specification. Secondly, that the plaintiff could not maintain trover for the flooring boards left on the premises by him and subsequently used by the defendant. *Williams v. Fitzmaurice*, 3 Hurl. & N. 844.

By articles of agreement under seal, the plaintiff covenanted with one E that he would, from time to time, when and so soon as he should have erected and covered in one or more of the messuages thereafter agreed and covenanted to be built by him upon the land thereafter described and agreed to be demised, &c., by indenture, demise and lease unto E, his executors, &c., the whole or such part or parts whereon one or more of the said messuages or tenements should have been built, &c., for ninety-eight years from the 29th of September then last (1852), at a certain yearly rent, payable quarterly,—the rents to be so apportioned that the yearly rent to be reserved on any such lease to be granted as aforesaid should not exceed one-sixth of the yearly value of the land and buildings to be thereby demised; with a proviso, that, if the yearly rent or rents to be reserved upon the lease or leases to be granted of any part or parts only of the land thereby agreed to be demised should amount to or make up the full yearly

rent thereby agreed to be reserved, the remainder of the land, when built upon, should be demised and leased at the yearly rent of a peppercorn only. The articles then contained a covenant by E with the plaintiff to pay the rent thereinbefore agreed to be reserved, and to pay rates, &c., to erect the messuages; and also a covenant, that, until the land, and the buildings erected as aforesaid, should be leased in execution of the covenant in that behalf, the said E, his executors, &c., would pay for the same the several yearly rents or sums thereinbefore stipulated or agreed to be reserved in the leases to be granted, to such persons, and in such manner and proportions, and at such times as the same would be payable in case such leases were actually granted. There was also a proviso for re-entry by the plaintiff, in case the whole or any part of the said yearly rent or rents thereby, or by the said leases so to be granted as aforesaid, to be reserved, should be behind or unpaid for twenty-one days. In January 1854, E assigned all his interest in the agreement to the defendant, who thereupon entered and occupied the land, erected certain buildings thereon, and paid the stipulated yearly sums, and then assigned to one W:—Held, affirming the judgment of the Court of Common Pleas,—that neither E nor the defendant acquired any estate in the premises under the building agreement, nor was any tenancy from year to year created thereby, or by the occupation of the land and payment of the stipulated sums. *Camden v. Batterbury*, 7 Com. B. Rep. N.S. 864.

On the 27th of April, A, who sold flour on commission for the defendant, a miller, verbally contracted to sell 150 sacks at 29s. per sack, no time being named for the delivery. The defendant repudiating his authority, on the ground that his instructions to him limited him to 30s. per sack, disputes arose between the parties; and eventually, on the 8th of June, the defendant agreed to deliver the flour, which he accordingly did, and sued for and recovered the price. The plaintiff then commenced an action against the defendant in the county court to recover the difference between the contract price and the price at which he had been obliged to purchase other flour, on the defendant's default. The judge found that the flour had not been delivered within a reasonable time; but he held that either the plaintiff must be considered to have allowed the defendant an extension of time for the performance of the original contract, or that the delivery of the flour had relation to a new contract taking effect from the time when the defendant signified his intention to execute the order; and that the defendant was entitled to judgment:—Held, that the decision of the county court judge was correct. *Williams v. Wheeler*, 8 Com. B. Rep. N.S. 299.

An agreement was made by a copyholder to sell his estate so soon as it should have become freehold, and to apply to the lord of the manor, and use his best endeavours to enfranchise the same, and procure all necessary parties to join in conveying the inheritance in fee simple to the purchaser, his heirs and assigns. The agreement was made after the passing of the 4 & 5 Vict. c. 35, but before the passing of the 15 & 16 Vict. c. 51. The conveyance in fee from the lord of the manor was obtained after the passing of the latter act, and it contained a reservation to the lord of his manorial rights:—Held, that the agree-

ment to purchase must be considered as made with reference to the Enfranchisement Acts, and that the reservations made under the 15 & 16 Vict. c. 51. were within the terms of the agreement. *Kerr v. Pearson*, 27 Law J. Rep. (N.S.) Chanc. 594; 25 Beav. 394.

Held, also, upon an enfranchisement under the 15 & 16 Vict. c. 51, and under an agreement to purchase a freehold, that it was not incumbent upon the vendor to produce the title of the lord of the manor. *Ibid.*

The plaintiffs contracted with the corporation of L to perform certain works, and the corporation agreed to pay for them in a specified manner, with a proviso that no sum should be considered due, nor should the plaintiffs make any claim on account of any work executed by them, unless the engineer of the corporation should certify the amount thereof, and that the plaintiffs were reasonably entitled thereto. The corporation also had the power of determining the contract if the plaintiffs should not in the opinion and according to the determination of the engineer exercise due diligence; and thereupon the engineer was to fix the amount earned by the plaintiffs. There was a general clause for referring all disputes and differences to the final arbitration of the engineer. The contract was determined by the corporation, and the plaintiffs filed a bill for an account; but it was held (affirming the decision of one of the Vice Chancellors) that, the certificate of the engineer not having been given, and not being shewn to have been fraudulently withheld, the bill must be dismissed, with costs. *Scott v. the Corporation of Liverpool*, 28 Law J. Rep. (N.S.) Chanc. 230; 3 De Gex & J. 334; 27 Law J. Rep. (N.S.) Chanc. 641; 1 Giff. 216.

A railway company granted to two lessees the sole and exclusive licence and privilege for ten years of selling books and other publications, at such of the company's stations as the lessees should think fit, and of using the book-stalls thereat respectively; covenanted that all books, &c., sent by the lessees to be sold, pursuant to such licence, should be conveyed by the company's trains to any such station without any charge, and warranted quiet and peaceable enjoyment:—Held, first, as to stations where book-stalls were in existence at the date of the grant, that the company must be taken to have granted the user of these specified stalls; and if not, still it was incumbent on the company to shew that stalls to which they attempted to remove the lessees would be equally convenient. Secondly, as to the stations, that if the lessees could be entitled in any case to erect stalls thereat, this Court would not make a declaration to that effect, because this Court could not judge whether sales from stalls or by colportage should be adopted, and also because such a declaration would lead to continual applications with reference to the gradual increase in size of the stalls. Thirdly, that the privilege of selling books, &c., authorized a *bond fide* sale to passengers, and such other persons as ordinarily attended at the company's stations on business connected with the railway, and not a general agency; consequently, that the lessees were not entitled to free carriage, except in respect of books so sold. And on bill filed by the lessees an injunction was granted, restraining the company from evicting plaintiffs from book-stalls existing at the date of the agreement, notwithstanding plaintiffs failed in their contention as to the second and third points, and not-

withstanding misconduct on the plaintiffs' part in not strictly and honourably performing their part of the agreement, the Court being of opinion that it would be impossible under the circumstances to estimate the damages to which plaintiffs would be exposed if an injunction was not granted. *Holmes v. the Eastern Counties Rail. Co.*, 3 Kay & J. 675.

This Court will not direct an account as to part of an agreement where it cannot decree specific performance of the whole, nor will the Court make any declaration of right upon a contract except as to so much of it as has been or is about to be broken. *Ibid.*

An agreement was entered into between four persons, who were interested in certain patents and inventions relating to gutta percha, that all patents taken out, or in the course of being taken, or intended to be taken out, or that might at any time thereafter be taken out, by any or either of them or on account of and for the benefit of any or either of them, in relation to the preparation and application of gutta percha or the manufacture of any articles therefrom should be assigned to trustees, and held for their common benefit. Subsequently, one of the parties took out a patent for "improvements in apparatus and machinery for giving shape and configuration to plastic substances," and refused to assign the patent to the trustees, alleging that it was not comprised in the agreement:—Held, that the patent, so far as it related to gutta percha, was subject to the trusts of the agreement, and that it could not be treated as not being so, because it was for machinery, which might be applied to the manufacture of articles of gutta percha, and was not for the manufacture of any such articles. *Bewley v. Hancock*, 6 De Gex, M. & G. 391.

A father, on a treaty for his eldest son's marriage, promised, by letter, to settle a sum of money forthwith, and to recognize his son in common with the rest of his family in the future provisions of his will. The sum of money was settled, and the marriage took place on the faith of the representation in the letter. By his will, the testator made a substantial provision for his son, but much less than equal to those made for his other children:—Held, that the promise was so vague as to the amount that, consistently with it, the testator might have given all his property to a stranger, and that the promise was satisfied by the provision in the will and codicil. *Kay v. Crook*, 3 Sm. & G. 407.

(b) Joint or Several.

F was indebted to A, B and C severally in several sums of money, for which they held several mortgages on several parcels of land, and A, B and C had brought separate actions against F; and in pursuance of an agreement made among them and other persons for securing those debts, an indenture was prepared, to which they were all parties, in which F covenanted to complete the mortgaged buildings according to certain plans, &c., and A, B and C covenanted to advance 1,557*l.* to F during the progress of the works. In further pursuance of the arrangements, the defendants gave to A, B and C a guarantee, which stated that, in consideration of the arrangements entered into by A, B and C, and their covenanting to advance to F for the purpose of enabling him to complete the build-

ings, they guaranteed that F should perform the covenants entered into by him with A, B and C in the indenture; the joint and separate liability of the defendants not to exceed 100*l.*:—Held, that A alone could not sue the defendants on the guarantee; the interest of A, B and C in the guarantee being joint and not several. *Pugh v. Stringfield*, 27 Law J. Rep. (n.s.) C.P. 34; 3 Com. B. Rep. N.S. 2.

(c) Entire Contracts.

The defendant wrote to the plaintiff offering to engage him for the command of a steamer destined for an exploring and trading voyage up the River Niger, paying him at the rate of 50*l.* a month, commencing from the 1st of December 1854, and also 20*l.* per cent. on the proceeds of the trade. The plaintiff replied that he accepted the proposal, "to be paid 50*l.* a month, and 20*l.* per cent. on the net proceeds of the trade." The plaintiff received 50*l.* a month for seven months, and afterwards proceeded on the voyage in command of the vessel; but before the expiration of the ninth month wrongfully abandoned the vessel:—Held, that the contract, whether taken as constituted by the plaintiff's letter, or by the defendant's letter as explained by the plaintiff's, gave a cause of action at the expiration of each month, and that the plaintiff was entitled to recover 50*l.* for the eighth month on an indebitatus count. *Taylor v. Laird*, 25 Law J. Rep. (n.s.) Exch. 329; 1 Hurl. & N. 266.

(d) Particular Words.

(1) "As soon as possible."

The plaintiff contracted to furnish iron hoops to the defendant "as soon as possible":—Held, that "as soon as possible" meant "as soon as the plaintiffs possibly could"; and that their contract was so far performed if they furnished the hoops without unreasonable delay, regard being had to their ability to make them and the orders they had already in hand. *Attwood v. Emery*, 26 Law J. Rep. (n.s.) C.P. 73; 1 Com. B. Rep. N.S. 110.

(2) "In such manner as shall be ultimately agreed upon."

Plaintiff, by contract in writing, sold his interest in a patent to the defendant, and it was by the contract agreed that the defendant should pay to the plaintiff for such interest 2,500*l.*, "in such manner as shall be ultimately agreed upon":—Held, that after a reasonable time had elapsed, and after the defendant had refused to enter into any agreement as to the manner of payment and had refused to pay, the plaintiff might sue him for the amount; and that it was no answer to the action to allege that no agreement had been made as to the manner of payment, or that the patent was not a new invention and worthless. *Hall v. Conder*, 26 Law J. Rep. (n.s.) C.P. 288; 2 Com. B. Rep. N.S. 22.

(3) "Market Value."

By a written contract, the plaintiffs agreed with the defendant to make for him a covering for a tent of very large dimensions, the canvas used to be equal to pattern, and of the market value of 11*d.* per yard, and the making to be charged at 5*d.* per yard; and it was agreed that, if the market value of the canvas should be less than 11*d.* per yard, the amount

(the difference) should be deducted:—Held, that "market value" meant the price in the market to an ordinary consumer, irrespective of the particular contract. *Orchard v. Simpson*, 2 Com. B. Rep. N.S. 299.

(4) "*Or any less number that may arrive.*"

The plaintiff sold to the defendant certain bales of hides. The bought note described them as—

"PB. 100 bales, containing 15,000
HB. 15 " " 2,840"

(or any less number that may arrive) East India hides, &c. shipped per *Ontario*, Calcutta to Hamburg, to be delivered at 11½d. per lb. round, but the wrappers to be charged at 8d. per lb.; the hides to be taken with all faults and defects, but the buyers to have the benefit of any claim that may be recovered on the original policy of assurance:—Held, that the clause "or any less number that may arrive" applied to the number of bales as well as to the number of hides in each bale, and consequently that the defendants were bound to accept ninety-seven bales which arrived, the rest of the one hundred and fifteen bales having been damaged by the sea and sold in Calcutta. *Beck v. Page* (Ex. Ch.), 28 Law J. Rep. (N.S.) C.P. 341; 7 Com. B. Rep. N.S. 861: affirming the judgment below, 28 Law J. Rep. (N.S.) C.P. 164; 5 Com. B. Rep. N.S. 708.

(5) "*Say from 1,800 to 2,000 quarters.*"

A contract was entered into between the defendants and the plaintiffs for the sale to the defendants of a cargo of wheat. In the contract the cargo was described as consisting "of about 2,000 quarters, say from 1,800 to 2,200 quarters, at the price of 50/-, say 50s., per delivered quarter of 492 lb. . . . to be shipped between the 1st of October and the 15th of November. . . . The measure, for the sake of invoice, to be calculated at 100 chetwerts equal to 72 quarters. Sellers guarantee delivery of invoice-weight, sea accidents excepted. Buyers to pay for any excess of weight, unless it be the result of sea damage or heating. Payment, cash in London, in exchange for usual shipping documents, as soon as the ship has got out of the Sea of Azoff, &c." The shipping documents were tendered to the defendants; but the cargo was, at the time it was shipped, and at all times subsequent, less than 1,800 quarters, both according to the said measure of 100 chetwerts equal to 72 quarters, and according to the measure that each quarter was to weigh 492 lb.:—Held, that as it appeared from the contract that the cargo was to be between the limits of 1,800 and 2,200 quarters, and as the cargo of which the shipping documents were tendered was less than 1,800 quarters, the defendants were not liable in an action for refusing to pay for it. *Tamvaco v. Lucas*, 28 Law J. Rep. (N.S.) Q.B. 301; 1 E. & E. 582: affirming the judgment below, 28 Law J. Rep. (N.S.) Q.B. 150; *nom. Tamvaco v. Lucas*, 1 E. & E. 581.

(6) "*Any Wet, Dirty or Unmerchantable Oil.*"

A entered into a contract with B to proceed to the East Coast of Africa, and there procure and ship for B in England palm-oil and other produce, A to receive as a remuneration for his services a commission of 6l. per cent. on the net proceeds of the dry merchantable palm-oil received by B. The agree-

ment further provided that A should not be entitled to any commission on "any wet, dirty or unmerchantable palm-oil" that might be received:—Held, that A was entitled to no commission in respect of palm-oil which was in the understanding of the trade "wet" oil, though such wetness did not render the oil unmerchantable, but was compensated for by an allowance to the purchasers of from 1½ to 2 per cent. on the price. *Warde v. Stuart*, 1 Com. B. Rep. N.S. 88.

(c) *Promise implied by Law.*

The defendant employed the plaintiff to find a purchaser for an estate at a certain price, the plaintiff to have 1l. 10s. per cent. on the purchase-money if a sale were effected. The plaintiff found a purchaser, but the defendant refused, or was unable, to complete the sale:—Held, that the plaintiff could recover on a *quantum meruit* on the common counts for work and labour, &c. *Prickett v. Badger*, 26 Law J. Rep. (N.S.) C.P. 33; 1 Com. B. Rep. N.S. 296.

Upon the finding of the jury of these facts, there is no question for them whether there was an implied contract on the part of the defendant to remunerate the plaintiff for his services, as such a contract is implied by law. *Ibid.*

The appellants (a gas company) had supplied the respondent with gas for several years, and he had hired of them a meter by the year, and payment both for the meter and the gas supplied was demanded and made quarterly. The respondent had also incurred expense in fitting his premises for the reception of gas. A dispute having arisen between them as to the amount of gas consumed and the accuracy of the charge made by the company during the last quarter, the latter gave the respondent notice that if he did not pay the amount claimed within a week the supply of gas would be discontinued. The respondent not having paid the amount within the week, the dispute still pending, the company discontinued the supply:—Held, that the company were at liberty to do so; and that there was no evidence from which a contract could be implied binding them to continue to supply gas for any specific period, or requiring them before discontinuing the supply to give the respondent notice of their intention to do so. *The Hoddesdon Gas and Coke Co. v. Haselwood*, 28 Law J. Rep. (N.S.) C.P. 268; 6 Com. B. Rep. N.S. 239.

(f) *Implied Undertaking for Title.*

A contract for the sale of an agreement for a lease does not imply an undertaking that the proposed lessor has title to grant the lease; and, in the absence of any express stipulation, it is no defence to an action upon such contract that the lessor has no title. *Kintrea v. Preston*, 25 Law J. Rep. (N.S.) Exch. 287; 1 Hurl. & N. 357.

(g) *Conditional Contracts.*

By means of bought and sold notes, the plaintiffs bought of the defendant "the cargo of 400 tons, provided the same be shipped for seller's account, of Nacrensis rice, more or less, of the average quality, as shipped per *Minna*, to proceed from Akyab to a port in the Channel for orders, at 11s. 6d. per cwt. for Nacrensis rice, or at 11s. for Larong, the latter

quality not to exceed 50 tons, or else, at the option of buyers, to reject any excess, to be paid for in cash, on the arrival of the vessel at the port of call, on delivery of the bills of lading, charter-party and policy of insurance; should the vessel be lost before the arrival at the port of call, this contract to be void".—Held, that the contract did not disclose an absolute contract of sale or warranty to ship a cargo of rice of the quality mentioned; and also, that the vessel having shipped a cargo of 285 tons of Larong rice and 150 tons of Latoorie rice, the plaintiffs were not entitled to the delivery, either of the entire cargo, or of that portion of it consisting of Larong rice. *Vernade v. Weber*, 25 Law J. Rep. (N.S.) Exch. 326; 1 Hurl. & N. 311.

In an action upon contract, the averments in the declaration, and the breach, being sufficient, according to the contract as stated, any defence arising out of a condition not stated in the declaration must, if not implied in law from the contract as stated, but capable of express proof, be specially pleaded; though, if implied, it may be raised on a denial of the averment of performance, or by demurrer, for want of such averment. *Coulson v. Attwood*, 26 Law J. Rep. (N.S.) Exch. 244.

In an action on a contract by the defendants to deliver goods at the wharf of third parties, in equal portions, in four months, to be made to the satisfaction of the inspector of such parties, and if not so made, to be removed by the defendants, and others substituted in the time named, to wit, four months; averments of performance on the plaintiffs' part, and breach that the goods delivered were not made to the satisfaction of the inspector, whereby they were rejected, and the plaintiffs lost the benefit of a contract with the third parties mentioned: pleas, first, denying the contract as stated; secondly, denying the breach; thirdly, alleging that the contract was subject to a condition that the disapproval of each portion should be notified in a reasonable time after its delivery. The contract, as stated, being proved, in fact, and it not appearing that there was any such condition in fact,—Held, that there was no such condition implied in law from the contract as stated or proved; or that the disapproval should be notified within the time named, or the four months; and, therefore, the jury not having found that the disapproval was in an unreasonable time, the Court discharged a rule to enter the verdict for the defendants. And, *quære*, whether the point was raised by any of the pleas; but, *semble*, that if it were sustainable, it appeared on the record, and might have been raised by demurrer, or by motion in arrest of judgment, on the ground of the absence of proper averments of performance of condition precedent to the plaintiffs' right of action. *Ibid*.

A contract, by way of guarantee, to pay over to the creditor monies received as the proceeds of the property of the debtor, is conditional, not only upon the receipt of money, the proceeds of such property, but on the receipt of such money properly payable to him, and does not apply to money received only subject to a prior claim of a third party, and which, therefore, was not payable to a creditor. *Jupp v. Richardson*, 26 Law J. Rep. (N.S.) Exch. 261.

Where the plaintiff had supplied timber for the erection of a house by the tenant of land on the security of an undertaking, by the defendants, to pay

over to him the amount out of the proceeds of the house when sold, and a lease was obtained by the tenant and mortgaged, but the lease was granted and deposited with the defendants only on condition that it should not be delivered until a claim of the lessor was satisfied (which, with the expenses, exhausted the mortgage-money), and the defendants received the mortgage-money on that condition, and applied it accordingly; it was held, first, that the money was to be deemed the "proceeds" of the house; but, secondly, that it was not money received within the meaning of the agreement, and that the plaintiff was not entitled to recover it. *Ibid*.

(h) Conditions Precedent.

The defendant agreed to purchase timber at a valuation to be made by the plaintiff and A on behalf of the defendant, and to pay the amount of the valuation by two bills, the first to be drawn for 150*l*., and the second for the balance. The plaintiff and A agreed upon the measurement of the timber in superficial feet, and the price per foot, but there was a difference of 58*l*. between the total amounts of their respective valuations. The defendant having refused to give the first bill for 150*l*. was sued by the plaintiff, and paid the amount:—Held (*dubitante Jervis, C.J.*), in an action by the plaintiff against the defendant for refusing to give a bill for the balance due according to the plaintiff's valuation, that there was evidence to warrant the jury in finding that a valuation had been made according to the agreement. *Gordon v. Whitehouse*, 25 Law J. Rep. (N.S.) C.P. 300; 18 Com. B. Rep. 747.

The owner of the ship *Royal Oak*, chartered by the defendant, gave to the plaintiffs, to whom he was indebted, the following order on the defendant: "Please to pay to H & F (the plaintiffs) on the *Royal Oak* being loaded and sailed, out of the advance, 73*l*." This order was agreed to by the defendant. The ship being loaded left the harbour where she lay, with her captain and crew on board, but without her necessary papers, and the captain returned on shore to procure them, the ship in the mean time standing off and on under easy sail; but it being discovered that she had in leaving the harbour struck on the bar, she was brought back, and her cargo was unloaded:—Held, first, that the loading and sailing of the ship were conditions precedent to the payment of the money. Secondly, that, under the circumstances, the ship had never sailed. *Hudson v. Bilton*, 26 Law J. Rep. (N.S.) Q.B. 26; 6 E. & B. 565.

The defendant agreed to pay the plaintiff certain instalments one month after the plaintiff should have delivered up to the defendants certain bills of exchange mentioned in a schedule to the agreement, the plaintiff also agreeing to procure at his own expense from the holders such of the said bills as were not in his own possession. In the schedule, besides other bills, two were described as bearing date the 15th and 18th of February 1854, and drawn by one M in favour of the plaintiff for 100*l*. and 200*l*. respectively. The two bills, being foreign bills, were drawn in sets of three, and the plaintiff had delivered up to the defendants one part of one bill and two of the other, and gave evidence that three of the other parts had miscarried on their way from London to Panama, and from Panama to

to London, and could not be found. By the agreement the plaintiff agreed to indemnify the defendants from all claims by reason of non-payment of any of the bills:—Held, in an action to recover the last instalment, that the plaintiff was not entitled to the same under the agreement until he had delivered up all the parts of the bills. *Kearney v. the West Granada, &c. Mining Co.*, 26 Law J. Rep. (N.S.) Exch. 15; 1 Hurl. & N. 412.

The plaintiffs contracted to sell to the defendant 200 tons of brimstone "to be delivered ex the first parcel of brimstone we have in the Tyne on our account." On the 24th of June a ship arrived in the Tyne with a large cargo of brimstone. The plaintiffs, having obtained leave from the owner to dispose of fifty tons on their own account, tendered the fifty tons to the defendant, who wished to cancel the contract, and refused to receive them. Another vessel having subsequently arrived in the Tyne with brimstone, the plaintiffs having in like manner obtained permission of the owner to dispose of it on their own account, on the 11th of July tendered 150 tons to the defendant in fulfilment of the contract. This portion also the defendant declined to accept. The defendant never objected to the brimstone being offered to him in two deliveries:—Held, that the plaintiffs had sufficiently tendered the brimstone pursuant to their contract to entitle them to recover in an action against the defendant for refusing to accept it. *Leidemann v. Gray* (Ex. Ch.), 26 Law J. Rep. (N.S.) Exch. 162.

The plaintiffs entered into a contract with the defendants to buy of them fifty cases of East India tallow at a certain price, the quality to be equal to sample, and the price to be paid fourteen days after the landing thereof, to be delivered by the defendants to the plaintiffs on the safe arrival of the ship, the *Countess of Elgin*, then on her way from Calcutta to London. In an action for the non-delivery of the tallow,—Held, first, that there was no sale of specific chattels which passed the property in the tallow from the defendants to the plaintiffs at the time of the contract. Secondly, that the arrival of the tallow was not a condition precedent, as the arrival of the ship was, to the sale of the tallow, and was not made so by the stipulation as to the time of payment; and therefore that the action was not maintainable. *Hale v. Rawson*, 27 Law J. Rep. (N.S.) C.P. 189; 4 Com. B. Rep. N.S. 85.

Declaration upon an agreement, whereby the plaintiffs agreed that, upon payment to them by the defendants of certain sums on certain specified days, they would grant to the defendants a lease of certain premises; and the defendants agreed to accept such lease. Averment, that all things had happened to entitle the plaintiffs to be paid; breach, that the defendants had not paid:—Held, on demurrer, a good declaration; that the granting the lease by the plaintiffs was not a condition precedent to the payment of the money by the defendants. *Baggallay v. Pettit*, 28 Law J. Rep. (N.S.) C.P. 169; 5 Com. B. Rep. N.S. 637.

By indenture of the 15th of May, the plaintiff covenanted with the defendant to procure a ship to stow on board a certain telegraphic cable then lying at M Wharf, to provision and rig the vessel, to provide and pay the crew and workmen, &c., to lay

down the cable, and that he, the plaintiff, would perform the several acts aforesaid, and have the ship ready equipped for sea at the Nore on or before the 15th of July, and would proceed forthwith to T and lay down the cable; and if the plaintiff made default in having the ship ready with the cable on board at the Nore by the 15th of July, the defendant might deduct and retain as liquidated damages 20*l.* a week. The defendant covenanted, subject to his right to deduct and retain as liquidated damages, to pay the plaintiff 5,000*l.*, by instalments, that is to say, 1,000*l.* part thereof on or before the expiration of seven days after the arrival of the ship at M Wharf; 2,000*l.* further part on or before twenty-one days after the arrival of the ship at the wharf; the remainder when the ship should put to sea from the Nore. And it was by the same indenture agreed and declared that for the true performance of the covenants by the plaintiff thereinbefore contained, and for securing the penalties which he might incur under these presents, the plaintiff and two responsible sureties should, within ten days of the execution of these presents, give and execute to the defendant, his executors and administrators, a bond in the penal sum of 5,000*l.*; and for the due performance of the covenants on the part of the defendant thereinbefore contained, the defendant and two responsible sureties should, within ten days from the execution of these presents, give and execute to the plaintiff, his executors and administrators, a bond in the penal sum of 5,000*l.*—Held, that the giving of the bond with sureties by the plaintiff to the defendant was a condition precedent to his right to recover against the defendant for not performing his part of the contract with relation to stowing the cable and paying the money. *Roberts v. Brett* (Ex. Ch.), 28 Law J. Rep. (N.S.) C.P. 823; 6 Com. B. Rep. N.S. 611; affirming the judgment below, 25 Law J. Rep. (N.S.) C.P. 280; 18 Com. B. Rep. 561.

In an action on articles of agreement, under which the plaintiffs, a banking company, were to make advances to a firm, to be guaranteed by the defendants at a limited rate of interest, and "in consideration" of the guarantee the plaintiffs were to release a certain debt due from the firm, the performance of the agreement extending over several years, a plea that it was not executed on behalf of the plaintiffs, "nor otherwise agreed to" by them (it appearing that the defendants brought it to the plaintiffs, executed it, and left it with the plaintiffs, who had acted upon it by making the advances at the specified rate of interest, but had never executed it),—Held, that the plea was not supported, and that the plaintiffs were entitled to recover. *The Liverpool Borough Banking Co. v. Eccles*, 28 Law J. Rep. (N.S.) Exch. 128; 4 Hurl. & N. 139.

By an agreement in writing the plaintiff agreed to sell the defendants a share in a mining sett for 250*l.*, and the defendants agreed to purchase at that price; and the parties further agreed to form a company, and as soon as the company was registered the defendants agreed to pay the 200*l.* as thereinbefore stated:—Held, that the readiness and willingness of the plaintiff to convey and the payment of the purchase-money were concurrent acts, and that, therefore, to an action for non-payment of the 250*l.* (the declaration averring general performance of conditions precedent), a plea that the plaintiff was

not ready and willing to convey was a good answer to the action. *Marsden v. Moore*, 28 Law J. Rep. (N.S.) Exch. 288; 4 Hurl. & N. 500.

Held, also, that a plea that the plaintiff had not at any time any title to the share in the mining sett, nor any right or title to convey the same, was good, as the plea must be construed as involving a denial, not only of a title in the plaintiff himself, but also of the power to procure a title by any grantor. *Ibid.*

The declaration stated that, in consideration that the plaintiff guaranteed to the defendant that two bills of exchange of 100*l.* and 62*l.*, both drawn by Messrs. A & Co. upon Messrs. O & Co., and both due on the 23rd of January 1859, would be paid to Messrs. O & Co. when due, the defendant in return guaranteed to the plaintiff the repayment of the sum of 300*l.* towards the payment of certain whiskeys which Mr. F had ordered and was about to receive from the plaintiff. The declaration alleged general performance by the plaintiff of all things to entitle him to the performance by the defendant of his part of the agreement; that the plaintiff delivered the whiskeys, and that the said Mr. F had not paid for the same, nor the said 300*l.*, or any part thereof. Breach, non-payment by the defendant of the 300*l.* Plea, that although the 300*l.* was not payable until after the two bills upon Messrs. O & Co. became due and payable, as the plaintiff and the defendant at the time of the said agreement knew, yet the said bills were not paid by the said Messrs. O & Co., of which the plaintiff had due notice, but never paid the said bills:—Held, after verdict for the defendant on such plea, that the plaintiff was entitled to judgment *non obstante veredicto*, as the performance of the plaintiff's promise was not a condition precedent to his right to sue the defendant for the non-payment of the 300*l.*, and the plea, therefore, was no answer to the action. *Christie v. Borelly*, 29 Law J. Rep. (N.S.) C.P. 153; 7 Com. B. Rep. N.S. 561.

A declaration stated that the defendant, as executor of one J, was accustomed and liable to pay over under her will to one A certain rents and monies received by him under the will to the use of A, and that, in consideration that the plaintiff would advance monies to A, the defendant promised to repay her any such sums as she might so advance, from and out of the first money which he (the defendant) should receive on account of A, to wit, out of the first monies to be by him thereafter received on account of the aforesaid rents and monies, as and when he should receive the same: Averment, the plaintiff afterwards advanced to A monies, in the whole amounting to 53*l.* 8*s.*, and A thereupon gave her an authority to receive the amount from the defendant; that the defendant afterwards received 20*l.* on account of the said rents and monies, and paid the same to the plaintiff, but afterwards, and before he received any more, purchased A's interest in the said rents and monies, and took an assignment thereof, and thereby disabled himself from performing his contract with the plaintiff, and had ever since received the rents and monies in his own right. Plea, that, at the time of the purchase of A's interest, the defendant had no notice or knowledge that the plaintiff had advanced A more than the 20*l.* so paid by him to the plaintiff, or that A had given the plaintiff an authority to receive any further sum:—Held, that the plea was a sufficient answer to the declaration; for that the defen-

dant's promise did not attach until the authority was given, and A, by parting with his interest, deprived himself of the power to give such authority. *Horler v. Carpenter*, 2 Com. B. Rep. N.S. 56.

The plaintiffs by deed contracted for the supply of gas to the public lanterns of the parish of Chelsea, covenanting, amongst other things, that they would, to the satisfaction of the defendants (the vestry), or their surveyor, light each lantern at sunset, and continue the same so lighted until sunrise,—the gas supplied to be well and sufficiently purified, so that the said gas should give a clear and white and brilliant light, and the light or flame to be such a light or flame as was known by the name of the large bat's-wing burner, each burner consuming at the rate of five cubic feet of gas per hour at the least; and the defendants covenanted, that, if the plaintiffs should well and sufficiently light, &c., and perform, fulfil, and keep all and singular the covenants in the deed contained on their part to be performed, &c., they, the defendants, would pay, out of the funds in their hands, or which they could or might raise or obtain by virtue of the powers and authorities vested in them, unto the secretary of the plaintiffs, a certain sum per annum for each and every lantern so lighted by them. To an action to recover the stipulated annual payments for gas supplied under this deed, the defendants pleaded,—that the plaintiffs did not during the said period light the said public lanterns, or cause the same to be and continue lighted, pursuant to the said deed, to the satisfaction of the defendants or their surveyor,—and that the plaintiffs did not during the said period so light the said public lanterns during each and every night at sunset, and so continue the same lighted till sunrise that the light or flame therein was such a light or flame as is known by the name of the large bat's-wing burner, and consumed at the rate of five cubic feet of gas per hour at the least, within the true meaning of the said deed:—Held, on demurrer, that the matters alleged in the pleas did not entitle the defendants to refuse to pay for the gas supplied under the contract,—the performance of all the several stipulations by the plaintiffs not being a condition precedent to their right to receive the money. *The London Gaslight Co. v. the Vestry of Chelsea*, 8 Com. B. Rep. N.S. 215.

Declaration stated that, by contract between plaintiffs and defendant, defendant agreed to procure, as soon as possible and within four months from the making of the contract, sufficient land for a communication between a certain railway and certain gas works, and stowing a certain quantity of coals, "and to grant a lease of the same land to plaintiffs for a term of five years from the date of the said contract," determinable at the end of three years "of the said term" by notice from plaintiffs, which notice never was given; that plaintiffs should pay to defendant for the land half-yearly an annual rent equivalent to 4*l.* per cent. on the money paid by defendant for the purchase, the first payment to be made six months after possession of the land should be given to plaintiffs, from which time only the rent was to run; and that, "upon the termination of the said term of five years, by effluxion of time or by notice," defendant should pay to plaintiffs all the monies expended by them for laying down sittings for the communication, and building sheds and erections on the land for the purposes mentioned in the contract (less 5*l.* per cent,

for deterioration). Allegation, that in part performance of the contract, defendant procured the land and put the plaintiffs into possession; and that plaintiffs occupied and enjoyed the land from that time until the termination of the said time of five years as hereinafter mentioned, and during the term they so occupied, &c. did pursuant to the contract expend money for laying down sidings, &c.; that the said term of five years had expired and terminated, to wit, by effluxion of time; that all things necessary had happened to entitle plaintiffs to receive from defendant, and render defendant liable to pay, the money expended (less, &c.); but defendant had not paid. Plea, that no lease of the said land was ever granted to the plaintiffs by the defendant, pursuant to the said agreement, nor did the said term of five years in the said agreement mentioned and contemplated ever come into, or have any existence. On demurrer.—Held, a bad plea; for that the granting of the lease by defendant was not a condition precedent to his liability to repay the money; and the meaning of the word "term" was not in the agreement restricted to a term created by lease, but included a period of five years, during which the plaintiffs should occupy, after being put into possession under the contract. *Bowes v. Croll*, 6 E. & B. 255.

(f) Farming Agreements.

By agreement in writing the defendant, as incoming tenant, agreed with the plaintiff, as outgoing tenant, to purchase straw upon the farm at a valuation to be made by two persons, or their umpire. Valuers were appointed by the parties, who did not agree upon the valuation or appoint an umpire, and in the meanwhile the defendant consumed the straw:—Held, that the plaintiff was entitled to recover for the straw as upon a *quantum meruit*, the arbitration agreed to by the parties having become impracticable. *Clarke v. Westrope*, 25 Law J. Rep. (N.S.) C.P. 287; 18 Com. B. Rep. 765.

A tenant of a farm agreed with his landlord "that no hay or straw should be sold off the land without the consent of the landlord, except the value of the straw so sold off be returned in manure on the said land":—Held, by *Pollock, C.B.* and *Parke, B.*, that the meaning of the agreement was, that the value in manure of the hay or straw sold off should be returned on the land; by *Alderson, B.* and *Platt, B.*, that, by the agreement, the tenant was bound to return manure to the value of the hay or straw so sold off. *Lovendes v. Fountaine*, 25 Law J. Rep. (N.S.) Exch. 49; 11 Exch. Rep. 486.

(k) When for the Court.

Although, in general, the question whether a contract has been executed only as an escrow is for the jury, because it generally depends on facts proved by oral evidence (as in *Pym v. Campbell*), yet where the evidence is in writing, as where the contract, signed by one party (even after signature by the agent of the other), is sent inclosed in, or is accompanied by, a letter explaining that it is only signed on condition of something being done—as, for example, a counterpart being executed by the other party—the construction of such evidence is for the Judge. And held, (*dubitante Bramwell, B.*) that such evidence was sufficient to shew that the contract was signed

and sent only as an escrow, to take effect after the condition was performed. *Furness v. Meek*, 27 Law J. Rep. (N.S.) Exch. 35.

(l) Time of the Essence of the Contract.

The defendants bought of the plaintiffs 667 tons of Swedish iron, the iron to be shipped from Sweden in the months of June, July, August and September, in about equal portions, each month, at 15l. 10s. per ton, delivered in London. The plaintiffs shipped only 21 tons of iron in June, which arrived in London after the expiration of the month:—Held, that the defendants were not bound to accept the smaller quantity, or any subsequent quantity tendered, and that therefore a plea shewing the non-shipment of any larger quantity within the specified time was an answer to an action for not accepting the iron or any part of it. *Hoare v. Renzie*, 29 Law J. Rep. (N.S.) Exch. 73; 5 Hurl. & N. 19.

(D) RESCISSION AND ABANDONMENT OF CONTRACTS.

A B, a factor in London, on behalf of the plaintiffs, who were foreign merchants, sold to C D a cargo of corn coming from Salonica, "of fair average quality when shipped, free on board, and including freight and insurance to a safe port in the United Kingdom," "payment at, &c. upon handing shipping documents." At the time of the sale (though unknown to the principals and the factor) the corn had been sold at a foreign port into which the vessel containing it had been driven by stress of weather, and at which, after examination, the corn was found utterly unfit to be sent forward to the United Kingdom. The vendee repudiated the contract; it was the custom of factors in this trade to sell on a *del credere* commission, and not to disclose the purchaser's name; it was not disclosed here:—Held, that as this was the sale of something which did not exist at the time of sale the foreign merchants could not recover against the factor, even on the *del credere* guarantee. *Couturier v. Hastie*, (House of Lords), 25 Law J. Rep. (N.S.) Exch. 253; 5 H.L. Cas. 673.

Although a plea of waiver or exoneration of a contract, if pleaded before breach, may be good, yet a plea of leave and licence before cause of action, in an action on a contract to complete a purchase, for the amount of the loss and expenses on a re-sale, was held bad, because (*dissentiente Bramwell, B.*) not amounting in substance to a plea of waiver or exoneration, and because (*per Channell, B.*) not alleging the leave to have been before breach. *Dobson v. Espie*, 26 Law J. Rep. (N.S.) Exch. 240; 2 Hurl. & N. 79.

The plaintiff and the defendant entered into an agreement for the joint working of letters patent for an invention. The agreement was for experiments being made in the first instance, at the cost of the plaintiff, but under the management of the defendant; after which, if successful to the satisfaction of the plaintiff, expressed in writing, the defendant was to be employed by him, at a salary and per-centage on the profits of the concern. The agreement then provided further stipulations as to the working of the concern. The experiments were made, and proved that the invention could be worked on the stipulated terms. The defendant neglected then to work the concern according to his part of the agreement; and the plaintiff worked it at a loss. The defendant ab-

seconded. The plaintiff filed a bill to set aside the agreement:—Held, on demurrer, that the plaintiff's remedy was at law, and the demurrer must be allowed. *Osborne v. Jullion*, 26 Law J. Rep. (n.s.) Chanc. 6; 3 Drew. 596.

The defendant, a retail dealer at Peterborough, ordered of the plaintiffs, wholesale dealers at Bristol, specific articles of earthenware, with a caution that the order was not to be exceeded. The plaintiffs sent the articles ordered by railway, packed in a crate with other articles of a distinct character from those ordered, and forwarded an invoice of the whole to the defendant, in which the price of each item was given, and the defendant charged as debtor to the plaintiffs for the lumped total. On the receipt of the invoice, the defendant refused to receive the crate, and it remained at the railway station. The plaintiffs having brought an action for goods sold to recover the price of the articles ordered,—Held, by *Lord Campbell, C.J.* and *Wightman, J.*, that the defendant had a right to reject the whole on account of the articles sent in excess; by *Coleridge, J.* and *Brie, J.*, that he had not. *Levy v. Green*, 27 Law J. Rep. (n.s.) Q.B. 110; 8 E. & B. 575.

A plea, in an action on a contract to do several things, that the contract was rescinded before the breach, even although the breach laid in the declaration is general, is to be construed as meaning that the rescission was before any breach; and, therefore, if this is not proved, the plea fails *in toto*, and there is no necessity for a new assignment. *Burgess v. De Lane*, 27 Law J. Rep. (n.s.) Exch. 154.

By a building agreement between A and B it was stipulated that A should complete for a specified price certain works on certain houses of B, the whole to be completed on a specified day, and to be done to the satisfaction of a surveyor named, upon whose approval payment was to be made. A failed to complete the work. He sued B on the agreement for the agreed price, and on a common count for a reasonable price according to measure and value. There was evidence, on the trial, that B had resumed possession of the houses, and was so far enjoying the fruits of A's labour:—Held, upon a rule to set aside a nonsuit and enter a verdict for the plaintiff, that there was no evidence to go to the jury in support of the plaintiff's claim; for that he could not recover on the special count, not having fulfilled it; and that the mere fact of B's taking possession of his own land on which buildings had been erected, or where repairs had been done or alterations made to a building thereon, did not afford an inference that he had dispensed with the conditions of the special agreement under which the works were done, or of a contract to pay for the work actually done according to measure and value. *Munro v. Butt*, 8 E. & B. 738.

The defendant on the 19th of August 1853, contracted to purchase of the plaintiff a parcel of Chassum waste-silk, "to arrive in all probability in January or February next, but further particulars will be furnished respecting the name of the ship or ships in the next mail or on the receipt of the next after that." The second mail after the 19th of August arrived in London on the 19th of September. No name of any ship was then communicated to the defendant; and, on the 18th of January 1854, the defendant wrote,—“We give you one week from this day's date to give to us the name of the ship on

which the 20,000 lb. of Chassum is on board, and' in default of your compliance with our request, we shall consider the same as a breach of the contract of the 19th of August last.” To this the plaintiff replied on the same day,—“I am happy to be able to remove the uneasiness you feel respecting the arrival of the 20,000 lb. of Chassum to your contract of 19. 8. 53, by informing you that it is already arrived, and that you will receive invoice in due course.” On the 19th, the defendant wrote,—“Your letter of yesterday is not an answer to ours of the same date, which required the name of the ship on which the Chassum had been shipped; and this is the information which we now again call for; but, as you say the Chassum has arrived, there is no occasion for the delay of a week in giving the information, which we now ask for in the course of tomorrow; in default of which, we shall act as indicated in our letter of yesterday.” The names of two ships were given on the 24th and 25th of January:—Held, that the defendant's offer to renew the contract not having been accepted by the plaintiff, the defendant was at liberty to retract it; and that his letter of the 19th of January was a sufficient retraction. *Gilkes v. Leonino*, 4 Com. B. Rep. 485.

CONVERSION.

[See TROVER.]

- (A) WHAT AMOUNTS TO A CONVERSION.
- (B) EXTENT OF ITS OPERATION.

- (A) WHAT AMOUNTS TO A CONVERSION.

Under an agreement to lease real estate, the tenant was to have the option of purchasing the premises at the expiration of the term, or sooner if the lessor should wish to dispose thereof. The lessor died, and at the expiration of the term the lessee claimed to be entitled to a conveyance, which was executed:—Held, that the realty was converted, and the purchase-money belonged to the personal representatives of the lessor. *Collingwood v. Row*, 26 Law J. Rep. (n.s.) Chanc. 649.

Where a settlor conveys real estate upon trust for sale, and directs the proceeds to be applied to certain purposes, some of which fail, whether the sale is directed to be made in the lifetime of the settlor or after his decease, the property will, to the extent to which the purposes fail, result to the settlor as personal estate. *Clarke v. Franklin*, 27 Law J. Rep. (n.s.) Chanc. 567; 4 Kay & J. 257.

Secus—if there is a failure of the whole purposes for which the sale is directed. *Ibid.*

Subject to the debts, &c. real estates were devised to A. They were all sold in an administration suit, to which the devisee was a party. After payment of the debts, &c. there remained a sum in court at the death of the devisee:—Held, that it was of the character of real estate, and passed to her heir. *Cooke v. Dealey*, 22 Beav. 196.

Where a testator directs a sale of his real estate for purposes which wholly fail, the heir takes it as realty; but if the failure be only partial, he takes it as personality. *Bagster v. Fackerell*, 26 Beav. 469.

under the first son's will,—Held, (assuming the custom to be valid, and notwithstanding the father had given benefits to his sons by his will) that the names of the sons were inserted in the grant as an advancement to each son successively. *Jane v. Cooke*, 27 Law J. Rep. (N.S.) Chanc. 202; 24 Beav. 513.

(C) MERGER IN FREEHOLD ESTATE.

A seised in fee of twelve 24th parts of a manor held by several as tenants in common, purchased lands holden of the manor, which were thereupon surrendered to a trustee for him, and afterwards to himself in fee, and he was admitted tenant of the entirety by the act of all the lords:—Held, that twelve 24th parts of his copyhold interest in the lands merged in his freehold estate therein as lord of the manor. *Catley v. Arnold*, 4 Kay & J. 595.

The law as to the divisibility of manors and the consequences of a division considered. *Ibid*.

(D) ALLOTMENT OF WASTE LANDS.

By agreement between the lord and the copyholders, waste lands of the manor were inclosed and allotted:—Held, that the allotments taken by the copyholders were of freehold tenure. *Paine v. Ryder*, 24 Beav. 151.

(E) FORFEITURE.

A bill by a copyholder to set aside a wrongful seizure by the lord is maintainable, notwithstanding that there is a remedy at law by action of trespass. *Andrew v. Hulse*, 27 Law J. Rep. (N.S.) Chanc. 655; 4 Kay & J. 392.

(F) FEES, FINES AND STAMP.

R died seised of four separate and distinct copyhold tenements of the manor of C (two of the tenements having been part of an ancient copyhold tenement held by D, and the other two tenements part of another ancient copyhold tenement held by E), having devised the said four tenements to the plaintiffs in fee as joint-tenants. The plaintiffs claimed of the steward of the manor to be admitted to all the tenements, first by a single admission in the usual form, and afterwards by two separate admissions; one in respect of the two tenements formerly held by D, and another in respect of the two tenements formerly held by E, but still insisting on their right to a single admission in respect of all the tenements. The steward refused to accept either of these admissions, and required that there should be four separate admissions and the payment of four separate sets of fees on each. He also claimed the payment of a fee in respect of the abolition of a surrender to the use of the will. The plaintiffs thereupon, to avoid a forfeiture, gave four separate admissions, and were admitted. Four full sets of fees, with four separate stamps, and four sums of 6s. 8d. in respect of the admission being of two joint tenants, were claimed by the steward. These fees were paid under a written protest against the right to more than two admissions and against the compensation fee for a surrender to the use of the will, and the fee in respect of the admission of joint-tenants. There was no custom proved in the manor that there should be only one admission on the claim of one person to be admitted to several separate tenements, nor any custom establishing the amount of the steward's fees

upon an admission to several tenements, or his right to claim a fee in respect of the admission of a joint-tenant:—Held, that the lord was entitled to require an admittance in respect of each of the tenements, and that four sets of fees and four stamps were payable. But that there was no ground for the claim by the steward of a separate fee in respect of the admission of each joint-tenant. Held, also, that the steward was not entitled to be paid a full set of fees in respect of each tenement, but upon a *quantum meruit* for his additional labour, and that the compensation to which he was entitled for the abolition of a surrender to the use of the will was also to be ascertained upon a *quantum meruit*. That the payments made to the steward could not be considered as voluntary, and the plaintiffs, therefore, were entitled to recover back the fee in respect of the admission of a joint-tenant, and what the Master should find the steward was not entitled to upon a *quantum meruit*. *Traherne v. Gardner*, 25 Law J. Rep. (N.S.) Q.B. 201; 5 E. & B. 913.

Copyholds being devised to one for life, remainder to others in fee, and they surrendering to a third person, who died without admittance,—Held, that his heir was entitled to admittance on payment only of a single fine. *Garland v. Alton*, 27 Law J. Rep. (N.S.) Exch. 438; 3 Hurl. & N. 390.

By an inclosure act, passed in 1766 the Commissioners were to allot a cow-pasture, to be enjoyed by the owners of commonable houses, and to be used as a cow-pasture only from Mayday to Martinmas, and from Martinmas to Ladyday, "and it was provided the same should for ever thereafter remain, go along with, and be of the same tenure with such houses, &c., but should not be subject or liable to any fee or fine whatsoever to the lord." The Commissioners made their award, and set out the cow-pasture. By an act, passed in 1772, for the purpose of dividing the cow-pasture, it was enacted that the Commissioners, after making certain other allotments, should set out the residue of the cow-pasture unto and amongst all and every the proprietors of commonable houses, &c.; "and that all the allotments which should be made of the said cow-pasture, should for ever thereafter remain and be of the same tenure with such houses, &c." The cow-pasture was divided and allotted, under the act of 1772, to the owners of commonable houses:—Held, that the provision in the act of 1766, that such parts of the cow-pasture as were copyhold should be held without payment of fines to the lord, exempted the owners of the copyhold tenements in the cow-pasture, when divided and held in severalty, from payment of fines to the lord. *Pochin v. Duncombe*, 1 Hurl. & N. 842.

(G) ENFRANCHISEMENT: COSTS ON PETITION FOR INVESTMENT.

A fund payable for the enfranchisement of copyholds having been paid, pursuant to the provisions of the Copyhold Act, 1852, into the Bank, in the name of the Accountant General, to an account "Ex parte the Copyhold Commissioners," the petition of the lord of the manor for the investment of the fund, pursuant to the act, was served upon the Commissioners, who appeared thereupon, but only to ask for their costs:—Held, that they were entitled to the costs of their appearance. *Ex parte the President and Fellows of Queen's College, Cam-*

bridge, in re the Copyhold Commissioners and the Copyhold Act, 1852, 27 Law J. Rep. (N.S.) Chanc. 178.

COPYRIGHT.

[The 5 & 6 Vict. c. 110, to consolidate and amend the Laws relating to the Copyright of Designs for Ornamenting Articles of Manufacture, amended by 21 & 22 Vict. c. 70.]

- (A) PROPRIETORSHIP OF.
- (B) INTERNATIONAL COPYRIGHT.
- (C) DRAMATIC COPYRIGHT.
- (D) COPYRIGHT OF DESIGNS.
- (E) PIRACY AND INFRINGEMENT OF.

(A) PROPRIETORSHIP OF.

The power of the Court, under the 14th section of the Copyright Amendment Act, 5 & 6 Vict. c. 45, to expunge an entry of proprietorship in the registry at Stationers' Hall, will be exercised only where there is distinct evidence that it is false, and the power to vary such entry only when the affidavits of the applicant disclose distinctly the means of making a correct entry. The Court of Common Pleas repudiates the possession of the power exercised by the Court of Queen's Bench in *Ex parte Davidson*, to direct that a rule nisi obtained under the above-named section shall be enlarged till the trial of an issue to determine the question of copyright. *Quære*—who is a "party aggrieved" entitled to apply under that section. *Ex parte Davidson*, 25 Law J. Rep. (N.S.) C.P. 237; 18 Com. B. Rep. 297.

One who adapts words of his own to an old air, adding thereto a prelude and accompaniment also his own, acquires a copyright in the combination, and may, in declaring for an infringement against one who has pirated the whole, properly describe himself as the proprietor of the entire composition. *Lover v. Davidson*, 1 Com. B. Rep. N.S. 182.

An agreement between an author and publisher that the latter should publish at his own expense and risk a work of the former, and after deducting from the produce of the sale the expenses, including a commission of 10l. per cent. on the gross amount of the sale, the profits remaining of every edition that should be published of the work should be divided equally between the author and the publisher, —Held, that this was not an irrevocable licence to publish, but a joint adventure, which the author might put an end to at any time after the publication of the first or any subsequent edition. *Reade v. Bentley*, 27 Law J. Rep. (N.S.) Chanc. 254; 4 Kay & J. 656.

An edition consists of so many copies as are issued to the public at a time; and where a work is stereotyped, every fresh issue is a new edition. *Ibid*.

An agreement between an author and a publisher that the latter should publish a certain work at his own expense and risk, and after deducting from the produce of the sale thereof the charges for printing, paper, advertisements, embellishments and other incidental expenses, including the allowance of 10l. per cent. on the gross amount of the sale for commission, the profits remaining of any edition that

should be printed, should be divided equally between author and publisher. The books sold to be accounted for at the trade sale price, unless it should be thought advisable to dispose of any copies or of the remainder at a lower price, which was left to the publisher's discretion:—Held, that this did not amount to an agreement for the sale of the copyright; that it was to be inferred from the agreement that the publisher was to fix the selling price of the book, and that he was to be at liberty to publish more than one edition. *Reade v. Bentley*, 3 Kay & J. 271.

Whether the agreement created a partnership *pro hac vice* between the author and publisher—*quære*. *Ibid*.

If any person by pains and labour collects and reduces into the form of a systematic course of instruction those questions which he may find ordinary persons asking in reference to the common phenomena of life, with answers to those questions, and explanations to those phenomena, whether such explanations and answers are furnished by his own recollection of his former general reading, or out of works consulted by him for the express purpose, the reduction of questions so collected, with such answers, under certain heads and in a scientific form, is sufficient to constitute an original work of which the copyright will be protected. *Jarrold v. Houlston*, 3 Kay & J. 708.

But another person may originate another work in the same general form, provided he does so from his own resources and makes the work he so originates a work of his own by his own labour and industry bestowed upon it. *Ibid*.

In determining whether an injunction should be ordered, the question, when the matter of the plaintiff's work is not original, is, how far an unfair or undue use has been made of the work. *Ibid*.

Instances of unfair or undue use, and the contrary, in works of this description. *Ibid*.

If, instead of searching into the common sources and obtaining your subject-matter from them, you avail yourself of the labour of your predecessor, adopt his arrangement and questions, or adopt them with a colourable variation, it is an illegitimate use. *Ibid*.

Falsely to deny that you have copied or taken any idea or language from another work, strong indication of *animus furandi*. *Ibid*.

Notwithstanding *Bell v. Whitehead* (3 Jur. 68), if the Court is led to the conclusion that there has been piracy, it will not grudge any labour that may be requisite, in order to ascertain how far the injunction should extend. *Ibid*.

Form of injunction where certain distinct parts of a work like the above are unobjectionable and others contain piracies. *Ibid*.

(B) INTERNATIONAL COPYRIGHT.

The International Copyright Acts, and the Convention with France and Order in Council made thereunder, do not exempt authors of works in France claiming copyright in this country from the conditions affecting authors of works in this country. *Cassell v. Stiff*, 2 Kay & J. 279.

The Order in Council of the 10th of January 1852, providing that French works must be registered at Stationers' Hall within three months after the first publication thereof in France, "or if such

work be published in parts, then within three months after the publication of the last part thereof":—Held, that a French newspaper, published weekly, and not intended to be completed in any definite number of parts, must be registered within three months after its commencement, or, if it had commenced before 1852, within three months after the date of the Order in Council. *Ibid.*

Semble—the registration of a number of such a periodical in 1855, long after its commencement, did not extend to the succeeding numbers the protection of the International Copyright Acts. *Ibid.*

Neglect to register on the part of the officials at Stationers' Hall prevents the author having the benefit of the statute as against the public. *Ibid.*

(C) DRAMATIC COPYRIGHT.

The plaintiffs by parol agreed with C that he should adapt a foreign dramatic piece to the English stage, and that they should have the sole right of representation in London, C retaining that right in the provinces:—Held, that this employment of C by the plaintiffs did not make them the authors of the adaptation within the 3 & 4 Will. 4. c. 15; and that the agreement was invalid as an assignment of the right of representation, not being by writing. *Shepherd v. Conquest*, 25 Law J. Rep. (N.S.) C.P. 127; 17 Com. B. Rep. 427.

Quære—whether such a partial assignment, if in writing, would have been valid. *Ibid.*

Quære—whether, under any circumstances, the copyright in a literary work, or the right of representation in a dramatic one, can become vested *ab initio* in an employer, who is not the person who has actually composed or adapted the work. *Ibid.*

The defendant, the manager of a theatre, verbally employed the plaintiff to compose music as part of the representation of a dramatic piece (one of Shakespeare's plays) adapted to the stage by the defendant, with the aid of scenery, dresses, music and other accompaniments, the general design of which representation was formed by the defendant, on the terms that, in consideration of reward paid by the defendant to the plaintiff, the music composed by the plaintiff should become part of such dramatic piece as designed for representation by the defendant, and that the defendant should have the sole liberty of performing such music as part of the dramatic piece:—Held, that under this contract, as between the plaintiff and the defendant, the defendant had the sole liberty of performing such music as part of the dramatic piece without assignment or consent in writing from the plaintiff. *Hutton v. Kean*, 29 Law J. Rep. (N.S.) C.P. 20; 7 Com. B. Rep. N.S. 268.

(D) COPYRIGHT OF DESIGNS.

The subject of registration, under the 5 & 6 Vict. c. 100, is a design, and not the article of manufacture to which it is applied under section 3. *Norton v. Nicholls*, 28 Law J. Rep. (N.S.) Q.B. 225.

A combination to be protected as a design must be one design, and not several designs. *Ibid.*

Semble—that when the component parts of a combination are all old, but the combination itself new, such combination is not a design within the 5 & 6 Vict. c. 100. *Ibid.*

It is not a sufficient registration under section 17.

of an article comprised in class 8. of section 3, to leave with the registrar an article manufactured according to the combination relied upon, with an intimation that it was to be applied to class 8, though it might be sufficient as regards articles comprised in class 5. *Ibid.*

A notice under section 7. is not sufficient, unless it be expressly stated therein that the proprietor of the design has not given his consent to the application of his design; and which does not state whether the proprietor intends to sue either for the application of the design to an article of manufacture, or for the sale of such article with the design applied. *Ibid.*

Semble—that the notice should specify the real claim intended to be made. *Ibid.*

It is a question for the jury whether a design is a new and original design. It is not to be withdrawn from them and decided as a question of law by the Court not to be a "new and original design," because it is shewn that the design is composed of a simple combination of two sizes of a previously well-known pattern. Thus, a pattern (called the "honeycomb pattern," consisting of a certain cellular arrangement of the surface in cells of a uniform size) had been for some time well known and applied to woven fabrics. The plaintiff designed a pattern in which large and small honeycomb cells were arranged, so that a border of the larger cells surrounded an enclosed portion of the smaller cells:—Held, reversing the judgment of the Court of Exchequer (27 Law J. Rep. (N.S.) Exch. 815; 3 Hurl. & N. 301), that the jury were warranted in finding this to be a new and original design. *Harrison v. Taylor* (Ex. Ch.), 29 Law J. Rep. (N.S.) Exch. 3; 4 Hurl. & N. 815.

The provisions of the Copyright of Designs Act, 1842 (5 & 6 Vict. c. 100. s. 15.) relative to furnishing the Registrar of Designs with copies, drawings or prints of the design to be registered previously to obtaining registration,—Held, to have been complied with by furnishing him with a specimen of the article to which the design was applied. *Norton v. Nicholls*, 4 Kay & J. 475.

(E) PIRACY AND INFRINGEMENT OF.

The first count stated that the plaintiffs as proprietors of a song printed and published copies of it with a likeness of the singer on the outside leaf, and that the defendant afterwards fraudulently printed and sold copies of another song closely resembling it in music, melody and words, and with a similar outside leaf, under the pretence that it was the song of the plaintiffs, and thereby injured the plaintiffs in the sale of their song. The second count was similar, but only alleged an imitation of the outside leaf. The third count alleged that the plaintiffs were proprietors of a copyright in a certain book, and that the defendant, without the consent in writing of the plaintiffs, printed for sale divers copies of the said book, and of portions of the said book, contrary to the form of the statute. The fourth count stated that the defendant had in his possession for sale and sold copies of the said book so unlawfully printed, &c. Plea, to the whole declaration, that the book or song in the declaration mentioned was printed, published and sold by the plaintiffs without the name of the printer, contrary to the 2 & 3 Vict. c. 12:—

Held, that the plea was no answer to the third and fourth counts. *Chappell v. Davidson*, 25 Law J. Rep. (N.S.) C.P. 225; 18 Com. B. Rep. 196.

Semble—that it was not necessary to allege in those counts that the piracy was committed in England. *Ibid*.

Quere—whether it was necessary to allege that the particulars of the copyright, &c. had been registered pursuant to the 5 & 6 Vict. c. 45. s. 24. *Ibid*.

Semble—that a plea pleaded to the whole declaration, but an answer on the face of it to some counts only, is bad altogether, and on demurrer cannot be taken distributively, under the 75th section of the Common Law Procedure Act, 1852, so as to entitle the defendant to judgment as to the counts to which it is an answer. *Ibid*.

A person selling a copy of a print from a spurious plate is liable to an action at the suit of the proprietor, under the stat. 17 Geo. 3. c. 57, although he sells it innocently, not having any knowledge of the piracy. *Gambart v. Sumner*, 29 Law J. Rep. (N.S.) Exch. 98; 5 Hurl. & N. 5.

A fraudulent intention in infringing copyright is not necessary to entitle the proprietor of that copyright to relief in the Court of Chancery if his right of property has been invaded. *Clement v. Maddick*, 1 Giff. 98.

The 23rd section of the Copyright Act (5 & 6 Vict. c. 45.) does not give to the registered proprietor of a copyright in any book a right in the Court of Chancery to more than the usual account of the net profits of all copies of the book. He has no right in this court to an account of the gross proceeds. To recover the pirated copies he must proceed at law. *Delfe v. Delamotte*, 3 Kay & J. 581.

CORONER.

[The Provisions of the Act for the Regulation of Municipal Corporations in Ireland, with respect to the Appointment of Coroners in Boroughs, amended by 23 & 24 Vict. c. 74.—The Law relating to the Election, Duties, and Payment of County Coroners, amended by 23 & 24 Vict. c. 116.]

(A) JURISDICTION TO HOLD INQUISITION.

(a) *Origin of a Fire.*

(b) *Second Inquisition.*

(B) DISALLOWANCE OF FEES BY QUARTER SESSIONS.

(A) JURISDICTION TO HOLD INQUISITION.

(a) *Origin of a Fire.*

A coroner has no power to hold an inquisition respecting the origin of a fire. *The Queen v. Herford*, 29 Law J. Rep. (N.S.) Q.B. 249.

Prohibition may issue to a Court exercising criminal jurisdiction. *Ibid*.

(b) *Second Inquisition.*

An inquest having been held *super visum corporis*, and a verdict recorded, the coroner cannot, *mero motu*, hold a second inquest. *The Queen v. White*, 29 Law J. Rep. (N.S.) Q.B. 257.

(B) DISALLOWANCE OF FEES BY QUARTER SESSIONS.

The Court of Quarter Sessions are the proper judges of whether or not a coroner has acted properly in holding an inquest, so as to entitle him to the fee of 20s. allowed by 25 Geo. 2. c. 29; and this Court will not interfere with the exercise of the discretion of the Quarter Sessions. *The Queen v. the Justices of Gloucestershire (Ex parte Gaisford)*, 27 Law J. Rep. (N.S.) M.C. 15; 7 E. & B. 805.

Quere—whether the Court of Quarter Sessions have a discretion to disallow the fee of 6s. 8d. granted by 7 Will. 4. & 1 Vict. c. 68. s. 3. when the disbursements attending the holding of an inquest are allowed to the coroner. *Ibid*.

CORPORATION.

[See MANDAMUS—MUNICIPAL CORPORATION.]

[The Act of the Fifth and Sixth Years of Her present Majesty, for enabling Ecclesiastical Corporations, aggregate and sole, to grant Leases for long Terms of Years, amended by 21 & 22 Vict. c. 57.]

CONTRACTS NOT UNDER SEAL.

Wherever a contract is essential to the purposes and object of a trading corporation, it may be enforced against them, although it be not under seal. *Henderson v. the Royal Mail Steam Navigation Co.*, 24 Law J. Rep. (N.S.) Q.B. 322; 5 E. & B. 409.

The Australian Mail Steam Navigation Company, which was constituted a trading corporation by charter for the purpose of maintaining a communication by steam and other vessels for carrying passengers, &c. between Great Britain and Australia, in the performance and for the more effectual prosecution of the objects of their charter, and by a resolution of the directors duly entered into as required by the charter, made a parol agreement with the plaintiff, that in consideration of his going to Sydney to bring home one of their ships which was supposed to be unseaworthy and uninsurable, they would pay his passage out to Sydney and allow him a remuneration for his said services; this contract being entered into by the company and performed by the plaintiff for the express purpose of preserving the said ship and maintaining the communication and carriage of passengers, &c. between Great Britain and Australia:—Held, that the plaintiff having performed his part of the agreement, the company were liable to pay him, notwithstanding that the contract was not under seal. *Ibid*.

The London Dock Company, a corporation constituted for the purpose of carrying on a particular trade, entered into a contract for cleansing and removing the filth and dirt accumulating in their docks and basins:—Held, that such a contract ought to have been under the corporation seal, as it was not a contract of a mercantile nature; nor was it with a customer of the company, nor was it of a character which created an impossibility that it should be under seal. *London Dock Co. v. Sinnott*, 26 Law J. Rep. (N.S.) Q.B. 129; 8 E. & B. 347.

The guardians of a poor-law union having reason to believe that their clerk had been guilty of fraud, and that sums of money had been misappropriated,

employed the plaintiff, an accountant, to audit their accounts, investigate them generally, and make up the books. Resolutions to this effect were from time to time entered in the rough minute-book, but there was no contract under the seal of the guardians:—Held, by *Erle, J.*, (*Crompton, J. dubitante*) that the plaintiff, having done the work agreed upon, was entitled to recover, although the contract was not under seal. *Haigh v. the Guardians of the North Bierley Union*, 28 Law J. Rep. (N.S.) Q.B. 62; E. B. & E. 873.

CORRUPT PRACTICES PREVENTION ACT.

[See PARLIAMENT.]

COSTS, AT LAW.

[Costs in Matrimonial Suits, see DIVORCE—Costs in Testamentary Suits, see WILL—Power of Arbitrator to grant, and Costs generally in references, see ARBITRATION, (F) Costs, *ante*, page 30.]

(A) IN GENERAL.

- (a) *Case stated by County Court Judge on Appeal.*
- (b) *Case stated by Justices and Conviction quashed.*
- (c) *Set-off of Interlocutory Costs against Judgment.*
- (d) *Costs in the Exchequer Chamber.*
- (B) PLAINTIFF'S RIGHT TO.
 - (a) *In general.*
 - (b) *Certificate: within what Time it must be given.*
 - (c) *Operation of County Court Acts and other Inferior Court Acts.*
 - (1) *Judgment by Default.*
 - (2) *Concurrent Jurisdiction.*
 - (3) *Officer of the Court.*
 - (4) *Amount Recovered.*
 - (5) *Appeal against Judge's Order for Costs.*

- (d) *Suggestion to deprive Plaintiff of Costs.*
- (e) *Action on a Judgment.*
- (C) DEFENDANT'S RIGHT TO.
 - (a) *For not proceeding to Trial.*
 - (b) *Costs of the Day.*
 - (c) *Successful Defence to Part of Plaintiff's Claim.*

- (d) *On Discharge of Jury by the Judge.*
- (e) *On Trial of Suggestion.*
- (f) *On Nonsuit in County Court.*
- (D) SECURITY FOR COSTS.
 - (a) *By a Defendant.*
 - (b) *Residence Abroad.*
 - (c) *Irishman domiciled in Ireland.*
 - (d) *Foreigners.*
 - (e) *Insolvents.*
 - (f) *Increasing Amount of.*

- (E) TAXATION OF COSTS.
 - (a) *Order to Tax.*
 - (b) *Scale of Taxation.*
 - (c) *Costs in the Cause.*
 - (d) *Several Defendants.*
 - (e) *On Payment into Court after Issue joined.*

- (f) *Plaintiff suing in Person.*
- (g) *Of Service out of the Jurisdiction.*
- (h) *On Discontinuance before Notice of Trial.*
- (i) *On Summons to stay Proceedings.*
- (k) *Witnesses.*
- (l) *Shorthand-writer's Notes.*
- (m) *Review of.*
- (n) *Second Application for.*
- (F) IN CRIMINAL CASES.

(A) IN GENERAL.

- (a) *Case stated by County Court Judge on Appeal.*

A County Court Judge having stated a case (upon appeal) in so confused a manner that the Court could not discover whether or not he meant to present a question of law for their decision, the case was remitted to him for amendment in this respect. Upon the case coming back, it clearly appeared to involve no question of law. The Court, under the circumstances, dismissed the appeal, without costs. *The London and North-Western Rail. Co. v. Grace*, 2 Com. B. Rep. N.S. 555.

- (b) *Case stated by Justices and Conviction quashed.*

Upon appeal, under 20 & 21 Vict. c. 43, against a conviction under a local turnpike act, for illegally taking toll, the conviction was quashed:—Held, that the party prosecuting must pay the costs. *Venables v. Hardman*, 28 Law J. Rep. (N.S.) M.C. 33; 1 E. & E. 79.

- (c) *Set-off of Interlocutory Costs against Judgment.*

Final judgment in an action having been signed against the defendant, he was arrested under a *ca. sa.*, and discharged by a Judge's order, with costs, to be taxed, against the plaintiff; and a summons by the plaintiff to stay taxation till the next term, in order to review the Judge's decision, was discharged with costs:—Held, that both these costs were interlocutory costs, within the 63 Reg. Gen. Hil. T. 1853, which might be set off against the judgment. *Melville v. Leeson or Leesom*, 27 Law J. Rep. (N.S.) Q.B. 318; E. B. & E. 324.

The plaintiff, having obtained judgment in an action, took the defendant in execution under a *ca. sa.* The latter applied to a Judge at chambers for his discharge on the ground of irregularity in the proceedings, and the plaintiff made a cross-application to amend. The two applications were heard together, and the Judge made an order "that the plaintiff should be at liberty to amend and should pay the defendant the costs of both applications":—Held, that these were interlocutory costs, the payment of which was not by the order made a condition precedent to the amendment; and (*hesitante Williams, J.*) that as they had been incurred in the same suit in which judgment had been obtained, the Court might, in the exercise of its equitable jurisdiction to prevent its process being abused, allow them to be set off against the judgment. *Thompson v. Parish*, 28 Law J. Rep. (N.S.) C.P. 153; 5 Com. B. Rep. N.S. 685.

But no set-off against a judgment in one suit can be allowed of a claim arising out of another separate and distinct suit. *Ibid.*

The taking a debtor in execution is an election binding upon the creditor to pursue that remedy and none other against his debtor; but it is not an absolute extinguishment of the debt, and the expressions to that effect in the judgment in *Beard v. M'Carthy* cannot be supported. *Ibid.*

Simpson v. Hanley and *Peacock v. Jeffery* are overruled by *Taylor v. Waters*. *Ibid.*

(d) *Costs in the Exchequer Chamber.*

A party in the Exchequer Chamber is to have costs where the judgment below is affirmed. *Pemberton v. Chapman*, E. B. & E. 1069.

(B) PLAINTIFF'S RIGHT TO.

[Under the Malicious Trespass Act, see *post*, (d) Suggestion to deprive Plaintiff of Costs.]

(a) *In general.*

[See *post*, (E) (d).]

The rule that if a plaintiff in an action of debt refuses an amount offered on a summons to stay before declaration, and recovers no more, he is not entitled to costs, and that the defendant may claim his costs of suit subsequent to the tender and refusal—*Shaw v. Hughes*—is, as regards the latter part of it, at all events, not so absolute as to preclude the Court or a Judge from exercising a discretion in the application of it, so as to modify its operation where the presumption of oppression on the part of the plaintiff is rebutted by some reasonable explanation of his ultimately accepting the sum offered in satisfaction. *Walton v. Brown*, 28 Law J. Rep. (N.S.) Exch. 88; 3 Hurl. & N. 879.

On a plea, *pais darrein continuance*, of the plaintiff's conviction for felony, the plaintiff, on confessing the plea, is entitled to his costs, under rr. 22, 23, of the Pleading Rules, Hil. T. 1853, notwithstanding the legal effect of a conviction for felony. *Barnett v. the London and North-Western Rail. Co.*, 29 Law J. Rep. (N.S.) Exch. 334; 5 Hurl. & N. 604.

A plaintiff who has filed an affidavit of debt against the defendant in the Court of Bankruptcy, without any reasonable or probable cause, cannot be deprived of his costs under 12 & 13 Vict. c. 106. s. 86, when before trial the action is referred to the award of an arbitrator. *Stevens v. Russell*, 1 Hurl. & N. 752.

To an action for libel in a newspaper, the defendant pleaded, under the 6 & 7 Vict. c. 96. s. 2, the insertion of a full apology and payment of 40s. into Court. The jury having found that the apology was not sufficient, but that the 40s. paid into Court was sufficient to cover the damage, the Judge directed a verdict for the plaintiff with 1s. damages.—Held, that the plaintiff was deprived of costs by the 3 & 4 Vict. c. 24. s. 2. *Lafone v. Smith*, 4 Hurl. & N. 158.

Semble—that the jury should have assessed the damages irrespective of the 40s. paid into Court, and that the defendant was entitled to have such sum returned to him. *Ibid.*

(b) *Certificate: Within what Time it must be given.*

A certificate, under the County Courts Act, 13 & 14 Vict. c. 61. s. 12, to entitle a plaintiff to costs may be granted after the assizes at which the cause

was tried. *Bennett v. Thompson*, 25 Law J. Rep. (N.S.) Q.B. 378; 6 E. & B. 683.

An under-sheriff has no power to certify for costs, under the County Courts Acts, after the writ of trial is returnable and has been returned. *Knapman v. Pryer*, 26 Law J. Rep. (N.S.) Exch. 143; 1 Hurl. & N. 719.

By section 121. of the London Small Debts Act, a plaintiff who brings an action of detinue in one of the superior courts, when he might have sued in the sheriff's court, and recovers less than 20l., shall have no costs, unless the Judge do forthwith certify that the cause was one which could not have been brought in the sheriff's court, or that there was sufficient reason for bringing the action in the superior court. Immediately after the trial of such an action, the verdict being for the plaintiff for 10l., the Judge was asked for a certificate. He took time to consider, the defendant making no objection, and subsequently granted the certificate:—Held, that the defendant could not object that power was only given to grant it forthwith. *Heden v. the Atlantic Royal Mail Steam Navigation Co.*, 29 Law J. Rep. (N.S.) Q.B. 191.

(c) *Operation of County Court Acts and other Inferior Court Acts.*

(1) *Judgment by Default.*

The effect of the statute 19 & 20 Vict. c. 108. s. 30. (which enacts that where an action of contract is brought in one of the superior courts to recover a sum not exceeding 20l., and the defendant suffers judgment by default, the plaintiff shall recover no costs unless the Court or Judge shall otherwise direct), is to place judgments by default on the same footing with respect to costs as judgments obtained by verdict; and, consequently, on proof that the superior Court had concurrent jurisdiction, under the 9 & 10 Vict. c. 95. s. 128, the plaintiff is entitled to an order for costs as a matter of right. *Heard v. Eley*, 26 Law J. Rep. (N.S.) Exch. 167; 1 Hurl. & N. 716.

A plaintiff, who recovers judgment by default, under the Summary Procedure on Bills of Exchange Act, for a sum less than 20l. on a bill of exchange, on which he might have sued in the London Small Debts Court, is entitled to his costs under that act, notwithstanding the London Small Debts Act. *Healey v. Johns*, 27 Law J. Rep. (N.S.) Q.B. 183; 8 E. & B. 946.

An action against common carriers, for the loss of goods delivered to them, as common carriers, to be carried for hire, is founded on the breach of the common law duty independently of contract, and therefore is not an action "of contract," within the 19 & 20 Vict. c. 108. s. 30, which enacts, that when an action of contract is brought in one of the superior courts to recover a sum not exceeding 20l., and the defendant suffers judgment by default, the plaintiff shall have no costs. *Tatnam v. the Great Western Rail. Co.*, 29 Law J. Rep. (N.S.) Q.B. 184.

(2) *Concurrent Jurisdiction.*

[See *INFERIOR COURT*; (C) Jurisdiction of the Court, (a).—*Taylor v. the Crowland Gas and Coke Co.*, 11 Exch. Rep. 1; s.c. 7 Law J. Dig. 212.]

A tradesman's bill for a series of articles delivered

continuously cannot be split into different causes of action. *Bonsey v. Wordsworth*, 25 Law J. Rep. (N.S.) C.P. 205; 18 Com. B. Rep. 325.

Where the plaintiff, a butcher, living at U, supplied meat continuously to the defendant, residing at C, within the jurisdiction of the W County Court, and some part of the meat was delivered at C, but the rest of it was delivered, and the orders for all were given at U, beyond the jurisdiction.—Held that the plaintiff had but one cause of action, and that the delivery of part of the meat was a material part of the cause of action, under the 128th section of the 9 & 10 Vict. c. 95, and that therefore the superior Court had not concurrent jurisdiction with the W County Court, and the plaintiff was not entitled to costs in the superior court under the 15 & 16 Vict. c. 54. s. 4: confirming *Wood v. Perry*. Ibid.

On an application to a Judge at chambers for an order for costs under the County Courts Act, 15 & 16 Vict. c. 54. s. 4, on the ground that the superior Courts had concurrent jurisdiction by reason that the cause of action did not arise wholly or in some material point within the jurisdiction of the County Court where the defendant dwelt or carried on his business, it is sufficient for the plaintiff to adduce by affidavit some evidence of a state of circumstances which would give concurrent jurisdiction. *Springbett v. King*, 26 Law J. Rep. (N.S.) Exch. 169; 1 Hurl. & N. 662.

In an action against a London steam navigation company, as common carriers by water, for the loss of goods received to be carried from London to Newcastle, they having an agent at the latter place, who carried on business for them, and also for others, as a general wharfinger:—Held, that although the plaintiff recovered less than 20*l.*, he was entitled to his costs. *Corbett v. the General Steam Navigation Co.*, 28 Law J. Rep. (N.S.) Exch. 214; 4 Hurl. & N. 482.

(3) Officers of the Court.

A proviso in a repealing statute, that the repealed statutes shall be repealed, "except as to acts done under them," will operate to preserve to parties sued for acts alleged to have been done under colour of the powers of the repealed statutes, a protection which those statutes conferred upon persons sued for such acts, at all events, if the action is brought before the repealing statute passes. *Foster v. Pritchard*, 26 Law J. Rep. (N.S.) Exch. 215; 2 Hurl. & N. 151.

Under the County Courts Amendment Act (19 & 20 Vict. c. 108. s. 2), which repeals the 139th section (*inter alia*) of the County Courts Act (9 & 10 Vict. c. 95.) along with various clauses of other county court acts, "except as to acts done under them," it was held, that the bailiff of a county court sued for an alleged trespass, under colour of the process of the Court, committed before the passing of the repealing act, the action having been also brought before the passing of that act, but tried afterwards, was still entitled to the protection given by the repealed clause; so that, the verdict not being for more than 20*l.*, and the Judge not having certified, he was held not liable for costs. Ibid.

(4) Amount Recovered.

In an action on contract in any of the superior

courts, if the plaintiff recover less than 20*l.* he is deprived of costs by the 13 & 14 Vict. c. 61. s. 11, unless he obtain a certificate under section 12. or an order under the 15 & 16 Vict. c. 54. s. 4. *Ashcroft v. Foulkes* and *Rumley v. Irwin*, 25 Law J. Rep. (N.S.) C.P. 202; 18 Com. B. Rep. 261.

The Master having allowed the plaintiff his costs, the defendant obtained a Judge's order to review the taxation. On shewing cause against a rule to rescind that order, the defendant objected that the materials before the Court were insufficient to shew what the taxation was, whereupon the Court, under the 17 & 18 Vict. c. 125. s. 46, ordered the Master's *allocatur* to be produced at once; and as the defendant's counsel stated that he had an answer on the merits, no terms were imposed. Ibid.

On an application to deprive the plaintiff of costs, under the County Courts Act, 13 & 14 Vict. c. 61. s. 11, which requires that he should recover above 20*l.* in actions on promises, and above 5*l.* in actions on the case, &c., the Court will look at the substance of the case and see if the action could have been maintained without any contract: if not, then whatever the form of the complaint, the right of action is founded on contract, and above 20*l.* must be recovered to carry costs. And whether or not this is so, in an action against a carrier or innkeeper, &c., on the custom of the realm, it clearly is so in an action against a livery-stable keeper for not putting a horse into a separate stable, as he was not bound to do so but by virtue of some express contract. *Legge v. Tucker*, 26 Law J. Rep. (N.S.) Exch. 71; 1 Hurl. & N. 500.

The 11th section of the 13 & 14 Vict. c. 61. deprives a plaintiff who recovers less than 5*l.* in an action of tort, in the superior court, of the costs of a demurrer on which he has succeeded, as well as of the costs of issues in fact. *Dunston v. Paterson*, 28 Law J. Rep. (N.S.) C.P. 185; 5 Com. B. Rep. N.S. 267.

The 81st section of the Common Law Procedure Act, 1852, which provides that the costs of any issue, either in fact or law, shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues, makes no difference in this respect. Ibid.

A sued B for an assault, with a count for slander, and obtained a verdict on the first count for 5*l.*, but failed to establish a cause of action on the second count:—Held, that he was entitled to no costs. *Smith v. Harnor*, 3 Com. B. Rep. N.S. 829.

(5) Appeal against Judge's Order for Costs.

The plaintiff recovered 40*s.* only in an action under Lord Campbell's Act, and the Judge, on the 21st of August, refused to grant a certificate, under the 13 & 14 Vict. c. 61. s. 12, that the cause was proper to be tried in the superior court. In the following Michaelmas Term the plaintiff applied by summons for costs, under the 15 & 16 Vict. c. 54, and the Judge indorsed thereon "no order." An application to the same effect was made to the Court in Hilary Term:—Held, that this was in effect an appeal against the decision of the 21st of August, and therefore that the motion was too late. *Craske v. Smith*, 4 Com. B. Rep. 446.

(d) *Suggestion to deprive Plaintiff of Costs.*

On a motion for a suggestion to deprive the plaintiff of costs under the London Small Debts Act, the affidavit to found the application stated, that part of the cause of action arose within the city, and went on to allege that the deponent heard both A and B, when called as witnesses for the plaintiff, say, in their evidence, that the bill of exchange on which the action was brought, was indorsed by A to the plaintiff at B's office in the city. In answer A and B both swore that they never said in their evidence that the bill was indorsed in the city, and that, in fact, the bill was indorsed to the plaintiff at A's house, out of the city jurisdiction. The Court held, that the answer to the application was complete, and that there was no conflict of legal evidence, and refused to allow the suggestion. *Lee v. Sandell*, 26 Law J. Rep. (N.S.) Q. B. 165.

In an action of trespass and false imprisonment for an arrest on a charge under the Malicious Trespass Act (7 & 8 Geo. 4. c. 30), the defendant having paid 5*l.* into court, and the jury having given a verdict for 15*l.*, the Judge not having certified,—Held, that the defendant was entitled to a suggestion to deprive the plaintiff of costs. *Norwood v. Pitt*, 28 Law J. Rep. (N.S.) Exch. 212.

The occupier of land found a man (employed by the owner) felling trees into the land in such a way as to damage growing barley; and after again and again desiring him to desist, gave him into custody for wilfully damaging the barley. In an action of trespass, the man having recovered 20*l.*, and the Judge having declined to certify for costs, a suggestion was entered to deprive him of costs, on the ground that the defendant was acting in pursuance of the Malicious Trespass Act (7 & 8 Geo. 4. c. 30. s. 22). The Judge, on the trial of the suggestion, having left it to the jury to say whether the defendant really and reasonably believed he was acting according to law, and they having found in the affirmative,—Held, that whether the question was for the Judge or the jury, the verdict was right. *Semble*—that it was rightly left to the jury. *Norwood v. Pitt*, 29 Law J. Rep. (N.S.) Exch. 127; 5 Hurl. & N. 801.

The Court will not enlarge the time for shewing cause against a rule to enter a suggestion under the City Small Debts Act, to deprive the plaintiff of costs, in order to enable the plaintiff to apply to the Judge for a certificate. *Ward v. Cardwell*, 18 Com. B. Rep. N.S. 639.

(e) *Action on a Judgment.*

An order under the statute 43 Geo. 3. c. 46. s. 4. for the costs of an action on a judgment cannot be made *ex parte*. *Lomax v. Berry*, 26 Law J. Rep. (N.S.) Exch. 281; 2 Hurl. & N. 127.

(C) DEFENDANT'S RIGHT TO.

(a) *For not proceeding to Trial.*

The defendant is not entitled to move for the costs of not proceeding to trial, in a case where, owing to the absence of both the plaintiff and the defendant at the trial, the cause was struck out: the defendant, under those circumstances, being the party in fault. *Morgan v. Fernyhough*, 25 Law J. Rep. (N.S.) Exch. 52; 11 Exch. Rep. 205.

Where a defendant had given a written consent for a Judge's order to sign judgment, attested by an attorney on his behalf, not his attorney on the record, and had revoked it next day and given the plaintiff notice that he intended to defend the action, but this notice was on the eve of the day for trial,—Held, that he was not entitled to claim costs from the plaintiff for not proceeding to trial. *Samuel v. Bate*, 28 Law J. Rep. (N.S.) Exch. 39.

(b) *Costs of the Day.*

The plaintiff, having mistaken what the Judge had said the day previously as to what causes would be taken on the day following, was not present on that day when his cause was called on. The defendant was present, and the Judge directed a nonsuit to be entered, after which the defendant left the assize town. The plaintiff shortly afterwards appeared in court, and discovered that the jury had not been sworn, upon which the Judge, after waiting for the defendant to return, and the defendant not returning, directed, instead of a nonsuit being entered, that the cause should be struck out. The defendant, having obtained a rule *nisi* for the costs of the day, the Court, thinking it was the defendant's own fault, in not having the jury sworn, that he did not obtain a nonsuit, under the circumstances of the case, discharged the rule, the costs of the day and of the rule to be costs in the cause. *Warne v. Hill*, 29 Law J. Rep. (N.S.) C.P. 201; 7 Com. B. Rep. N.S. 726.

(c) *Successful Defence to Part of Plaintiff's Claim.*

Where to a general count a general traverse is pleaded, the issue may be treated distributively: and if the plaintiff succeed in part only and recover less than his demand, the defendant has a right to have the verdict entered for him as to the residue, and to have the costs, if any, allowed him of his successful defence to any distinct part of the plaintiff's claim. *Traherne v. Gardner*, 26 Law J. Rep. (N.S.) Q.B. 259; 8 E. & B. 161.

Where, therefore, to a count for money had and received, the defendant pleaded never indebted, and the claim of the plaintiff (who sought to recover certain fees paid by him to the defendant under protest) consisted of several distinct items, on each of which he recovered something, and the defendant succeeded in reducing the demand as to several of them, so that the plaintiff recovered less than his demand,—Held, that the defendant was entitled to have the verdict for the residue entered for him, and to have the costs allowed him of those parts on which he had succeeded. *Ibid*.

(d) *On Discharge of Jury by the Judge.*

Where the jury, being unable to agree, are discharged by the Judge from giving a verdict, and the plaintiff afterwards discontinues, the defendant is not entitled to the costs of the trial. *Wall v. the London and South-Western Rail. Co.*, 25 Law J. Rep. (N.S.) Exch. 98; 11 Exch. Rep. 696.

(e) *On Trial of a Suggestion.*

A defendant, who has lost the verdict on the trial of the cause, but has gained the verdict on the trial of a suggestion to give him the costs, cannot have the costs of such suggestion. *Norwood v. Pitt*, 29 Law J. Rep. (N.S.) Exch. 486; 5 Hurl. & N. 801.

(f) *On Nonsuit in County Court.*

The 9 & 10 Vict. c. 95. s. 129, by which a defendant is entitled to costs as between attorney and client, where a verdict is not found for the plaintiff, excludes cases where the plaintiff dwells more than twenty miles from the defendant. *Mason v. Tucker*, 28 Law J. Rep. (N.S.) Exch. 271; 4 Hurl. & N. 586.

(D) SECURITY FOR COSTS.

(a) *By a Defendant.*

The Court or a Judge can order the defendant in an action to find security for costs. And where the defendant had brought error, was out of the country, and had not put in bail, the Court refused to set aside an order that he should give security. *Hill v. Fox*, 27 Law J. Rep. (N.S.) Exch. 416; 3 Hurl. & N. 547.

(b) *Residence Abroad.*

An *audita querela* is an action within the 3 & 4 Will. 4. c. 42. s. 84, and as costs may therefore become payable by the plaintiff, he is compellable, when resident abroad, to give security for costs. *Holmes v. Pemberton*, 28 Law J. Rep. (N.S.) Q.B. 172; 1 E. & E. 369.

An officer in the service of the East India Company in India, at the time the act, 21 & 22 Vict. c. 106, for the better government of India, came into effect, who continues in actual service in the Indian army, cannot be called upon to give security for costs, as he is not voluntarily abroad. *Whit-tall v. Campbell*, 29 Law J. Rep. (N.S.) Exch. 326; 5 Hurl. & N. 601.

(c) *Irishman domiciled in Ireland.*

An Irishman domiciled in Ireland, who brings an action in one of the superior courts in this country, is compellable to give security for costs, though, at the time of the application for such security, he is a soldier serving the Queen, and with his regiment in Ireland. *Chappell v. Watts*, 29 Law J. Rep. (N.S.) Q.B. 167.

(d) *Foreigners.*

A foreigner, resident within the jurisdiction of the Court, instituting a suit, will not be compelled to give security for costs where there is no reason to suppose that he intends to leave the country immediately. *Crispin v. Doglione*, 29 Law J. Rep. (N.S.) Prob. M. & A. 130; 1 Sw. & T. 522.

(e) *Insolvents.*

When the relative of an infant, who has been appointed *prochein ami* to sue on his behalf, turns out to be insolvent, the Court will remove him, unless it appears that no other person can be properly appointed in his place. *Lees v. Smith*, 29 Law J. Rep. (N.S.) Exch. 294; 5 Hurl. & N. 632.

(f) *Increasing Amount of.*

Where, upon an interpleader, a party has been let in to defend on the condition of his paying the money into court and giving security for costs to an amount to be fixed by the Master, on whose decision security has been given to a certain amount,—*Quere*, if the Court can order that security to be increased. At

all events, the Court will not do so merely because it turns out that, by reason of commissions or from other causes which were not unforeseen when the Master settled the amount of security, the costs are likely to exceed the amount for which the security was given. *Foster v. Colby*, 27 Law J. Rep. (N.S.) Exch. 55.

The rule laid down in *Foster v. Colby*, that the Court will not interfere with the Master's discretion as to the amount of security for costs, unless a change of circumstances is clearly established, confirmed; and held, that the amount of security could not be increased merely because it was apprehended that the expenses attending a commission to examine witnesses might be greater than had been anticipated. *Haseltine v. Watkins*, 28 Law J. Rep. (N.S.) Exch. 40.

(E) TAXATION OF COSTS.

(a) *Order to Tax.*

The plaintiff having recovered and signed judgment in ejectment, a Judge made an order on him to deliver his bill of costs to be taxed. The Court refused to set aside such order, although it appeared that the defendant was about to take the benefit of the Insolvent Acts, and his object for having the bill taxed was to insert the amount of the costs in his schedule. *Baker v. Saunders*, 29 Law J. Rep. (N.S.) C.P. 158; 7 Com. B. Rep. N.S. 158.

The Court will not interfere with the taxation of costs, except to correct some error of principle into which the Master may have fallen; therefore, where a rule for a new trial directed that the costs of the first trial should be paid by the plaintiff, unless the second should have a certain event, and the defendant had thereupon paid the debt under a Judge's order which referred the costs to the "Court,"—Held, that this must be taken to mean the Court by its proper officer, and that the taxation must go to the Master without any further direction, under the rule already made. *Burton v. Burton*, 29 Law J. Rep. (N.S.) Exch. 291.

(b) *Scale of Taxation.*

In an action for work and labour, to which the defendant pleaded never indebted and a set-off, the particulars indorsed upon the writ of summons claimed 24l. 13s. as the balance due to the plaintiff, after giving credit for a specific sum. At the trial the plaintiff proved a debt to that amount, which was, however, reduced to 4l. 14s. 7d. by a set-off of 19l. 18s. 5d. due to the defendant. The *postea* was entered for the plaintiff for 24l. 13s. on the issue of never indebted, and on the issue on the set-off for the defendant for 19l. 18s. 5d. There was no certificate for costs:—Held, that the plaintiff had failed to recover more than 20l., and that his costs ought to be taxed on the lower scale, under the 8th of the Directions to the Masters, Hil. Term, 1853. *Tonge v. Chadwick*, 25 Law J. Rep. (N.S.) Q.B. 128; 5 E. & E. 950.

Where, under the 19 & 20 Vict. c. 108. s. 26, a Judge makes an order that a cause in a superior court shall be tried in a county court, and the order is silent as to what costs are to be allowed, the Master of the superior court in making his taxation may take the county court scale of costs as his guide, so far as respects that part of the proceedings which

took place in the county court. *Wheatcroft v. Foster*, 27 Law J. Rep. (N.S.) Q.B. 277; E. B. & E. 787.

The effect of an order, under the Common Law Procedure Act, 1854, section 3, referring a cause to the Judge of a county court, is not to remove the proceedings out of the superior court. The scale applicable to the taxation of costs in such case is, therefore, the scale applicable to proceedings in the superior court.—*Wheatcroft v. Foster* distinguished. *Edwards v. Edwards*, 28 Law J. Rep. (N.S.) C.P. 25; 5 Com. B. Rep. N.S. 536.

In an action of contract the plaintiff sought to recover 28l 19s. 4d. The defendant pleaded, except as to 26l 10s. 6d., never indebted, and, as to that sum, tender before action, and payment into court. The jury found for the defendant upon an issue joined upon the last plea, and also found a verdict for the plaintiff, for 2l 8s. 10d. The Judge refused to certify that the cause was a proper one to be tried before him:—Held, that the plaintiff had recovered less than 20l., and therefore that he was not entitled to have his costs taxed upon the higher scale. *James v. Vane*, 29 Law J. Rep. (N.S.) Q.B. 169.

(c) *Costs in the Cause.*

When, upon a rule to strike out or amend a plea on the ground that it is calculated to "prejudice, embarrass or delay the fair trial of an action," the Court does not make absolute any part of the rule in terms, either to strike out or amend that plea, but the rule made is to amend another plea so as to raise a certain question, and no order is made as to costs, the costs are costs in the cause. *Barnes v. Hayward*, 25 Law J. Rep. (N.S.) Exch. 318; 1 Hurl. & N. 242.

A sued B upon two bills of exchange and a promissory note, and obtained a verdict, subject to a bill of exceptions. A *venire de novo* was awarded, and, upon the second trial, the evidence obtained by B under a commission to Paris induced A to abandon the second bill, and he had a verdict on the other bill and the note, subject to a second bill of exceptions. Proceedings were afterwards instituted in Chancery, which resulted in a decree or order that the bill of exceptions should be abandoned, and the second bill given up to B, and the cause retried, striking out the count upon that bill. Upon that trial B succeeded:—Held, that, on the taxation of the costs at law, B was not entitled to the costs of the commission as "costs in the cause,"—the evidence taken thereunder not being applicable to any part of the record as it then stood. *Jewell v. Parr*, 2 Com. B. Rep. N.S. 809.

(d) *Several Defendants.*

The plaintiff sued M for a money demand. M pleaded in abatement the non-joinder of B and G. The plaintiff amended his pleadings, adding B and G as joint defendants. M pleaded as to 230l. parcel, &c. payment into court, and as to the residue never indebted. B and G each separately pleaded never indebted to the whole demand. On the trial, a verdict was found for M, that no more than 230l. were due; but as to B and G, that they were jointly liable with M for 212l.:—Held, that M was entitled, under section 39. of the Common Law Procedure Act, 1852, to the costs of the plea in abatement and the amendment, and also to the general costs of the cause and

of the trial. *Cusneau v. Morrice*, 25 Law J. Rep. (N.S.) Q.B. 126.

Held, also, that the plaintiffs were not entitled to any costs as against B and G. *Ibid.*

(e) *On Payment into Court after Issue joined.*

The principle on which costs are to be taxed is, that they are to be an indemnity. *Harold v. Smith*, 29 Law J. Rep. (N.S.) Exch. 141; 5 Hurl. & N. 381.

When money is paid into court after issue joined, and the plaintiff elects to go on with the action for the residue of his claim, and fails at the trial, he is not entitled, on taxation of costs, to the costs of preparations for trial, even although partly incurred before the payment into court, as the taxation ought then to be considered as taxation of the costs on amendment of pleading, and not, under the rule 12. of Hil. Term, 1853, as to payment into court. *Ibid.*

A defendant having, after issue joined, obtained an order allowing him, a few days before trial, to amend the pleadings and pay money into court, and the plaintiff, who had prepared his briefs, &c., having thereupon elected to go on for the residue of his claim, and being nonsuited at the trial, the Master allowed the plaintiff the general costs up to the time when he so elected to go on, including the greater part of the briefs, &c., deducting such costs as appeared to be ascribable to the claim which ultimately failed:—Held (*dissentiente Martin, B.*), that the taxation had been made upon the wrong principle; and, *semble, per Bramwell, B.*, that the plaintiff was not entitled to any of the general costs, even although partly applicable to the satisfied claim. *Ibid.*

(f) *Plaintiff suing in Person.*

In an action by an infant, the writ was sued out in person, and one E B being appointed next friend, a copy of the order for that purpose was served on the defendant's attorney, indorsed "E B, next friend, at S N C's, No. 8, Symond's Inn, Chancery Lane"; and a declaration was afterwards delivered with a notice to plead similarly signed. The plaintiff having obtained a verdict,—Held, that the above was a sufficient notice to the defendant that S N C was authorized by the next friend to act as attorney; and, the Master having on taxation allowed only costs out of pocket, the Court refused to set aside an order directing him to review his taxation. *Bryant v. Wilson*, 3 Com. B. Rep. N.S. 722.

(g) *Of Service out of the Jurisdiction.*

A defendant being out of the jurisdiction and personally served with a writ under the Common Law Procedure Act, 1852, s. 18, is liable to the expense attending such service or reasonable efforts to serve him, and the question as to the amount must be raised before the Master on taxation of costs, with the proper materials for that purpose. *White v. Brett*, 28 Law J. Rep. (N.S.) Exch. 32.

(h) *On Discontinuance before Notice of Trial.*

On a discontinuance before notice of trial, the costs of instructions for briefs, &c., ought not to be allowed to the defendant, even although he is under terms to take short notice of trial. *Cooper v. Boles*, 29 Law J. Rep. (N.S.) Exch. 141; 5 Hurl. & N. 188.

(i) *On Summons to stay Proceedings.*

To a declaration for goods sold and delivered the defendant pleaded, except as to 15*l.*, never indebted; and as to 15*l.*, tender. Verdict for the defendant on the first issue, and for the plaintiff on the second. The defendant had, after writ but before declaration, taken out a summons to stay proceedings on payment of 15*l.* and costs, but had not paid the money into court, and the plaintiff refused to accept it, claiming more:—Held, that the defendant not having paid the money into court was not entitled to his costs incurred subsequent to the summons. *Hore v. Sazl*, 25 Law J. Rep. (N.S.) C.P. 181; 17 Com. B. Rep. 599.

The Master having taxed the plaintiff his costs of the cause, allowed the defendant 40*s.* as the formal costs of the issue on which he had succeeded, refusing to look at a bill by which the defendant claimed costs of increase. The defendant moved to review the taxation on affidavits disclosing these bare facts, but neither the contents of the bill were brought before the Court, nor anything to shew that the defendant was entitled to costs of increase. The Court refused to review the taxation. *Ibid.*

(k) *Witnesses.*

In an action for libel the defendant pleaded not guilty and a justification. The publication being *prima facie* privileged, the plaintiff called witnesses to prove that the facts therein stated were false. The defendant called other witnesses to prove that those facts were true. The evidence of some of these witnesses was not known to the defendant when he published the alleged libel, but the facts charged were alleged to have taken place in a town where the plaintiff and the defendant both resided, and were of a character likely to attract notoriety. The jury found that the defendant had acted *bona fide*, and that the justification was not proved; and the verdict was entered on the first issue for the defendant, and for the plaintiff on the second issue:—Held, that the defendant was entitled to the costs of all the witnesses called by him to prove the truth of the facts, as they were material to answer the case of malice shewn by the plaintiff's witnesses who spoke to the falsehood of the facts, the jury being at liberty from the circumstances to infer knowledge of the truth or falsehood on the part of the defendant; and that the plaintiff was not entitled to the costs of any of his witnesses called to prove the falsehood of the charge. *Harrison v. Bush*, 25 Law J. Rep. (N.S.) Q.B. 99; 5 E. & B. 344.

A party calling a witness substantially in support of one or more issues, on which he succeeds, is entitled to the costs of the witness, although his evidence may, in a slight degree, be applicable to other issues on which the party calling him does not succeed. *Jewell v. Parr*, 25 Law J. Rep. (N.S.) C.P. 179; 17 Com. B. Rep. 636.

In an action for beer sold, where the defence was payment, and the carman of the plaintiff proved the delivery, and the servants of the defendant proved payment, alleging that they had received part of the money from the defendant's wife, and part from the defendant, and the defendant, who lived at a great distance, was present at the trial, and it was asked, on behalf of the plaintiff, whether the defendant was

to be called, and the defendant was, in consequence, put into the witness-box, but no questions were asked him: after a verdict for the defendant,—Held, that the defendant's costs of travelling and attending the trial ought to be allowed. *Flower v. Gardner*, 27 Law J. Rep. (N.S.) C.P. 56; 3 Com. B. Rep. N.S. 185.

The ordinary rule, not to allow on taxation the expenses both of the attorney and the London agent of the attorney of the party as witnesses in the cause (where it is tried at a town where neither of them reside), is relaxed, where it clearly appears that both of them were material and necessary witnesses for the party, as where one had written a letter and received an answer, and the other had communicated the answer to the plaintiff. *Chapman v. Rodaway*, 27 Law J. Rep. (N.S.) Exch. 7.

Where there is the common order to tax a bill, as between attorney and client, or attorney and agent, and no reservation of the question of retainer or liability, the Master has, nevertheless, jurisdiction to consider whether any item is a proper item of charge, and is not confined merely to the question of amount. And if the agent, having attended a case as a witness, has charged for his attendance something beyond the ordinary charge of a witness, the Master will be justified in disallowing such extra charge, unless there is some special contract to pay a reasonable remuneration, in which case it will be for the Master to say what is reasonable. *Sollery v. Flecker*, 27 Law J. Rep. (N.S.) Exch. 11.

The payments to witnesses must be actually made in money before they can be allowed on the taxation of costs of a cause. The fact of the witnesses giving receipts for the amount, on the personal agreement or undertaking of a plaintiff to pay them what is allowed, cannot be treated as payment. Where the rule is not strictly complied with, the Court will, on the application of the party who has paid the costs, review the taxation, so that the excess over and above the amount actually paid at the time of the first taxation may be refunded, with the costs attending the application, notwithstanding that the whole amount originally allowed has been since paid to the witnesses. *Cross v. Durrell*, 29 Law J. Rep. (N.S.) Exch. 473.

A plaintiff having been brought up by *habeas corpus* to give evidence in one cause, when at the assizes gave evidence in another cause against the same defendant. Having succeeded in the first and failed in the second cause,—Held, that on taxation of the costs of the first cause, he was entitled only to one moiety of the costs of the *habeas corpus*. *Griffin v. Hoskyns, Esq.*, 1 Hurl. & N. 95.

After public notice that common jury causes in London would be taken on the 18th of February, on the 12th a fresh notice was issued that they would be taken on the 16th. A cause, in which the plaintiff, his attorney and witnesses, resided in the country at a great distance from London, having been put in the list for the 15th, was called on in its turn, and the witnesses not being in attendance was referred. The witnesses arrived in the evening after the Court had risen. The arbitrator having awarded in favour of the plaintiff,—Held, that, on taxation, the Master was at liberty to allow the plaintiff the costs of his witnesses as costs in the cause. *Standeven v. Murgatroyd*, 3 Hurl. & N. 570.

(D) *Shorthand-writers' Notes.*

Shorthand-writers' notes cannot ordinarily and without consent be allowed in the taxation of costs. Where, in an arbitration, shorthand-writers' notes of each day's proceedings had been used, and the Master had disallowed the expense on the taxation of costs,—Held, that the Master had taken a right course, and that the taking of notes of each day's proceedings was the proper duty either of a junior counsel or of an attorney's clerk, so far as it may be necessary for the information of the respective parties; and so far as it is necessary for the purposes of justice it is the proper duty of the arbitrator. *Croom v. Gore*, 25 Law J. Rep. (N.S.) Exch. 267; 1 Hurl. & N. 14.

(m) *Review of.*

The Court will order a review of the Master's taxation where he has clearly made an error of calculation, or in the construction of an order as to the allocation of costs between the parties. But all such applications should, in the first instance, be made at chambers. *Levett v. Rothwell*, 27 Law J. Rep. (N.S.) Exch. 6.

Where the Master has, in taxing costs, made a manifest mistake in calculation, as in *Levett v. Rothwell*, or has erroneously allowed or disallowed any item on some supposed rule which does not apply, as in *Chapman v. Rodway*, the Court will correct his decision. And where he has erroneously declined to exercise his discretion, on the supposition that some rule precluded him from so doing, the Court will interpose, and will direct him to exercise his discretion and review his taxation. But where he has exercised his discretion, although the Court will correct his decision if it is manifestly wrong, they will not do so when it is doubtful whether it is so. *Knight v. the Gravesend Rail. Co.*, 27 Law J. Rep. (N.S.) Exch. 8.

Where there has been issue joined, but the plaintiff has had leave to add a fresh count, the pleadings to which are not concluded when the action is settled, it is not so clear that the ordinary rule of not allowing costs of briefs, &c. before final joinder of issue, does not apply, that the Court will interfere to review the Master's taxation disallowing those costs; at all events, if he has not merely acted on the rule, but has also exercised his discretion on the whole case. *Ibid.*

Acting upon the rule laid down in the preceding cases, where the Master had been directed to review his taxation as to the disallowance, as between attorney and client, of the expenses of plaintiff's attorney for attending at the trial (in London), and he had reconsidered the matter and again disallowed the charge, considering that it had not been sufficiently sustained, the Court refused a rule directing him again to review his taxation. *Pobjoy v. Rich*, 27 Law J. Rep. (N.S.) Exch. 10.

(n) *Second Application for.*

The Court having refused an application to direct the Master to tax the plaintiff's costs, a second application, differing in form but in substance the same, was made two terms after upon grounds which might have been laid before the Court on the first occasion, and it was therefore refused. *Leggo v.*

Young, 25 Law J. Rep. (N.S.) C.P. 176; 17 Com. B. Rep. 548.

(F) *IN CRIMINAL CASES.*

The Judge who tries a prisoner has power, under section 22. of the statute 7 Geo. 4. c. 64, to allow the costs of the prosecution on the hearing of a case reserved for the Court for consideration of Crown Cases; and the officer of that Court will tax and ascertain such costs, and certify the amount to the officer of the Court below. *R. v. Lewis*, Dears. & B. 326.

COSTS, IN EQUITY.

- (A) IN GENERAL.
- (B) ON COMPULSORY SALE.
- (C) ON APPEAL.
- (D) MOTIONS.
- (E) DISCLAIMING DEFENDANTS.
- (F) ADMINISTRATION SUITS.
- (G) CREDITORS' SUITS.
- (H) HEIR-AT-LAW.
- (I) OF CONTEMPT.
- (K) SETTING OFF COSTS.
- (L) UPON WHAT FUND CHARGEABLE.
- (M) TAXATION OF COSTS.
 - (a) *Practice as to, in general.*
 - (b) *Scale.*
- (N) SECURITY FOR COSTS.

(A) *IN GENERAL.*

Where an application to parliament is sanctioned by the Court the costs of it will be allowed, although the application fails. *In re the Bedford Charity*, 26 Law J. Rep. (N.S.) Chanc. 613.

In an information filed before the passing of the act, 18 & 19 Vict. c. 90, 'An act for the payment of costs in proceedings instituted on behalf of the Crown in matters relating to the revenue, and for the amendment of the procedure and practice in Crown suits in the Court of Exchequer,' the Court has no jurisdiction to order the Attorney General to pay the costs of a successful defendant: *aliter*, with respect to defendants made parties after the passing of the act. *The Attorney General v. Hammer*, 28 Law J. Rep. (N.S.) Chanc. 511; 4 De G. & J. 205; 27 Law J. Rep. (N.S.) Chanc. 837.

Defendants who have been dismissed from a suit with costs, and have registered the order dismissing them, will not be allowed their costs out of funds subsequently realized in the suit. *Miller v. Pridgen*, 26 Law J. Rep. (N.S.) Chanc. 183.

A purchaser, under a decree of the Court, paid his purchase-money into court. He then objected to the title; but before his objection was answered, he executed the conveyance.—Held, that he had no right to interfere with the distribution of the purchase-money. *Ibid.*

A railway company claimed a lien on certain coal-waggons in their possession belonging to B, and threatened to sell them. B, thereupon, filed a bill to restrain the sale and detention of such waggons. By arrangement the company agreed not to sell them until after a specified day. Subsequently to

that day, B brought an action of trover and detinue against the company, and in that action he recovered possession of the coal-waggons from the company. No further proceedings had been taken in the suit instituted in equity. Upon a motion by B, the Court ordered all proceedings in the suit in equity to be stayed, and the costs of such suit to be paid by the company. *North v. the Great Northern Rail. Co.*, 29 Law J. Rep. (N.S.) Chanc. 301; 2 Giff. 84.

Where, upon the application of a plaintiff, the solicitor of the Suitors' Fund, who also acted for other defendants appearing *in forma pauperis*, was appointed guardian *ad litem* of an infant defendant, and the plaintiff was ordered to pay the infant's costs, the Court refused to apportion the costs between the several defendants, and allowed the solicitor of the Suitors' Fund the infant's full costs. *Frazer v. Thompson*, 29 Law J. Rep. (N.S.) Chanc. 402; 1 Giff. 537; but see s.c. 4 De Gex & J. 659, *infra*.

According to the present practice, a respondent unnecessarily served, is not, as a matter of course, entitled to his costs of appearing. *In re Birch's Legacy*, 2 Kay & J. 369.

Where exceptions to an answer are allowed, costs do not follow as of course, but must be asked for expressly by the successful party. *Earp v. Lloyd*, 4 Kay & J. 58.

The Court has no jurisdiction to order payment out of the Suitors' Fund of the costs incurred by the solicitor of the suitors' fund as guardian *ad litem* of an infant defendant. *Frazer v. Thompson*, 4 De G. & J. 659.

In a suit for an account of tithes, the Court, in decreeing an account and payment, may apportion the costs where the defendants have several defences. But where there is a common defence the costs must be paid by the defendants generally. *Esdaile v. Peacock*, John. 216.

Where a plaintiff having a clear ground for relief against proceedings at law set up by amendment a further independent ground for the same relief, founded on suggestions of misrepresentation which failed on the evidence,—Held, that though the decree was in his favour, he must pay the costs of that part of the case on which he failed. *Pledge v. Buss*, John. 663.

On a bill to restrain the infringement of a patent a motion for injunction was ordered to stand over until after the trial of an action, nothing being said about costs. In the action the plaintiff succeeded on the issue as to the infringement, but failed in establishing the validity of his patent. The bill was afterwards dismissed, with costs:—Held, that the defendant's costs on the motion were costs in the cause. *Betta v. Clifford*, 1 Jo. & H. 74.

Circumstances under which the costs of a third counsel will be allowed. *Ibid*.

A sum of 10*l*. is usually allowed without taxation for the costs of a petition to obtain money out of court standing to a separate account, and in which no one but the petitioners are interested. *Gover v. Stillwell*, 21 Beav. 182.

In an administration suit all proper and necessary parties have their costs prior to the administration of the fund. But in suits by mortgages to ascertain priorities upon an estate or upon a fund produced by it, after the proper costs of the plaintiff are paid

the costs of the other incumbrancers are added to their securities and paid in the order of their priorities. *Ford v. the Earl of Chesterfield*, 21 Beav. 426.

In a bill for an account the costs were given to the plaintiff, although a balance of 2,000*l*. was found due from him to the defendant, the plaintiff having succeeded in the substantial matters of litigation. *May v. Biggenden*; *Cheeseman v. May*, 24 Beav. 207.

Principles on which the costs of a suit for an account are regulated. *Ibid*.

Costs out of the estate directed to be paid to the plaintiff, who wholly failed in her suit, the trustee, who was a defendant, having asked for a declaration as to the construction of the will. *Martin v. Blagrave*, 25 Beav. 125.

The costs of defendants dismissed pending the suit on their being ascertained to be purchasers for value, without notice, were ordered, at the hearing, to be paid by the principal defendants. *Hughes v. Howard*, 25 Beav. 575.

A defendant having *pendente lite* offered to pay all that was ultimately found due from him, the plaintiff was ordered to pay all the subsequent costs of suit. *Remnant v. Hood*, 27 Beav. 74.

The costs on the allowance of exceptions for insufficiency may be made payable immediately. *Thomas v. Rawling*, 27 Beav. 375.

The costs of all parties were, in 1857, ordered to be taxed and paid out of a fund in Court, and the residue was directed to be paid to the parties entitled. Solicitors who had acted for some defendants down to 1840 had no notice of the order, and their costs had been omitted in the taxation. Upon their petition, these costs were ordered to be taxed and paid by the parties to whom the residue of the fund had been paid over. *Armstrong v. Storer*, 27 Beav. 471.

The costs of counsel in chambers are always understood as being allowed, unless the contrary is expressed. *Greville v. Greville*, 27 Beav. 596.

The Court does not compel persons who have different shares in an estate to appear by the same solicitor, because their interests as regards their opposition to the claim of the plaintiff are identical. Therefore, the bill being dismissed, with costs, each of such persons gets his separate costs. But a trustee and his *cestui que trust* get but one set of costs between them; and the person entitled to a share, and all his incumbrancers, have but one set of costs, which is payable to the first incumbrancer. *Remnant v. Hood* (No. 2), 27 Beav. 613.

(B) ON COMPULSORY SALE.

[See LANDS CLAUSES CONSOLIDATION ACT.]

In matters attached to the Court of Exchequer before its abolition, this Court has a discretion, and may direct costs to be paid analogous to those formerly allowed in that court. *In re Robertson*, 26 Law J. Rep. (N.S.) Chanc. 349; 23 Beav. 433.

The Commissioners of Woods and Forests took real estate for public purposes from incapacitated persons. They paid the purchase-money into the Court of Exchequer. That Court made an order for its investment at the cost of the Commissioners. The stock was afterwards transferred into this Court under the 5 Vict. c. 7. Upon an application by the

parties who would have been entitled to the real estate.—Held, that they were entitled to the transfer of the stock, and that the costs of this petition and transfer must be paid by the Commissioners. *Ibid.*

Where settled estates had been purchased by a corporation under the powers in their act and the purchase-money paid into court, the tenant for life of the land taken petitioned for payment out of court of part of the money to be invested in the purchase of another estate. She laid the abstract before her own counsel, who approved of the title, and, subsequently, it was laid before one of the conveying counsel of the Court, who also approved the title. The taxing Master disallowed the fees of the private counsel, but his decision was overruled by one of the Vice Chancellors:—Held, on appeal, that so much of the costs as consisted of fees for consultation between the two counsel were reasonable charges, but that the whole cost of the investigation of the title by the private counsel was too much, and the Court sanctioned a compromise of the claim, and varied the order of the Vice Chancellor. *In re Jones's Settled Estate*, 27 Law J. Rep. (n.s.) Chanc. 706.

An act enabling a public body to take lands compulsorily directed that, in cases of disability, the purchase-money should be paid into court, and laid out in the purchase of other hereditaments, and that in the mean time it should be invested in consols, and the dividends paid to the persons entitled. The act authorized the Court to order "the expenses of all purchases from time to time to be made in pursuance of the act" to be paid by the public body:—Held, that the costs of the interim investment in consols, and of the order to pay the dividends to the tenant for life, must be borne by the fund, and not by the public body. *In re Gould*, 24 Beav. 442.

In a transferred Exchequer case the Court was only authorized by the act to order the costs of re-investment of the purchase-money of lands compulsorily taken by a corporation. Parties having become absolutely entitled applied for payment to them out of court of the money, instead of re-investing it:—Held, that the corporation must pay the costs. *In re the Tiverton Market Act* (No. 2), 26 Beav. 289.

(C) ON APPEAL.

One of several defendants appealed, and, substantially, from the whole decree, and the appeal was dismissed, with costs:—Held, on taxation, that the same fees on the plaintiff's briefs which had been allowed on the original hearing ought to be allowed on the appeal. Held, also, that the length of the interval between the two hearings ought not to vary the amount. *Sturgis v. Morse* (No. 2), 26 Beav. 562.

(D) MOTIONS.

Where a plaintiff, after receiving notice of motion to dismiss for want of prosecution, filed replication, and gave notice thereof, and tendered 20s. costs,—Held, that the tender not having been made until after the defendant's brief had been delivered, the defendant was not bound to accept the tender, but was entitled to his costs actually incurred, and might bring on the motion for that purpose. *Hughes v. Lewis*, John. 696.

There is no practice as to 20s. being the proper tender, but the defendant is entitled to taxed costs. *Ibid.*

(E) DISCLAIMING DEFENDANTS.

What disclaimer entitles a defendant to his costs. *Ward v. Shakeshaft*, 1 Dr. & Sm. 269.

In suits for redemption to entitle a defendant who has never claimed an interest, to his costs, he is not bound to shew that he has disclaimed, or given notice to that effect, before he was made a defendant to the suit. *Bellamy v. Brickenden*, 4 Kay & J. 670.

A devisee of mortgaged estates, in a suit for redemption, disclaimed after the suit had been revived against him, denying that he ever had or claimed any interest:—Held, that he was entitled to costs, notwithstanding persons who had acted as his solicitors in other matters, on being applied to by plaintiffs before he was made a defendant, to know whether he claimed an interest, had neglected to return any answer to such application. *Ibid.*

The rules laid down in *Ford v. Lord Chesterfield* (16 Beav. 520), as to costs of disclaiming defendants in suits for foreclosure or redemption approved. *Ibid.*

(F) ADMINISTRATION SUITS.

One of the Vice Chancellors ordered the costs of two inquiries, which had been prosecuted in his chambers, to be costs in the cause, although his decision as to one of the inquiries was favourable to one of the parties litigant, and his decision as to the other inquiries was in favour of the other parties litigant. On appeal, the Lords Justices decided that the costs, being in respect of matters purely personal between the two litigants, should be borne personally respectively by them, and that the question of these costs was a proper subject of appeal. *Horn v. Coleman*, 26 Law J. Rep. (n.s.) Chanc. 544.

A testator, by his will, directed his executors to pay so much of his residuary personal estate as they could by law dispose of for charitable purposes to the Lincoln Penitent Female Home, and made no further disposition of such residuary personal estate:—Held, that the costs of a suit to administer the testator's estate ought to be paid out of the residuary personal estate, inapplicable by law to the payment of the legacy to the charity, and, consequently, undisposed of by the will. *Taylor v. Mogg*, 27 Law J. Rep. (n.s.) Chanc. 816.

In a suit for the administration of the testator's real and personal estate, it was decided that the debts ought to be paid out of his real in exoneration of his personal estate; and upon a question as to the payment of the costs,—Held, that they must be paid out of the personal estate. *Stringer v. Harper*, 28 Law J. Rep. (n.s.) Chanc. 643; 26 Beav. 585.

A legatee under a will filed a bill to administer the estate, which turned out to be sufficient to pay the creditors, but not the legatees:—Held, that the plaintiff was entitled to costs as between solicitor and client. *Thomas v. Jones*, 29 Law J. Rep. (n.s.) Chanc. 570; 1 Dr. & Sm. 134.

Bequest of specific chattels in trust to sell, "in the first place" to pay the debts, and then to divide the residue amongst five persons. There was no residuary gift:—Held, that the debts were primarily

payable out of the general residue. *Newbegin v. Bell*, 23 Beav. 386.

There being no residuary gift, the next-of-kin filed a bill for administration; the debts exhausted the residue, but there remained assets specifically bequeathed:—Held, that the plaintiff must bear his own costs, but that the executor was entitled to his costs out of the specific legacies. *Ibid*.

An alleged creditor carried in a claim in an administration suit for a debt alleged to be due from the testator. The claim having been disallowed, the claimant was ordered to pay the costs of the proceedings. *Yeomans v. Haynes*, 24 Beav. 127.

Where debts of a testator had been paid out of the income of the estate of an infant tenant in tail under his will by the direction of the Court, after decree in an administration suit, and the tenant in tail subsequently died an infant, and his administrators more than six years after taking out administration to him, filed a bill to revive the administration suit for the purpose of having such payments recouped out of the corpus of the estate, and for the payment of the costs of the administration suit:—Held, first, that the payment on behalf of the infant having been made by the Court, a merger of the charge could not be presumed; and secondly, that the pending of the suit prevented such claim being barred by lapse of time. *Aloop v. Bell*, 24 Beav. 451.

A testator devised part of his real estate in trust for sale to pay his debts "and the costs and charges of proving and attending the execution of his will and the several trusts therein contained:—Held, that the costs of an administration suit were charged upon this estate. *Ibid*.

A bill was filed for the administration of the real and personal estate. A part of the real estate was specifically devised, and gave rise to questions of construction; other part was devised to charities, which devise was void under the Statute of Mortmain. The residuary real estate descended on the heir, and the residuary personal estate was undisposed of and went to the next-of-kin:—Held, that the costs of suit attributable to the administration of the trusts of the real estate were payable out of the descended estates, and those relating to the execution of the trusts of the personal estate out of the residuary personal estate. *Sanders v. Miller*, 25 Beav. 154.

(G) CREDITORS' SUITS.

A suit was instituted by a creditor for the administration of a testator's estate, and another creditor sued the administratrix at law for the debt. Notice of a decree in the suit was given to the plaintiff in the action, who nevertheless continued the action and obtained a verdict for his debt and costs:—Held, that the creditor was not entitled, as against the other creditors in the suit, to his costs in the action after notice of decree. *Sharrod v. Wingfield*, 28 Law J. Rep. (N.S.) Chanc. 176.

A creditors' suit having been instituted after a statement by the legal personal representatives that there were no assets, which statement turned out to be true, the plaintiff was ordered to pay the costs. *Fuller v. Green*, 24 Beav. 217.

(H) HEIR-AT-LAW.

The costs of an issue *devisavit vel non* are in the discretion of the Court; and, therefore, where an

heir-at-law obtained an issue to try the validity of the will (which, as to personality, had been established in the ecclesiastical court,) the Court, after the verdict had been returned against the heir-at-law, directed each party to pay his own costs. *Stacey v. Spratley*, 28 Law J. Rep. (N.S.) Chanc. 563; 4 De Gex & J. 199.

The heir-at-law of the testator was served with notice of the decree in an administration suit, and the costs of proving his pedigree were directed to be paid out of the testator's estate. *Swift v. Swift*, 29 Law J. Rep. (N.S.) Chanc. 121; 1 De Gex, F. & J. 160.

(I) OF CONTEMPT.

Where a defendant is in prison under an attachment for contempt for not putting in his answer, and is not brought before the Court within thirty days from the time of his being in custody, he will be discharged without payment of costs. *Portescue v. Hallett*, 26 Law J. Rep. (N.S.) Chanc. 711.

The 5th rule of the 15th section of 1 Will. 4. c. 36, which allows the plaintiff the first four days of the next term in case the thirty days expire out of term, is superseded by the 74th Order of May 1845. *Ibid*.

(K) SETTING OFF COSTS.

An order was made against the plaintiff for payment of the costs of an application for an injunction, and execution was issued upon failure of payment by the plaintiff, but no return had been made to the writ. The defendants were subsequently ordered to pay the costs of an application to dismiss the plaintiff's bill. An appeal by the plaintiff against the first decision of the Court was still pending. The defendants moved to set off their costs against those ordered to be paid by the plaintiff. The motion was granted, upon the defendants undertaking not to levy for more than the balance; and as the defendants had not applied for a set-off when the order was made against them, no costs as to this application were given on either side. *Bryon v. the Metropolitan Saloon Omnibus Co.*, 28 Law J. Rep. (N.S.) Chanc. 798; 4 Drew. 546.

(L) UPON WHAT FUND CHARGEABLE.

Parties interested in a fund standing in the name of the Accountant General in one suit were ordered to pay the defendants in another suit their costs. These being taxed, and a minute having been left with the senior Master of the Common Pleas, this Court on petition made a charging order on the fund for such costs, and granted an interim stop order. *Wells v. Gibbs*, 22 Beav. 204.

(M) TAXATION OF COSTS.

(a) Practice as to, in general.

An abstract of title to property (a suit for the discovery and inspection of the title deeds to which had been instituted and dismissed) was partly prepared before the suit, and in taxing the costs, the Taxing Master allowed for drawing the same, and he also allowed charges for the employment of two junior counsel in the preparation of the answers, but upon appeal to the Master of the Rolls, both the same were disallowed; and, upon appeal to the Lords Justices, his Honour's decision was affirmed. *Davis v.*

Dysart, 25 Law J. Rep. (n.s.) Chanc. 322; 8 De Gex, M. & G. 33; 21 Beav. 124.

The general rule that upon taxation of costs as between party and party, the briefs of more than two counsel shall not be allowed, is not inflexible. *Pearce v. Lindsay*, 1 De Gex, F. & J. 573; John. 702.

Objections were taken before the Taxing Master to his certificate, and affidavits were filed on that occasion. He disallowed them, and the defendant gave notice of motion to review the certificate, but no further affidavits were filed. The defendant, having abandoned his motion, was held liable to pay taxed costs and not forty shillings. *Hervey v. Smith* (No. 2), 23 Beav. 443.

One set of costs being allowed to trustees who had severed in their defences, the division of it was left to the Taxing Master. *The Attorney General v. Wyville*, 28 Beav. 464.

(b) Scale.

The allowance of the higher scale of fees does not depend upon the amount to be recovered, but upon the questions raised in the suit, and whether the suit is one which affects the entire property involved. *Grimes v. Harrison*, 28 Law J. Rep. (n.s.) Chanc. 828; 27 Beav. 198.

The higher scale of costs mentioned in the Orders of January 30, 1857, applies to all cases except those specified in such Orders as subjects of the lower scale. *Reade v. Bentley*, 3 Kay & J. 271.

(N) SECURITY FOR COSTS.

A petitioner who is out of the jurisdiction, and is not a party to the suit, will be ordered upon motion by a respondent to give security for costs before the petition comes on for hearing. *Atkins v. Cook*, 26 Law J. Rep. (n.s.) Chanc. 353; 3 Drew. 694.

A defendant having applied for time to answer the plaintiff's bill is not thereby precluded from afterwards moving that the plaintiff may give security for costs, if subsequently to the application he discovers facts not appearing upon the face of the bill, which would have entitled him to make the application before taking any step in the cause. *Swanzy v. Swanzy*, 27 Law J. Rep. (n.s.) Chanc. 419; 4 Kay & J. 237.

A plaintiff described himself of a particular place, and stated that his wife and family resided at this address; that he was a commission agent, and travelled about the country, but had been at his residence within the last few months. Upon an affidavit that he could not be found at his address, and that his place of abode could not be discovered, he was ordered to give security for costs. *Oldale v. Whitehead*, 28 Law J. Rep. (n.s.) Chanc. 333.

The Court will not require from a limited company security to be given for costs at the instance of a defendant who alleges that the plaintiffs are insolvent, since the solvency or insolvency of the plaintiffs can only be ascertained on the accounts being taken. *Caillaud's Patent Tanning Co. (limited) v. Caillaud*, 28 Law J. Rep. (n.s.) Chanc. 357; 26 Beav. 427.

The plaintiff left his residence shortly after filing his bill, but continued to pay rent for it. The defendants were unable to find him, or to obtain any information from his solicitors as to where he was:—Held, a case for requiring security for costs. *Mandy v. Bewicke*, 8 De Gex, M. & G. 468.

Where the bill described the plaintiff as a lieutenant in H.M. ship *Gladiator*, now on service, the Court refused to compel him to give security for costs. *Clark v. Fergusson*, 1 Giff. 184.

Where a limited company was plaintiff,—Held, that a bond for 100*l.* was sufficient security for costs, within the meaning of the Joint-Stock Companies Act, 1857, section 24. *The Australian Steam-Ship Co. (limited) v. Fleming*, 4 Kay & J. 407.

A plaintiff, who was gone to California, was ordered to give security for costs. Two months afterwards the defendant moved that the plaintiff might give security within a limited time, or that the bill might be dismissed:—Held, that the motion was premature. *O'Connor v. Sierra Nevada Co.*, 23 Beav. 608.

A plaintiff having gone abroad on matters connected with the suit was ordered to give security for costs; but having returned to this country, the order was discharged. *O'Connor v. Sierra Nevada Co.*, 24 Beav. 435.

COUNSEL.

[Action by client against his counsel for excess of authority, see ACTION, (A) (b), *ante*, page 4. And see DAMAGES (F): *Thomas v. Harris*.]

(A) AUTHORITY TO BIND HIS CLIENT BY AGREEMENT TO COMPROMISE ACTION.

(B) CLIENTS' COMMUNICATIONS, WHEN PRIVILEGED.

(C) PRIVILEGE OF.

(A) AUTHORITY TO BIND HIS CLIENT BY AGREEMENT TO COMPROMISE ACTION.

When counsel in a cause, duly instructed, consents, at Nisi Prius, on behalf of his client, to a compromise or arrangement, the Court will not inquire into the existence or extent of his authority; but his consent will bind the client, although the client repudiate the authority of his counsel to give it.—Per *Cresswell, J.* and *Williams, J.*, *dissentiente Crowder, J.* Per *Crowder, J.*—So far as the conduct of a cause is concerned, counsel has authority to act entirely on his own judgment and discretion, uncontrolled by his client; but where a compromise is contemplated, and litigation is to cease upon terms to be arranged, counsel can only act under special instructions from his client. *Swinfen v. Swinfen*, 25 Law J. Rep. (n.s.) C.P. 303; 18 Com. B. Rep. 485.

In order to procure an attachment against a party for disobeying a rule of Court, it is indispensably necessary that there should be a demand of performance at the time of serving the rule, and a refusal; and the strongest evidence of the intention of the party to disobey the rule, expressed before the service, will not suffice without such demand. *Ibid.*

This Court may grant an attachment for disobedience of a rule, drawn up on an order of Nisi Prius, made at the trial of an issue from Chancery. *Ibid.*

Semble, per *Cresswell, J.*, that though formerly an application for a new trial in the case of an issue from Chancery must have been made to the Court of Chancery, it ought now to be made to the Court of common law from which the writ issues on which the proceedings at law are founded. *Ibid.*

The Court refused to enforce, by attachment, an agreement of compromise made by counsel at Nisi Prius on behalf of his client, where one member of the Court differed as to the authority of counsel to make it. *Swinfen v. Swinfen*, 26 Law J. Rep. (N.S.) C.P. 97; 1 Com. B. Rep. N.S. 864.

Before the trial of an action the defendant, his attorney and his counsel, conferred together with reference to terms of compromise which had been offered by the plaintiff and rejected by the defendant, and counsel, on leaving the defendant, said that "he would do his best for him," and the defendant expressed no dissent. The action was immediately afterwards settled in court, the defendant being present, and expressing no dissent; and an order of Nisi Prius was drawn up accordingly. The Court refused to set aside such order, although the defendant made an affidavit that the action was settled without his authority, and that, although present in court, he did not understand what was going on:—Held, per *Willes, J.* and *Byles, J.*, that the authority of the defendant's counsel to make the compromise ought not to be inquired into in this proceeding between the parties. *Chambers v. Mason*, 28 Law J. Rep. (N.S.) C.P. 10; 5 Com. B. Rep. N.S. 59.

(B) CLIENTS' COMMUNICATIONS, WHEN PRIVILEGED.

A party to a cause cannot object to his counsel in a former transaction, out of which the action arose, stating the condition of a document at the time it was produced by the opposite party. Where, therefore, in an action for false imprisonment, the question was, whether the plaintiff had been guilty of embezzlement, and this depended on whether an entry in his employer's books, stating the receipt of the money he was charged with embezzling, was inserted *before* or *after* he was taken before the Justices, it was held that the counsel who attended for the now plaintiff might be called, on the part of the defendant, to shew that the book did not then contain the entry in question. *Brown v. Foster*, 26 Law J. Rep. (N.S.) Exch. 249; 1 Hurl. & N. 736.

(C) PRIVILEGE OF.

[See ATTORNEY AND SOLICITOR: *Mackay v. Ford*, ante, page 38.]

Semble—that a barrister, who has not been admitted an advocate in any ecclesiastical court, cannot practise as counsel in the Court of Probate in non-contentious matters. *In the goods of Ludlow*, 27 Law J. Rep. (N.S.) Prob. & M. 7.

COUNTY.

[County Rate, see RATE.]

[The Law concerning detached Parts of Counties amended by 21 & 22 Vict. c. 68.—The Conveyance of County Property to the Clerk of the Peace of the County provided for by 21 & 22 Vict. c. 92.—The Acts for the better Regulation of Divisions in the several Counties of England and Wales amended by 22 & 23 Vict. c. 65.]

COUNTY COURT.

[See COSTS—INFERIOR COURT.]

COVENANT.

[See PLEADING; Equitable Pleadings.]

- (A) WHEN VALID.
- (B) IMPLIED COVENANTS.
- (C) VOLUNTARY COVENANTS.
- (D) DEPENDENT OR INDEPENDENT COVENANTS.
- (E) COVENANTS RUNNING WITH THE LAND.
- (F) DISCHARGE OF COVENANTS.
- (G) CONSTRUCTION OF COVENANTS.
 - (a) *In general.*
 - (b) *In Restraint of Trade.*
 - (c) *Creation of Tenancy to give Right of Distress.*
 - (d) *A Matter of Law for the Judge.*
- (H) DAMAGES FOR BREACH OF.
- (I) ACTIONS AND SUITS.

(A) WHEN VALID.

A covenant for payment by a municipal corporation in a mortgage deed is not void, although the mortgage may have been *ultra vires*. Therefore, to an action on such a covenant, it is no answer to say, that the mortgage was after the passing of the 5 & 6 Will. 4. c. 76, and not for payment of any previous debt or for any of the purposes mentioned in section 92, and that the deed was not made with the approbation of the Lords of the Treasury, under section 94. Neither is it an answer to such an action that the corporation has no property liable to execution in an action on the covenant. *Payne v. the Mayor, Aldermen and Burgesses of the Borough of Brecon*, 27 Law J. Rep. (N.S.) Exch. 495; 3 Hurl. & N. 572.

(B) IMPLIED COVENANTS.

The corporation of Harwich agreed with the plaintiff, *inter alia*, to let the plaintiff the making of certain works to be made under the authority of an improvement act, paying him a stipulated price, and the plaintiff agreed to take the works, and as to a certain portion of them which might require the assent of the Commissioners of Woods and Forests, that he "would well, truly and faithfully construct, make and execute the works as set forth and described in the said specification and laid down on the said plan, at and for the price or sum of 4,987*l.*, subject to the following provisions." Then followed certain provisions—that the assent of the Woods and Forests should be obtained; that the corporation should not be prevented from proceeding with the works by the Eastern Union Railway Company, or any person acting under the powers given to that company to make part of the works in question; and that the approbation of the Treasury should be given to the corporation to borrow the money required on mortgage:—Held, on demurrer to a declaration, assigning as a breach that the corporation omitted to procure or obtain the assent of the Woods and Forests or the approbation of the Treasury within a reasonable time, that, although it might have been

expected on both sides that such assent and approbation should be obtained, there was no implied covenant on the part of the corporation to obtain it, and therefore that the breach was bad. *Smith v. the Mayor of Harwich*, 26 Law J. Rep. (n.s.) C.P. 257; 2 Com. B. Rep. N.S. 651.

By a deed, between S and the defendants,—(which recited that S was seised of three closes, and the defendants were possessed of a mill and dye-house, from which was produced a quantity of dye-water and soke, and that the defendants had agreed with S for leave to make, and had made, a reservoir in one of the closes, for the reception of the dye-water and soke, in order to filter the same, and also a drain to carry off the dye-water and soke from the reservoir, and, in consideration of such leave, had agreed to give to S the liberties and privileges thereafter mentioned, and to supply him with pure water),—in consideration of being supplied by the defendants with pure water, and of receiving for his own use the sediment and sludge which might from time to time be found in the reservoir and drain, and of using such dye-water and soke for manuring his land, S gave licence to the defendants and their assigns for ever to use the reservoir and drain, and covenanted to cleanse them whenever necessary; and the defendants covenanted with S and his assigns that they would at all times thereafter supply pure water sufficient for the cattle, &c. of the occupiers of the said closes; and that it should be lawful for S and his assigns at all times to cleanse the reservoir and drain, and take the sediment and sludge away for his own use:—Held (*Coleridge, J.* dissenting), that there was only a licence to S to take and use the sediment and sludge, if there were any; and that a covenant by the defendants to send down the dye-water and soke from their mill to the reservoir could not be implied. *Sharp v. Waterhouse*, 27 Law J. Rep. (n.s.) Q.B. 70; 7 E. & B. 816.

By deed executed by the plaintiff and defendants, an incorporated company, after reciting that the plaintiff had agreed to construct for the defendants a well and other works particularized in a previously prepared specification, the plaintiff covenanted to construct the well and other works mentioned in the specification, and to provide all engines, pumps, &c., and all other implements and things mentioned in it, as required to be provided by the person contracting to perform the said work, or as might be found necessary to carry on and complete the said works, and all workmanship and labour whatsoever necessary and sufficient for the making, construction and completion of the works in a good and workmanlike manner, and in all respects conformable to the specification. The specification, which was under the company's seal, contained this clause, "The contractor will be required to sink the well to the depth of 120 feet, after which the company will undertake the erection of a permanent steam-engine, and permit the pumping to be performed by it":—Held, that there was an implied covenant by the defendants to erect the permanent steam-engine. *Knight v. the Gravesend and Milton Waterworks Co.*, 27 Law J. Rep. (n.s.) Exch. 73; 2 Hurl. & N. 6.

(C) VOLUNTARY COVENANTS.

[*Alexander v. Brame*, 7 Law J. Dig. 225: on appeal, 7 De Gex, M. & G. 525.]

DIGEST, 1855—60.

(D) DEPENDENT OR INDEPENDENT COVENANTS.

The declaration stated, that by indenture, in consideration of the plaintiff performing his covenants to act as engineer to a railway company, and prepare plans, &c., it was agreed that he should be paid for his services 25,000*l.* by instalments, and the defendant covenanted to be personally responsible for the due payment thereof. Breach, that the plaintiff had not been paid. The defendant pleaded, that, by the said indenture, it was covenanted that in case the construction of the railway should not be proceeded with, the plans, &c. should immediately become the property of the directors, and in case the whole sum of 25,000*l.* should not then have been paid, it should be referred to S to decide whether any, and what, further sum, if any, should be paid to the plaintiff. Averment, that before any instalment was due, the construction of the railway was not proceeded with, and the defendant was always ready to refer to S:—Held, that the covenants in the declaration and in the plea were not independent, and that the plea disclosed a good answer to the declaration. *Hemans v. Picciotto*, 26 Law J. Rep. (n.s.) C.P. 163; 1 Com. B. Rep. N.S. 646.

A lease for lives contained a covenant by the lessee that he would "at his own proper costs and charges well and sufficiently repair, amend, maintain, uphold and keep all and singular the thereby demised premises in all and all manner of needful and necessary reparations whatsoever, having or taking in and upon the said thereby demised premises competent and sufficient housebote, hedgebote, firebote, plowbote and gatebote, for the doing thereof, without committing any waste or spoil":—Held, in an action for not keeping the demised premises in repair, that the covenant to repair was absolute, with a licence to the lessee to take competent and sufficient housebote, &c.; and that the finding such competent and sufficient housebote, &c. upon the premises was not a condition precedent to the liability of the lessee to repair. *The Dean and Chapter of Bristol v. Jones*, 28 Law J. Rep. (n.s.) Q.B. 201; 1 E. & E. 484.

(E) COVENANTS RUNNING WITH THE LAND.

On a covenant by lessee, not naming assigns, to repair and yield up in repair all buildings and erections, an assignee is liable in respect of the non-repair of buildings erected during the term. *Minshull v. Oakes*, 27 Law J. Rep. (n.s.) Exch. 194; 2 Hurl. & N. 793.

In an action by the reversioner on such a covenant, a plea, by way of equitable defence, that the defendant had re-demised the premises to the plaintiff for the residue of the term, wanting thirty days, under a similar covenant, the defendant finding timber, &c. for repairs,—averments, that he had found such timber, that the plaintiff broke the covenant, and that the non-repair sued for was the same non-repair, and that the damages were identical,—was held bad, either as a plea of equitable set-off or as a legal defence by way of avoidance of circuity of action; because, notwithstanding the express allegations of the plea, it was manifest upon the pleadings that the covenants of the parties differed as to the duration of the time over which they extended, and also as to the degree of liability they respectively imposed, so that

it was impossible that the measure of damages could in each case be the same. *Ibid*.

(F) DISCHARGE OF COVENANTS.

A testator under covenant, on his daughter attaining twenty-one or marriage, to pay to trustees 10,000*l*. for her benefit, with a declaration that in case she died leaving no child who should attain twenty-one, or if a daughter should marry, it should form part of his personal estate—during his daughter's minority, in order to liberate his estate, borrowed 10,000*l*., which was paid to the trustees, who released the covenant and lent a portion of the fund to the testator on the security of his real estate. The daughter having died under age and unmarried,—Held, that the 10,000*l*. having been actually raised, passed under the testator's will as his personal estate. *Tucker v. Loveridge*, 1 Giff. 377.

The testator on his marriage covenanted that his representatives should, within three months after his decease, pay 2,000*l*. to trustees to be held for his wife for life. By his will after directing all his debts to be paid, he gave his widow an annuity of 200*l*. a year payable quarterly, and other benefits:—Held, that the provision for the wife under the settlement was not satisfied by the provision made for her by the will.—The authority of *Watken v. Smith*, 4 Mad. 325, impugned. *Cole v. Willard*, 25 Beav. 568.

(G) CONSTRUCTION OF COVENANTS.

(a) *In general.*

A lease contained a covenant not to carry on upon the demised premises any public trade or business, and to occupy and use the premises as a private dwelling-house only. The lessee kept a day-school, and also had a dancing class on the premises once or twice a week, and placards were published stating that the house was open as a dancing academy on certain evenings:—Held, that this was a breach of the covenant. *Wickenden v. Webster*, 25 Law J. Rep. (n.s.) Q.B. 264; 6 E. & B. 387.

L. became tenant of a theatre under a lease, which contained covenants not to convert it to any other uses than those of a theatrical kind, but to use his utmost endeavours to improve it for that use, not to grant or let the boxes, &c. for a longer period than for one year or season, and not to incur the property. L., on account of embarrassments, shut up the theatre. He had previously let the boxes in the month of December for a period of one year, to be dated from the succeeding March, and he gave two *bond fide* creditors warrants of attorney, on which they entered up judgments:—Held, that these acts did not constitute breaches of the covenants above mentioned. *Croft v. Lumley* (House of Lords), 27 Law J. Rep. (n.s.) Q.B. 321.

L., after the supposed breaches of covenant, tendered money as rent. The lessor refused to receive it as rent, but finally did accept it, though protesting that he took it not as rent under the lease, but as compensation for the occupation of the premises merely, and that he did not mean to waive, but expressly reserved, the right of re-entry.—*Quare*—whether, if there had been any forfeiture by breaches of covenant, this acceptance of the money was a waiver of them. *Ibid*.

The defendant covenanted, by deed, to pay to the

plaintiff's testator, A D, the sum of 213*l*. 15*s*., as and for the purchase-money for certain seams and beds of coal and minerals, in manner and at the times following, viz., the sum of 21*l*. 7*s*. 6*d*. on the day of the date hereof, and the remaining sum of 192*l*. 7*s*. 6*d*. by four several promissory notes, under the hand of the defendant, bearing even date with the said deed, payable to A D or order respectively, on the 1st of July in every year, until the whole of the purchase-money should be fully paid, together with interest thereon, after the rate of 5*l*. per cent. per annum, until the same promissory notes should be severally paid:—Held, to be a covenant to pay the purchase-money when the notes became due, and that the covenant was not performed by the mere delivery of four promissory notes. *Dixon v. Holdroyd*, 27 Law J. Rep. (n.s.) Q.B. 48; 7 E. & B. 903.

A plate glass shop-front fixed in its place by wooden wedges without screws, nails, or glue, which could be removed without injuring the premises, is a window, erection, or improvement within the meaning of a covenant by the lessee to yield up the premises at the end of his term "with all windows," &c. "which then were or at any time thereafter should be thereunto affixed or belonging (looking-glasses and furniture excepted), and together also with all sheds, erections, buildings and improvements, which should be erected, built or made on the demised premises." *Burt v. Haslett*, 25 Law J. Rep. (n.s.) C.P. 201; 18 Com. B. Rep. 162; affirmed in error, 25 Law J. Rep. (n.s.) C.P. 295; *nom. Haslett v. Burt*, 18 Com. B. Rep. 898.

By the terms of a local act for authorizing a company to make a canal, no mine proprietor was to work for minerals under or within twenty yards of any tunnel made by virtue of such act; but that if any such proprietor should be desirous of so working, he was to give notice of his intention to do so, and the company, if they should refuse to permit him to work such part as he might have gotten, were to pay him such price for the same as should be fixed by a compensation jury, to be summoned under the powers of the act. The plaintiffs were proprietors of certain mines of coal in land, under part of which there was a tunnel of the said canal company, made pursuant to the act, and the interest which the plaintiffs had in such mines was acquired under a lease for a term of years, at certain rents and royalties, in which there was a covenant by the plaintiffs with the lessors (who were not the said canal company) to work the said mines, and raise coal thereout until the whole of such mines, or as great a quantity as by working in a diligent manner could be gotten, should be worked out, "except the ribs and pillars, which must necessarily, or which the said lessors might require to, be left." The plaintiffs being desirous of working the coal lying under the said tunnel, gave notice of their intention to do so, according to the above act, when the company refused to permit them to work such part, and a compensation jury having been summoned according to the directions of the act, assessed a sum of money, to be paid by the company to the plaintiffs for their ceasing to work such part of the mines. In an action by the plaintiffs against the company for not paying the sum so assessed, the defendants pleaded, *inter alia*, fourthly, that the mines which the plaintiffs so ceased from working, and the coal which they

so left ungotten, were a rib within the meaning of their covenant in the said lease, and that the lessors did require the said coal to be left by the plaintiffs for such rib, and that everything happened for such requirement to be an effectual requirement under the said covenant; fifthly, that the plaintiffs did not cease from working the said minerals within twenty yards of the said tunnel; and sixthly, that after refusal by the defendants to permit the plaintiffs to work the mines, and before the summoning of the jury, the plaintiffs abandoned their notice and claimed to work the said coal, and did, in fact, work and carry away a portion of the said tunnel accordingly:—Held, that such pleas were no answer to the action. *Swindell v. the Company of Proprietors of the Birmingham Canal Navigations*, 29 Law J. Rep. (n.s.) C.P. 364.

By agreement, dated the 29th of August 1851, the plaintiff agreed that he would, on or before the 25th of March 1852, demise to the defendants a mine of rock salt, to hold from the 25th of June 1851, for twenty-one years, under the rents, and subject to the covenants and terms therein mentioned, and the defendants agreed to execute a counterpart of such lease. At the time of the agreement for the lease the defendants had begun to sink a shaft on their adjoining land, for the purpose of getting the plaintiff's mine; and after the agreement, viz. in September 1851, the defendants were prevented from working the mine by the influx of brine into two shafts then sunk by them, and they could not by any reasonable application of labour, diligence, skill, money or other means, work it, but nevertheless, and after giving notice of the fact to the plaintiff, they, on his application, executed the lease on the 16th of November 1852. The lease followed the terms of the agreement in every respect, being for twenty-one years from the 25th of June 1851, at a mine rent of 6d. for every ton of rock salt raised or gotten, and also in case the defendants should not raise 2,000 tons yearly, 6d. for every ton by which the quantity raised and gotten should fall short of 2,000 tons. The defendants covenanted to pay the mine rent, and to raise the full quantity of 2,000 tons, and in case of default to pay for that quantity, and also with reasonable diligence to sink a shaft in the defendants' land adjoining (by means of which the mine was to be worked), and to work the mine to a certain depth and in a proper and workmanlike manner. The lease contained a proviso (also in accordance with the agreement), that in case the rock salt should during the continuance of the term fail by any inevitable accident, then on payment of all rent due, and on performance of all covenants by the defendants, the said term, or the residue thereof then unexpired, should cease and determine. Nothing was done after the execution of the lease, nor was the mine reached or worked by the plaintiff:—Held, that even if the influx of brine was an "inevitable accident" within the meaning of the proviso, yet that, having occurred before the execution of the lease, it was no answer to an action for breaches of the covenant contained in the lease, nor could the defendant be said to have sunk the shafts with reasonable diligence or in a proper and workmanlike manner, not having done anything at all after the execution of the lease; but that the remedy of the defendants, if at all, was in equity for a reform of the lease. *Jervis*

v. Tomkinson, 26 Law J. Rep. (n.s.) Exch. 41; 1 Hurl. & N. 195.

A declaration in covenant stated, that one F and G being seised of an estate in fee demised by indenture to the defendant and his assigns leave to dig for clay therein, and make such adits and erect sheds, engine-houses and buildings as he should think necessary for working the clay, and to have and hold the same for twenty-one years, determinable by a twelve-month's notice; that the defendant covenanted with F and G, their heirs and assigns, to pay compensation to them, their heirs and assigns, for all such lands within the limits thereof as he might injure by such digging, the amount in case of difference to be settled by an arbitrator; and that the defendant would keep such "works," and all houses, sheds, engine-houses, &c. in good repair; that the defendant entered and got the clay until the 31st of May 1853, when F and G by indenture granted and conveyed the lands to the plaintiff, his heirs and assigns for ever, who thereby became seised thereof in fee, and that the interest of the defendant was determined by a notice to quit. First breach, that although the defendant by digging for clay after the plaintiff so became seised did injure and destroy part of the land, for which the plaintiff was entitled to a compensation, and although the plaintiff appointed an arbitrator to ascertain the amount, yet the defendant refused to appoint one. Second breach, that the defendant did not keep the "works" in repair. Pleas, first, not guilty; secondly, that the defendant in digging for clay after the plaintiff became so seised did not injure the lands. It was proved at the trial, that the defendant had in digging for the clay injured the lands, but that such injury was done before the conveyance of the land to plaintiff. The Judge amended the declaration by striking out the words "after the plaintiff so became seised":—Held, on motion to enter a verdict for the defendant and in arrest of judgment, first, that the amendment ought not to have been allowed, as its allowance afforded reasonable grounds for a demurrer; secondly, that pit-pans and levels were "works" within the meaning of the covenant, thirdly, that the claim to damages in respect to the injury to the land being merely a chose in action did not pass to the plaintiff by the conveyance of the land to him, and that the agreement as to ascertaining the amount of injury was merely incidental and annexed to the substantial matter, and was to be exercised by the person who was the owner of the land at the time the injury was done, and to whom the compensation ought to be made; lastly, that the conveyance of the land to the plaintiff during the existence of the term in the incorporeal hereditaments was an assignment of the reversion within the statute 32 Hen. 8, c. 84; that the covenant to repair, as it directly touched and concerned the thing demised, was assignable with the reversion, and that the action might be brought in the name of the plaintiff, who was entitled to the benefit of the covenants. *Martyn v. Williams*, 26 Law J. Rep. (n.s.) Exch. 117; 1 Hurl. & N. 817.

The lessor of a mine or vein of coal lying under certain closes covenanted that the lessee should and might peaceably and quietly have, hold, occupy, possess and enjoy the mine, without any let, suit, trouble, molestation, interruption or disturbance whatsoever. The lessor in working ironstone lying between the surface of the soil and the demised coal,

caused part of the roof of the coal-mine to crush and fall in and to be flooded. The working of the ironstone was done in a workman-like manner:—Held, that these acts constituted a breach of the covenant for which the lessee might maintain an action thereon, and (being continued at the time of action brought) also entitled him to an injunction restraining the lessor from working the ironstone within such a distance of the surface as interfered with the lessee getting the coal with full advantage and profit. *Shaw v. Stenton*, 27 Law J. Rep. (N.S.) Exch. 253; 2 Hurl. & N. 858.

E M covenanted that he would, by will, settle 3,000*l.* to be charged upon and issuing out of all such real and personal property as he should at his death be seised or possessed of:—Held, that this constituted a speciality debt. *Eyre v. Monro*, 26 Law J. Rep. (N.S.) Chanc. 757; 8 Kay & J. 805.

The Earl of M, by articles of separation between himself and his wife, covenanted that he would, on or before the 1st of February 1835, either by a charge on freehold estates to be situate in England or Wales, or by an investment in the funds, or by the best means which might then be in his power, secure the payment of an annuity to a trustee for his wife:—Held, that this did not create a charge on the lands of which the Earl was seised on the 1st of February 1835, but was a personal covenant providing for the doing of a certain act whereby a charge might be created. *Countess of Mornington v. Keane*, 27 Law J. Rep. (N.S.) Chanc. 791; 2 De Gex & J. 292.

(b) In Restraint of Trade.

A covenant, by a licensee for the residue of a term of fourteen years, of patent improvements in machinery for slubbing fibrous substances, not to make or vend any slubbing frames whatever without the invention applied to them, is not void as a covenant in restraint of trade. To an action for breach of such covenant, the defendant pleaded that he was at all times ready and willing, and offered to use, exercise, and put the invention in practice, both in the making and vending slubbing frames with the invention attached, and used his best endeavours to induce manufacturers and others to employ him to make and to purchase and apply the same from him; nevertheless, the invention and frames to which the invention was applied, was and were of so little value and utility, and were so defective and worthless, that without the defendant's default he was at all times during the continuance of the licence unable to induce any person so to employ him, and was by reason thereof prevented from using, exercising or putting in practice the said licence, and the said invention and licence became and were useless to the defendant, and the licence was of no use, benefit or effect, wherefore the defendant made and vended slubbing frames without the said invention applied to them:—Held, that the plea was no answer to the action. *Jones v. Lees*, 26 Law J. Rep. (N.S.) Exch. 9; 1 Hurl. & N. 189.

(c) Creation of Tenancy to give Right of Distress.

Plaintiff mortgaged his interest in leasehold premises and his goods thereon to V and others; V and others by deed assigned the mortgage, the debt and arrears of interest then due, and all their rights under

the mortgage, to the defendants. The mortgage deed contained a clause, "to the intent that the said V and others, their executors and assigns, may have for the recovery of the interest accruing on the principal money secured, the same powers of entry and distress as are by law given to landlords for the recovery of rent in arrear, the said B, the plaintiff, doth hereby attorn and become tenant from year to year to the said V and others, their executors and assigns, of the said premises, at the yearly rent of 125*l.* to be paid on the 23rd of March and 23rd of September." Plaintiff remaining in possession of the premises and goods, the defendants, after the assignment to them, entered and seized goods for arrears of interest due before the assignment:—Held, in an action of trespass, that the defendants could not justify such seizure under that clause; that such clause operated as a creation of a tenancy, for the purpose of giving such rights of distress as would arise under such tenancy; that V and others, having conveyed away their estate before the seizure, could not have distrained either at common law or under the statute of Anne. *Brown v. the Metropolitan Counties Life Assur. Soc.*, 28 Law J. Rep. (N.S.) Q.B. 236.

Supposing such clause could be construed as a mere personal licence to V and others to seize chattels, *semble*, that as such it could not be transferred by them; neither could they act under it at a different time and for a longer period than they would have had the right of distress as landlords, and the defendants could not justify the seizure as their servants. *Ibid.*

(d) A Matter of Law for the Judge.

In an action upon a covenant, or other written contract, it is the duty of the Judge to state to the jury its construction, as a matter of law, or to explain to them how far its construction may be modified by evidence of usage, when such evidence is admissible; and in cases where such evidence is not admissible, and the construction of the contract is a question of law, his omitting to direct the jury as to its construction is a misdirection. *Griffiths v. Rigby*, 25 Law J. Rep. (N.S.) Exch. 284; 1 Hurl. & N. 237.

In an action on a covenant in a demise of coal-mines, accompanied by a proviso that in case the coals, so far as the same could be fairly wrought, should be worked out prior to the expiration of the term, the rent should cease,—Held, a misdirection in the Judge to leave the meaning of that proviso, especially with reference to the words "fairly wrought," to the jury, upon evidence as to the impossibility of working the mine at a profit; the question of profit having no bearing upon the proviso, which regarded only the manner of working; and the construction of which was a question of law for the Judge to determine by his direction. *Ibid.*

(H) DAMAGES FOR BREACH OF.

The defendant, a tenant of the plaintiff, covenanted in a lease to deliver up, at the expiration of his term, certain fixtures on the premises. The term expired on the 1st of April. On the 10th, the plaintiff demanded possession; on the 13th, the defendant received notice from a mortgagee that he was entitled to possession of the premises, and that he

demand payment of the rent, and on the same day the defendant bought the mortgagee's interest. The landlord having afterwards brought an action for breach of the covenant in not delivering up the fixtures,—Held, first, that the defendant was not estopped from denying the landlord's title to the fixtures; secondly, that the plaintiff was not entitled to recover the full value of the fixtures, but only the actual damage sustained by him from the loss of the possession of them from the 10th to the 13th of April. *Watson v. Lane*, 25 Law J. Rep. (N.S.) Exch. 101; 11 Exch. Rep. 769.

A covenant in a deed between the plaintiff and the defendant, after providing for the carrying on of the business of surgeons and apothecaries, in partnership, at W, upon certain specified terms, stipulated "that after the determination of three years, and so long as the plaintiff shall reside in W, or within twelve miles thereof, the defendant shall not practise or carry on, either directly or indirectly, the business of a surgeon or apothecary, or see any patients (except as mentioned), nor assist or introduce any other medical man in W, or within twelve miles thereof, but shall, before the expiration of the term of three years, introduce the plaintiff to all such persons as may be exclusive patients of the defendant, and shall also, during the said term, use his best endeavours to secure the same for the plaintiff after the expiration of the said three years; provided always, and it is hereby expressly agreed and declared, that in case the defendant shall make default in the observance or performance of the covenant lastly hereinbefore contained, the defendant will forthwith pay unto the plaintiff the sum of 2,000*l.*, not in the nature of a penalty, but as ascertained liquidated damages; that, notwithstanding the clause lastly hereinbefore contained, the defendant may, after the determination of the term of three years, act in consultation with other medical gentlemen in W or elsewhere; that the defendant may also, if he think fit, after the determination of the term of three years, attend midwifery cases in W and within twenty miles thereof, the fee for which shall be equal to or exceed the sum of one guinea, but he shall pay one-half of the fees which he shall receive for each of such midwifery cases unto the plaintiff so long as the plaintiff shall continue to practise at W; but the fees that the defendant may attend at a greater distance than twenty miles from W shall belong exclusively to him":—Held, in an action for breaches of the terms of the covenant, both before and after the three years (it being expressly negatived that such breaches related to the exceptions in the covenant), that the sum of 2,000*l.* applied only to the preceding stipulations in the covenant, and was to be taken as liquidated damages, and not as a penalty. *Reynolds v. Bridge*, 26 Law J. Rep. (N.S.) Q.B. 12; 6 E. & B. 528.

The defendant by deed assigned to the plaintiffs, who were trustees for the A Assurance Society, and as collateral security for a mortgage for advances made by the office, a policy of assurance in the A Society, and covenanted with the plaintiffs to keep it alive; and in case he should not do so, that it should be lawful for the plaintiffs to pay the premiums and keep it alive, and that all sums so paid by them should be charged on the land in the same way as the original mortgage-money; but there was

no covenant, on the part of the defendant, to repay any such sums to the plaintiffs. The defendant made default in paying the premiums for several years, and such premiums were placed to the credit of the company in their books, in an account kept by them for that purpose, and were yearly debited by them to the mortgage account of the defendant, all which was according to the usual practice of the office. The plaintiffs then sued the defendant for a breach of covenant, and the defendant paid into court 1*s.*:—Held, that assuming the facts to shew that the plaintiffs had paid the annual premiums to the office, they were not entitled to recover more than nominal damages. *Quære*—whether the facts did amount to payment. *Brown v. Price*, 27 Law J. Rep. (N.S.) C.P. 290; 4 Com. B. Rep. N.S. 598.

A lessee is entitled to recover from his sub-lessee substantial, and not merely nominal, damages for a breach of an express covenant to repair, although, at the time of action brought, the lessee has no reversion by reason of the entry of his lessor, after such breach, for a forfeiture. *Davies v. Underwood*, 27 Law J. Rep. (N.S.) Exch. 113; 2 Hurl. & N. 570.

(I) ACTIONS AND SUITS.

The assignee of a mortgagor can sue, as assignee of the reversion, on covenants in a lease by indenture by mortgagor. *Cuthbertson v. Irving*, 28 Law J. Rep. (N.S.) Exch. 306; 4 Hurl. & N. 742.

A declaration in a covenant stated a demise by indenture by A B to the defendant, and covenants by him with A B and his assigns, and alleged that A B afterwards assigned the premises to the plaintiff, whereby the reversion thereof came to and vested in the plaintiff. It appeared that the lessor was mortgagor in possession, and that the assignment disclosed the mortgage, which shewed that the legal estate was vested in a trustee in trust for the mortgagor, and that the deed of conveyance or assignment was only executed by the lessor:—Held, that the declaration sufficiently alleged a legal estate in the plaintiff, and that the allegation was supported by reason of an estate by estoppel; and that the plaintiff, as assignee of the reversion by estoppel, could sue the lessee on covenants running with the land. *Ibid.*

A lessor held not to be entitled, in respect of a breach of covenant in a lease, to follow the assets of a deceased lessee, which had been placed in settlement upon the marriage of the lessee's daughter, there being no imputation as to the honesty with which the assets had been dealt with. *Dilkes v. Broadmead*, 29 Law J. Rep. (N.S.) Chanc. 810; 2 Giff. 113; affirmed 30 Law J. Rep. (N.S.) Chanc. 268.

CRIMINAL LAW.

See the various Titles of Offences. Also CENTRAL CRIMINAL COURT—CERTIORARI—COSTS, at LAW; In Criminal Cases — PENAL SERVITUDE — PLEADING.]

CROWN.

[See EXTENT.—The practice as to entry of satisfaction on Crown Debts and on Judgments amended by 23 & 24 Vict. c. 115.]

RIGHTS OF.

A person died intestate, and no claim being made by the next-of-kin, the Solicitor to the Treasury administered to the intestate's estate and took possession of the property on behalf of the Crown. Thirty years afterwards the next-of-kin appeared and substantiated his claim:—Held, that the Crown must be treated as an ordinary administrator under similar circumstances, and that the property must be refunded, with interest at 4l. per cent. *Edgar v. Reynolds*, 27 Law J. Rep. (N.S.) Chanc. 562; 4 Drew. 269.

An information for the purpose of having the title of the Crown to alluvium gained from the sea declared and established is analogous to a bill to ascertain boundaries, and requires in support of it admissions or evidence shewing a title in the Crown to some lands in the possession of the defendant. *Attorney General v. Chambers*; *Attorney General v. Rees*, 4 De Gex & J. 55.

But where the witnesses in support of the information deposed that the alluvium had been added to the mainland not gradually and imperceptibly but rapidly,—Held, that a sufficient case had been made for directing issues. *Ibid*.

Turning of cattle upon alluvium by the proprietor of land, not separated from it by any boundary, although without interruption, held not an assertion of right so acquiesced in as to raise a presumption of title. *Ibid*.

Semble—that the title to alluvium arising from artificial causes does not differ as to the rights of landowners from the title to alluvium arising from natural causes, where the artificial causes arise from a fair use of the land adjoining the sea-shore, and not from acts done with a view to the acquisition of the sea-shore. *Ibid*.

Where the Crown seeks to recover land alleged to have been reclaimed from the sea by encroachment or purpresture, if the defendant disputes the Crown's right to the soil between present high and low water mark, the Court will direct issues to try that right, before inquiring how far in former times the ancient high-water mark extended inland; and this course will be adhered to, notwithstanding the hardship it may impose upon the defendant, who, by admitting the soil on which he has done acts of ownership to be part of the foreshore, will in effect have proved the case of the Crown, in the event of his failing to satisfy a jury that a grant must be presumed. *Attorney General v. Chamberlaine*, 4 Kay & J. 292.

But if in a case like the above the defendant admits the Crown's title to the soil between present high and low water marks, then, upon an inquiry what is the boundary of the foreshore, the onus would be thrown upon the Crown of shewing that the high-water mark, in former times, extended further inland than at present—*semble*. *Ibid*.

CROWN OFFICE.

[The Act for abolishing certain Offices on the Crown Side of the Court of Queen's Bench, and for regulating the Crown Office, amended by 23 & 24 Vict. c. 54.]

CURSITOR BARON.

[Office of, abolished by 19 & 20 Vict. c. 86.]

CUSTOM AND PRESCRIPTION.

(A) IN GENERAL.

(B) CUSTOM OF LONDON.

(A) IN GENERAL.

A claimed a right of common over a Crown forest in respect of an allotment of waste land made to him under an Inclosure Act in 1810, and relied on an uninterrupted enjoyment for thirty years, under the 2 & 3 Will. 4. c. 71. s. 1:—Held, that this claim might be defeated by shewing that the enjoyment of the right commenced in 1810, and that the grant of any right over the forest was made absolutely void by a statute passed previously to 1810. *Mill v. the Commissioner in charge of the New Forest*, 25 Law J. Rep. (N.S.) C.P. 212; 18 Com. B. Rep. 60.

Quere—whether the 2 & 3 Will. 4. c. 71. applies to a case in which the right claimed could not have been legally granted by reason of the express prohibition contained in a statute. *Ibid*.

To an action of trespass *quare clausum fregit* the defendant justified under a custom for the inhabitants of H to take water from a well in the plaintiff's close, and proved a continuous use of the well by the inhabitants. It was also proved that in 1809 the close in question was allotted to the plaintiff under an inclosure act, which incorporated the General Inclosure Act (41 Geo. 3. c. 109.), section 10. of which empowers the Commissioners to set out roads, ways, and watering-places, and by section 11, all ways which are not so set out are to be extinguished. Section 14. directs that the allotments are to be in lieu of all rights of common and all other rights to which the allottees were entitled, and enacts that after the making of the award, all rights of common, and all rights whatsoever intended by the local act to be extinguished, are to cease. Neither the local act nor the award contained any reference to the well or to any way to it, but the latter did set out certain watering-places and ways to them:—Held, that the award and act had not the effect of extinguishing the well, either directly or indirectly, by reason of the way to it being put an end to, and that the right claimed by the defendant was therefore proved. *Race v. Ward*, 26 Law J. Rep. (N.S.) Q.B. 133; 7 E. & B. 384.

To a declaration by the plaintiff as reversioner of land, alleging that the defendant dug and excavated stone and sand and converted the same to his use, and made holes and excavations in the land, and erected mounds of earth and rubbish, so as permanently to alter, damage, injure and spoil the surface of the land, the defendant pleaded that R was seised in fee of the mines and stone within certain parts of the lordship of B, and that R, and all whose estate he had, and his and their tenants, from time immemorial, had been used and accustomed of right as often as it might be necessary for the purpose of effectually working the said quarries, to enter upon the waste lands within the part of the lordship

within which the quarries were situate, and to dig through the same to the quarries, and to raise the stone and carry away the same, doing no more than necessary for the purpose aforesaid. The plea then alleged a demise by R to the defendant of a quarry of stone under these lands and justifying the acts complained of in exercise of the above right. The defendant, also, pleaded statutory prescriptive pleas, alleging the enjoyment of the right for forty and twenty years respectively:—Held, on demurrer, that the pleas were good. *Rogers v. Taylor*, 26 Law J. Rep. (n.s.) Exch. 203; 1 Hurl. & N. 706.

The plaintiff sold goods to the defendants to be delivered free on board at Liverpool. The defendants directed the goods to be put on board a steamer to Trieste. The goods were placed on board such steamer by the plaintiff, who parted with the control over them, and placed them under the control of the defendants, and when the plaintiff so placed them on board, he did so with the intention of delivering them to the defendants. By the custom of the trade, the price of goods to be delivered free on board was not payable before production of the bill of lading, or some other document giving evidence of their being on board; but as the owners of the steamer refused to give a bill of lading or other document of the goods being on board, without the freight was previously paid, and as the defendants, when informed thereof, declined to have anything to do with the matter, the plaintiff was unable to comply with such custom without paying the freight. The plaintiff, however, had never undertaken to pay the freight or to take out a bill of lading:—Held, that the plaintiff was entitled to recover the price of the goods as sold and delivered, notwithstanding the custom, as the defendants must be taken to have discharged the plaintiff from the strict observance of it. *Green v. Sichel*, 29 Law J. Rep. (n.s.) C.P. 213; 7 Com. B. Rep. (n.s.) 747.

To an action for disturbance of common, the defendant pleaded a prescriptive right, as occupier of certain land, to common of pasture for one cow, and three fourth parts to a right of common of pasture for one other cow, and a prescriptive right in L, as occupier of other land, to one fourth part of a right of common of pasture for one cow; the defendant then justifying in his own right, and as the servant of L in putting two cows upon the common:—Held, that, whether or not there could be a right to common of pasture for a fraction of one animal, the plea was bad, as the allegation of a right to three-fourths of a right was unintelligible. *Nichols v. Chapman*, 29 Law J. Rep. (n.s.) Exch. 461; 5 Hurl. & N. 643.

Whether a right can legally exist in an officer of the Crown to sell the soil of the Crown and not account for the proceeds, *quære*; but, if it can legally exist, such right ought to be established by evidence cogent and invincible. *Attorney General v. Mathias*, 27 Law J. Rep. (n.s.) Chanc. 761; 4 Kay & J. 579.

Semble—an office of trust under the Crown cannot be annexed to a manor. *Ibid.*

A profit à prendre in another's soil cannot be claimed by custom, however ancient, uniform and clear the exercises of that custom may be. *Ibid.*

A right to carry away the soil of another, without stint, cannot be claimed by prescription; nor can the

claim be sustained by evidence of a lost grant. *Ibid.*

(B) CUSTOM OF LONDON.

[This special custom abolished by 19 & 20 Vict. c. 94.]

The custom of London which authorized the raising of a building on an old foundation so as to obstruct the passage of light and air through the ancient windows of a neighbour's house is abrogated by section 3. of the statute 2 & 3 Will. 4. c. 71. *The Merchant Taylors' Co. v. Truscott* (Ex. Ch.), 25 Law J. Rep. (n.s.) Exch. 173; nom. *Truscott v. the Merchant Taylors' Co.*, 11 Exch. Rep. 855.

A freeman of London, upon his first marriage, conveyed real and personal estate to trustees upon trust to sell and invest, and pay the dividends to his wife for life, afterwards to himself for life, and to divide the capital amongst the children as he and she, or the survivor, should appoint, and in default to the child or children of the marriage, to be vested when he, she or they should attain twenty-one. There was one child of this marriage, and the wife died. The powers were not, nor was either of them, ever exercised. The freeman upon his second marriage assigned personal estate to trustees upon trust to invest and pay the dividends to the second wife for life in case she should survive him, and after her death to assign the capital to the children of the marriage as he and she, or the survivor, should appoint, and in default to the children of that marriage who, being sons, should attain twenty-one, or being daughters should attain twenty-one or marry, in equal shares. And it was declared that the provision for the wife was not for her jointure or in bar and satisfaction of dower. There were two children of this marriage, and the wife survived. The powers were not, nor was either of them ever exercised. The freeman died intestate. In a suit for the administration of his estate the Court obtained the certificate of the Lord Mayor and Aldermen of London, and held, that as to the eldest child there was no custom of the city of London that in order to participate in the orphanage share he was bound to collate his contingent interest under the first settlement. Held, also, in the same manner as to the children of the second marriage in regard to the second settlement. Held, also, that it being for the benefit of the first child to take under the settlement rather than his share in the residue, the Court elected for him so to do. Held, also, that the widow was not barred by any custom of the city of London of her customary share, chamber and paraphernalia. *Blunt v. Lack*, 26 Law J. Rep. (n.s.) Chanc. 148.

Where a freeman of the city of London by his will appoints an executor, the whole of the personal property is taken out of the custom; but where no executor is appointed, the custom is only displaced to the extent of the disposition contained in the will. *Chappell v. Haynes*, 27 Law J. Rep. (n.s.) Chanc. 336; 4 Kay & J. 163.

CUSTOMS.

[See REVENUE.]

DAMAGES.

[Assessment of, see COSTS, AT LAW (D) (a)—
CARRIER (F)—COVENANT (H)—SLAVE TRADE.]

- (A) WHEN AND FOR WHAT RECOVERABLE.
 - (a) *In general.*
 - (b) *In Actions for Breach of Contract.*
 - (c) *In Cases of Accidental Death, under 9 & 10 Vict. c. 93.*
- (B) SUBSTANTIAL OR NOMINAL DAMAGES.
- (C) SPECIAL AND GENERAL DAMAGE.
- (D) CRITERION AND MEASURE OF DAMAGES.
- (E) LIQUIDATED DAMAGES.
- (F) EXCESSIVE DAMAGES.
- (G) SET-OFF OF DAMAGES.
- (H) PLEADING AND EVIDENCE.

(A) WHEN AND FOR WHAT RECOVERABLE.

(a) *In general.*

An action will not lie for a bare revocation of an authority to sell on commission, although the party to whom the authority was given may be entitled to remuneration for work which he may have done in pursuance of the authority and before revocation, if the terms of the employment were such that a contract to pay such remuneration might be implied. *Simpson v. Lamb*, 25 Law J. Rep. (N.S.) C.P. 113; 17 Com. B. Rep. 603.

The plaintiffs were clerical agents, and on being employed to buy or sell livings charged a fee of three guineas for entering the particulars in their books and making inquiries, and 5*l.* per cent. upon the purchase-money on a sale being effected. The defendant employed them to sell an advowson, and, as the value was large, they consented to forego the fee of three guineas. The defendant having afterwards himself sold the advowson, the plaintiffs brought an action, and in the first count of the declaration claimed the amount of the commission, &c., as damages for wrongful revocation of the authority to sell; and they also made a claim on a *quantum meruit*:—Held, that they were not entitled to recover on the special count,—nor upon the *quantum meruit*, as there was no evidence of anything done by them which was not ordinarily covered by the fee of three guineas. *Ibid.*

Quære—whether the plea of “Not guilty” to a declaration for a wrongful revocation of an authority to sell, puts in issue anything but the fact of revocation. *Ibid.*

The plaintiffs, being corn-factors, bought a quantity of barley which was warranted to be seed barley of a particular quality, and in the course of their trade re-sold it, with a like warranty, to certain persons, who sowed it on their land believing that it was of the stated quality. The crop which came up was of an inferior kind of barley, and claims were made upon the plaintiffs by the sub-purchasers for compensation in respect of the damage which they had suffered, and the plaintiffs agreed to satisfy them; but no sum was fixed. In an action by the plaintiffs against the defendant it was held (*Wightman, J. hesitante*), that they might recover the amount of damage which the sub-purchasers had suffered, as they were liable to pay it to them, though they had not in reality paid anything, and

might never be forced to pay. *Randall v. Roper or Raper*, 27 Law J. Rep. (N.S.) Q.B. 266; E. B. & E. 84.

The defendant, in writing, requested the plaintiff to pay the amount of a bill of exchange accepted by H, and then continued as follows:—“I request you to commence an action against H, and to try the same at an early assizes for the recovery of the amount of the said bill and interest. And I hereby agree to be answerable to you for the due payment of the amount of the said bill and interest, which you may pay to ***, and for all costs, damages and expenses which you may sustain by reason of such payment, and the trying of the said action, against H, and in any manner relating or incidental thereto.” The plaintiff commenced and tried the action against H, who obtained a verdict, and consequently the plaintiff was obliged to pay him his costs. The plaintiff also became liable to pay the bill of costs of his own attorney, but at the time the action was brought he had not paid it:—Held, in an action upon the above undertaking, that the plaintiff was entitled to recover from the defendant, not only the money which he had paid to H, but also that which he was liable to pay to his own attorney. *Spark v. Heslop*, 28 Law J. Rep. (N.S.) Q.B. 197; 1 E. & E. 563.

(b) *In Actions for Breach of Contract.*

In actions for breach of contract, no damages can be, in general, recovered, that are incapable of being specifically stated and appreciated with certainty, and which depend merely on the feelings or inclination of the jury to give. *Hamlin v. the Great Northern Rail. Co.*, 26 Law J. Rep. (N.S.) Exch. 20; 1 Hurl. & N. 408.

The plaintiff, a person in business, travelled to meet his customers, booked himself by the defendants' railway as a passenger from London to Hull by a train, which the defendants advertised to arrive at Hull the same night. On reaching Grimsby, where the defendants' line ended, it was found that the Hull train had left, and although the plaintiff might have reached Hull that night by taking a special conveyance and hiring a boat to cross the Humber, he remained at Grimsby and proceeded by train the next morning, but he was too late to reach Driffield and other places by the hour he had previously appointed for meeting his customers, and in consequence he was obliged to hire conveyances to see some of his customers elsewhere, and was detained several days waiting for the market-days to see others. The plaintiff having brought an action against the defendants for breach of their contract to convey him to Hull,—Held, that he was only entitled to recover the amount of hotel expenses at Grimsby, and the railway fare the next day to Hull, and was not entitled to recover for any damage whatever occasioned by his not reaching Driffield and other places by the time he might have reached them if the defendants had performed their contract. *Ibid.*

The plaintiff, having contracted with S to repair a machine, employed the defendant to make part of the machinery, a fire-box, but did not inform him of his contract with S. The defendant failed to complete his contract within the time specified, but the interval between that time and the time fixed for

the completion of the plaintiff's contract with S was sufficient to have enabled the plaintiff to have got a fire-box made elsewhere. The plaintiff for want of the fire-box failed to complete his contract with S, and being sued by him paid damages:—Held, that such damages were not recoverable by the plaintiff from the defendant as the result of the defendant's breach of contract, within the rule laid down in *Hadley v. Baxendale*. *Portman v. Middleton*, 27 Law J. Rep. (N.S.) C.P. 231; 4 Com. B. Rep. N.S. 822.

(c) *In Cases of Accidental Death, under 9 & 10 Vict. c. 93.*

Legal liability alone is not the test of injury, in respect of which damages may be recovered under Lord Campbell's Act (9 & 10 Vict. c. 93). A reasonable expectation of pecuniary advantage by the relative remaining alive may be taken into account by the jury, and damages may be given in respect of that expectation, if it be disappointed, and the probable pecuniary loss thereby sustained. But no damages can be given in respect of funeral expenses or mourning; the incurring of such expenses not being "injury resulting from the death" within the meaning of the 2nd section. *Dalton v. the South-Eastern Rail. Co.*, 27 Law J. Rep. (N.S.) C.P. 227; 4 Com. B. Rep. N.S. 296.

In an action on the 9 & 10 Vict. c. 93, for injury resulting from death, the damages should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. *Franklin v. the South-Eastern Rail. Co.*, 8 Hurl. & N. 211.

In an action by a father for injury resulting from the death of his son, it appeared that the father was old and infirm, that the son, who was young and earning good wages, assisted his father in some work for which the father was paid 3s. 6d. a week. The jury having found that the father had a reasonable expectation of benefit from the continuance of his son's life,—Held, that the action was maintainable. *Ibid.*

(B) SUBSTANTIAL OR NOMINAL DAMAGES.

[See COVENANT (H): *Broun v. Price*.]

The plaintiff, on the 30th of October 1857, agreed to buy and the defendant to sell 400 parcels of iron, to be delivered immediately, and to be paid for by a bill at four months. The bill was given and was dishonoured on the 4th of March 1858. 100 parcels of iron were duly delivered, and a delivery order was given by the defendant for the other 300, and that order was indorsed on the 19th of November by the plaintiff to his bankers, H & Co. On the 17th of November the defendant suspended payment, and the contract to deliver was broken on the 19th of November. The plaintiff was adjudicated a bankrupt on the 10th of February 1858, and though the holders of his acceptance claimed to be creditors against him for the amount, they did not prove against his estate, and he did not pay any part of it. The defendant had paid to the holders (his indorsees) a composition of 8s. in the pound, amounting to 577l. 10s.:—Held, in an action brought by H & Co. in the name of the plaintiff to recover the value of the iron, that they were only entitled

to recover nominal damages. *Griffiths v. Perry*, 28 Law J. Rep. (N.S.) Q.B. 204; 1 E. & E. 680.

Where in an action of contract the damages are not mere matter of computation, and there is any view upon which the jury might not unreasonably consider that there was a breach of contract, but no substantial damage, a verdict for the plaintiff for merely nominal damages will not, especially if the matter in dispute is only a small sum, be set aside. *Nichol v. Bestwick*, 28 Law J. Rep. (N.S.) Exch. 4.

A declaration after stating that the plaintiff was about to institute a suit in the Divorce Court against his wife, for the dissolution of their marriage, and that the defendant was a surgeon and apothecary, alleged, that in consideration that the plaintiff would retain and employ the defendant to collect and prepare the medical and other evidence necessary to such suit, and to attend and give evidence at the trial for certain fees and reward, the defendant promised to use due diligence, &c. in collecting and preparing the evidence for the said suit, and to appear as a witness and to give testimony at such trial. Breach, that the defendant did not appear at the trial, by reason whereof the plaintiff was obliged to withdraw the record. The defendant pleaded non assumpsit. At the trial there was evidence of the contract as alleged, and of the defendant having represented to the plaintiff that he might safely take his case into the Divorce Court:—Held, that the action lay, and that the plaintiff was entitled to recover substantial damages against the defendant for his non-attendance as such witness, without shewing that the plaintiff would have succeeded in the Divorce Court if the testimony of the defendant had been given there. *Yeatman v. Dempsey*, 29 Law J. Rep. (N.S.) C.P. 177; 7 Com. B. Rep. N.S. 628.

(C) SPECIAL AND GENERAL DAMAGE.

In an action by a surgeon and accoucheur for slander, imputing to him, in words spoken to one D, that a female servant of his had had a child by him; special damage that D had refused to employ him in his profession,—the Court held, that he was entitled to recover such damage as the jury might consider had arisen from that particular loss of employment, but not to such general damage as might be supposed to have arisen from repetitions of the slander. *Dixon v. Smith*, 29 Law J. Rep. (N.S.) Exch. 125; 5 Hurl. & N. 450.

Quære—whether in an action for slander not actionable *per se*, the plaintiff can go into general damage beyond the special damage laid. *Semble*—that he cannot. *Ibid.*

(D) CRITERION AND MEASURE OF DAMAGES.

[See *ante* (A) (c); and see ASSIGNMENT (B): *Watson v. M'Lean*, *ante*, page 34—SHIP AND SHIPPING: *Smith v. M'Guire*.]

In an action for the non-delivery of a ship at the time contracted for, the jury gave as damages the difference between the profits she would have earned if delivered at that time, when freights were high, and the profits she did earn when delivered seven months later, when freights were low. That being the measure of damages agreed to at the trial, the Court refused to disturb the verdict. *Fletcher v. Tayleur*, 25 Law J. Rep. (N.S.) C.P. 65; 17 Com. B. Rep. 21.

Semble, per *Jervis, C.J.* and *Willes, J.*, that, as in the case of a breach of a contract to pay money, the interest of the money is the measure of damages, so in the case of a breach of a contract to deliver a chattel, the measure of damages should be the average profit made by the use of such a chattel. *Ibid.*

The defendant agreed to deliver to the plaintiff 100 casks of a certain description of tallow at a certain sum, payment to be made by the plaintiff in advance. The plaintiff having prepaid the price, the defendant delivered tallow of an inferior description, which the plaintiff, after objecting to it and, as the jury found, without taking to it as owner, re-sold within a reasonable time for a less sum than he had prepaid, and then sought to recover the difference from the defendant in an action, not for money had and received, but for damages for the delivery of inferior tallow:—Held, that the prepayment by the plaintiff could not be taken into consideration in apportioning the damages, but that the true measure was the difference between the value in the market of tallow of the quality contracted for, at the time of the delivery, and the amount made by the re-sale of the tallow actually delivered. *Loder v. Kekulé*, 27 Law J. Rep. (N.S.) C.P. 27; 3 Com. B. Rep. N.S. 128.

On a covenant with an insurance company, to keep up a policy in their office, as security for money lent by them, the policy being dropped after the first year, and the principal and interest having been recovered by judgment, the measure of damage is not the premiums which would have been payable to the company had the policy been kept up; the true principle in such a case is the real injury, if any, sustained, either through loss of the security, or the expenses incurred in effecting another insurance. *The National Assur. Co. v. Best*, 27 Law J. Rep. (N.S.) Exch. 19; 2 Hurl. & N. 605.

The amount due on a judgment, deducting payments made and proved at the trial, or the amount due for costs on a contract to pay costs for suing, are "matters of calculation," which may be referred to the Master to inquire. *Ibid.*

Where a writ of *ca. sa.* is countermanded by the plaintiff's attorney, before any arrest of the defendant, his arrest under the writs of other parties, does not make him in custody at the suit of the first plaintiff; and a discharge by such plaintiff's attorney from such custody is no discharge of the debt. *Ibid.*

If a person contracts with another for the sale of a particular article, and breaks his contract, the proper damages are such as may fairly and reasonably be considered either as arising naturally from the breach of contract, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach of it. *Sneed v. Foord*, 28 Law J. Rep. (N.S.) Q.B. 178; 1 E. & E. 602.

The defendant contracted to deliver to the plaintiff, a farmer, a steam thrashing-machine within three weeks from the 24th of July, but did not do so till the 11th of September. The plaintiff, as the defendant well knew, was in the habit of thrashing out his wheat in the field, and sending it off at once to the market. In consequence of the non-delivery of the machine, it became necessary to carry the wheat home and to stack it. The wheat was

damaged by exposure to weather, so that it was necessary to dry it in a kiln, and the quality was much deteriorated, and before it could be sold the price had fallen. The defendant knew that the machine was wanted for immediate use at the time appointed for the delivery, but he led the plaintiff on from day to day to believe that it would be shortly delivered:—Held, in an action for the non-delivery of the machine, in accordance with the rule laid down in *Hadley v. Baxendale*, that the plaintiff was entitled to recover damages in respect of the deterioration of the quality of the wheat, in respect of the expense of carrying and stacking it, and in respect of the expense of kiln-drying. *Ibid.*

Held, also, that the plaintiff was not entitled to damages in respect of the fall in the market price. *Ibid.*

The defendant distrained and sold sheep of the plaintiff (who rented the estate of the tenant) for rent due; there being cattle and horses of the plaintiff on the land, which might have been distrained; and the jury having, on counts in trover and trespass, found for the plaintiff for the value of the sheep of which he had been deprived,—Held, that the sheep not being distrainable at common law, and the taking and selling, therefore, having been unlawful, the action could be maintained; and that the full value was recoverable. *Keen v. Priest*, 28 Law J. Rep. (N.S.) Exch. 157; 4 Hurl. & N. 236.

W, being agent to sell for two distinct principals, A and the defendant, both dealers in manure, contracted with the plaintiff to take back manure which, as agent for A, he had supplied to the plaintiff, on condition that the plaintiff would take certain other manure, which the defendant dealt in, instead, and which W warranted, it being, as the jury found, usual to sell such manure with a warranty. The defendant executed the order for the latter manure, and received payment from the plaintiff, who was also a dealer in manure, and, as the defendant knew, purchased to sell again. The plaintiff, having re-sold the manure to different purchasers, was threatened with an action by one of them for loss sustained by reason of the manure being, as was proved, of an inferior quality, and the plaintiff made good the loss, but no complaints were made by the other purchasers:—Held, first, that the defendant was liable to the plaintiff in an action on the warranty given by W; secondly, that the difference between the value of the manure supplied, and its value if it had been according to the warranty, was a correct measure of damages. *Semble*—that the loss which the plaintiff made good to his vendee was damage naturally arising from the defendant's breach of contract, and for which he was liable to the plaintiff. *Semble*—that if the two contracts made by W with the plaintiff were to be considered as only one, the plaintiff had sufficient interest in it to maintain this action. *Dingle v. Hare*, 29 Law J. Rep. (N.S.) C.P. 143; 7 Com. B. Rep. N.S. 145.

The plaintiff, having contracted with the defendant to buy of him a lot of sheep at a certain price (less than the market price), to be paid for on delivery, took away five, for which he paid in a day or two, and agreed to take the rest in a fortnight. Within that time, before any application for the remainder, the defendant sent them away and re-sold them. The vendee then, within the fortnight,

applied for half of them, offering to pay for them; and, finding that they were re-sold, sued the vendor on the contract and also in trover:—Held, that he was not entitled, on either count, to recover the full value, but only the difference between the price he was to have paid for them and the market price when he was entitled to them. *Chinery v. Viall*, 29 Law J. Rep. (N.S.) Exch. 180; 5 Hurl. & N. 288.

In an action against a joint-stock company for improperly withholding shares after a tender of the sum due for calls and interest, the proper measure of damages is the value of shares at the market price of the day of the tender, deducting the amount of calls and interest. *Cockerell v. the Van Diemen's Land Co.*, 18 Com. B. Rep. 454.

(E) LIQUIDATED DAMAGES.

By an agreement in writing A agreed to sell and B to purchase the stock-in-trade and effects of a public-house at the valuation of C and D; the goods to be valued and possession given on or before the 13th of October 1858, "and in the event of either party not complying to every particular set forth in the agreement he shall forfeit and pay the sum of 50*l.*, and all expenses attending the same":—Held, that the sum named was a penalty, and not liquidated damages. *Betta v. Burch*, 28 Law J. Rep. (N.S.) Exch. 267; 4 Hurl. & N. 506.

(F) EXCESSIVE DAMAGES.

[See PRACTICE, AT LAW; New Trial: *Smith v. Woodfine*.]

Where the defendant had, under an assignment by an executrix of all monies due to her under her husband's will, seized and sold the stock upon the plaintiff's farm, claiming under a bill of sale to her by a former occupier of the stock then on the farm, as security for money advanced by her, and the plaintiff had repeatedly applied to the defendant in vain for accounts of his claim, and there was no satisfactory evidence as to whether the original debt was subsisting, and the sale included many things which the defendant must have known were not in the bill of sale at all, and there were circumstances of great aggravation,—Held, that it was rightly left to the jury whether they believed the debt to be due, and whether it was due to the assignor as executrix, and that if not they should find for the plaintiff, and that it was a proper case for vindictive damages. And they having given beyond the full value of the stock seized more than double that value by way of damages, the Court were reluctant to interfere, although they thought the amount excessive, and recommended a compromise. *Thomas v. Harris*, 27 Law J. Rep. (N.S.) Exch. 353.

And per *Pollock, C.B.*, counsel have authority to consent to such a compromise in the absence of their clients, such consent being clearly within their ordinary authority. *Ibid*.

In an action for a personal injury arising from indisputable negligence; the injury being permanent and recovery apparently hopeless, the Court will not reduce the damages if the Judge is not dissatisfied with the verdict. *Britton v. the South Wales Rail. Co.*, 27 Law J. Rep. (N.S.) Exch. 355.

(G) SET-OFF OF DAMAGES.

To an action for freight the defendant pleaded,

by way of defence on equitable grounds, that the plaintiff in the course of his employment by the defendant undertook to carry coal of the defendant, and by his negligence and unskilfulness the coal was lost, and that the cost price of the coal was equal to the plaintiff's demand, and claiming equitably to set off the one against the other:—Held, on demurrer, that the plea was bad. *Stimson v. Hall*, 26 Law J. Rep. (N.S.) Exch. 212; 1 Hurl. & N. 831.

(H) PLEADING AND EVIDENCE.

The declaration stated, that, by an agreement, in writing, between the plaintiff and the defendant, it was witnessed that the defendant agreed to become assistant to the plaintiff in his profession of photographic painter for the term of five years, and to give up his whole time to re-touching portraits, &c., and not to take employment from other persons, and to follow the plaintiff's directions, and not divulge any secret of the art, and be faithful to the plaintiff in all his dealings; and that it was further witnessed that, in consideration of the defendant's agreement, the plaintiff thereby agreed to pay the defendant a weekly remuneration for every portrait re-touched, after certain rates, and to guarantee that the defendant should be continually supplied with portraits to re-touch; and that, lastly, it was thereby agreed that the plaintiff and the defendant should respectively forfeit 500*l.* to be paid to the other of them as liquidated damages, in case of any breach by either of them in the true performance of the terms of the agreement. The declaration then averred that the defendant had broken the agreement in several particulars, stating them, and that "by reason of which said several premises the defendant forfeited and became liable by virtue of the agreement to pay to the plaintiff the said sum of 500*l.* as liquidated damages, but the defendant had not paid the same or any part thereof," and the plaintiff claimed 500*l.* The defendant pleaded "to the plaintiff's claim of 500*l.* as and for liquidated damages," setting out the agreement (according to which, as was admitted on argument, the 500*l.* was in the nature of a penalty, and not liquidated damages), and averred that the 500*l.* therein mentioned was a penalty, and not liquidated damages; and that the defendant was not liable to pay the plaintiff the said sum of 500*l.* as liquidated damages:—Held, on demurrer to the plea, by *Williams, J.*, *Crowder, J.* and *Byles, J.*, that judgment should be for the plaintiff, because the averment in the declaration "that by reason of the premises the defendant forfeited, by virtue of the agreement, the 500*l.* as liquidated damages, and had not paid the same," was immaterial, and the plea therefore bad as being pleaded to damages only. *Reindel v. Schell*, 27 Law J. Rep. (N.S.) C.P. 146; 4 Com. B. Rep. N.S. 97.

Willes, J. dubitante, on the ground that the plea professed to answer only the immaterial averment, and, therefore, judgment ought to be for the defendant, as upon an immaterial plea to an insufficient declaration. *Ibid*.

In an action for assaulting the plaintiff and giving him into the custody of a policeman, it appeared that the charge upon which the defendant arrested the plaintiff was for fraudulently heaping up mounds of earth, to make it appear that he was entitled to receive from the defendant a larger sum for work

contracted to be done:—Held, that as the charge could not be pleaded as a justification, evidence of the truth of it was admissible in mitigation of damages under the plea of not guilty. *Linford v. Lake*, 27 Law J. Rep. (N.S.) Exch. 384; 3 Hurl. & N. 276.

The defendant, a merchant in Spain, agreed to consign to the plaintiffs, agents in London, all the raisins which should be shipped by him for this country, to sell for him, for a certain commission on the "invoice price." In an action to recover the amount of commission on two shipments consigned by the defendant, in breach of his agreement, to third persons,—Held, that it was competent to the plaintiffs to shew the proximate value of the consignments upon which he claimed commission, without producing the invoices. *Plank v. Gavila*, 3 Com. B. Rep. N.S. 807.

DEBENTURES.

Commissioners were authorized by act of parliament to raise a sum of money for parish purposes, and to secure it by debenture or assignment of the rates. The Commissioners gave a debenture for 1,000*l.* to A B who was treasurer and also a commissioner. A B advanced nothing at the time, but he subsequently advanced the amount, and from that time only he received interest. By subsequent receipts of rates the balance was turned, and A B had funds in hand:—Held, by Lord St. Leonards and the Master of the Rolls, that the transaction was not invalid; and that A B was entitled to charge full interest on his debentures until he had been formally paid off. *Fletcher v. Gibbon*, 28 Beav. 212.

Commissioners were authorized by an act to raise money on the security of the assignments of parish rates. Interest on the debentures was to be paid *pari passu*, and the debentures were to be paid off by ballot:—Held, that the relation of trustee and *cestui que trust* was constituted by the act, and that the holders of the debentures were entitled to sue in the Court of Chancery for an account of the monies received by the trustees, and of their payments, and that they were not bound to proceed on their bonds at law. *Ibid.*

In a suit against Commissioners to enforce debentures on parish rates, it was insisted that the rate-payers were necessary parties: first, because the validity of the plaintiff's security was contested; and, secondly, because they ought to be present at the taking of the accounts. The objection was overruled, on the ground that the validity of the plaintiff's security had been determined in a former suit, in which the Attorney General was a party, and because the rate-payers would be sufficiently represented in taking the accounts by the Commissioners, who were defendants. *Ibid.*

Some only of many Commissioners appointed under an act to raise money on the rates for parish purposes were made defendants to a suit by a bondholder to enforce payment. It was objected that all the Commissioners ought to be parties. The objection was removed by the Court ordering the decree to be served on the absent Commissioners with notice that they might attend the taking of the accounts. *Ibid.*

Form of decree in a suit against parish Commissioners to enforce payment of debentures on the parish rates under a special act. *Ibid.*

Railway debentures were granted, by which the "undertaking and all tolls and sums of money arising by virtue of the act, and all estate, right and interest of the company," were assigned to the debenture creditors. Other creditors subsequently obtained judgments against the company, and afterwards, by authority of an act of parliament, the railway was sold, and the purchase-money paid into court:—Held, that the debentures being prior in date had priority over the judgments as against the purchase-money. *Furness v. the Caterham Rail. Co.*, 27 Beav. 358.

DEBTOR AND CREDITOR.

[Taking debtor in execution, see COSTS, AT LAW (A) (c), *Thompson v. Parish*. And see JUDGMENT (M).]

[Certain provisions of an act, 54 Geo. 3. c. 137, relating to judicial procedure and securities for debts in Scotland, amended and re-enacted by 19 & 20 Vict. c. 91.]

- (A) RIGHTS OF THE CREDITOR.
- (B) CHARGING ORDER.
- (C) ASSIGNMENT OF DEBTS.
- (D) DISCHARGE OF DEBTS.
- (E) DEED OF INSPECTORSHIP.
- (F) ASSIGNMENT TO CARRY ON TRADE FOR BENEFIT OF CREDITORS.
- (G) OFFER OF COMPOSITION.
- (H) COMPOSITION AGREEMENTS.
- (I) COMPOSITION DEEDS.
 - (a) *When Binding or Invalid.*
 - (b) *What Creditors entitled to Benefit of.*
 - (c) *Order of Payment of Debts.*

(A) RIGHTS OF THE CREDITOR.

The law in force in Mauritius is the French law, as settled by the *Code Civil*. By that law a judgment obtained in the island against a debtor, and duly registered in the island, constitutes a specific charge on the debtor's real estate in the island, with priority according to its date. *Lang v. Reid*, 12 Moore's P.C. 72.

A mortgage bond hypothecating immovable and other property, given by debtors in favour of a creditor to secure the debt, at a time when from the hopeless state of the debtor's affairs, sequestration was inevitable, declared void under the Cape of Good Hope Insolvent Law Ordinance, No. 6. of 1843, section 84, as being an undue preference over the other creditors. *Smith v. Carpenter*, 12 Moore's P.C. 101.

By section 24. of the Cape of Good Hope Ordinance, No. 6. of 1843, the question of intention, in making an alienation, or payment, is left open to be determined upon all the circumstances and facts of the case, by the Court or a jury, as well with respect to pressure by a creditor to induce a debtor to give security to him in preference to the general body of creditors, as in other respects. *Ibid.*

This section does not require, as the English in-

solvent law does, that in order to constitute fraudulent preference, the transaction should be voluntary. *Ibid.*

On the 20th of August 1857, B, the senior partner of a firm of Bristol, merchants and shipowners, being then in London, wrote and delivered to the plaintiff for valuable consideration a delivery order, directing D, one of the partners of B, then at Bristol, in whose name the wharfrage business of B's firm at Bristol was carried on, to deliver to the order of the plaintiff "fifty tons of palm-oil out of the first of our ships which shall arrive, whether it be the *Glenely*, *Arab*, *Mary Ann B*, or *Victory*." On the day following, the Bristol firm suspended payment, and their affairs were wound up under the provisions of the arrangement clauses of the Bankrupt Act, by deed of assignment, dated the 8th of September 1857, of which the defendants were trustees. The deed provided that no creditor having a specific lien or security for his debt, who executed the deed, should be prejudiced as to his security. Notice of the delivery order was given to the defendants at latest on the 5th of September. The first of the ships named in the order which came to port arrived at Bristol on the 23rd of October 1857, but of her cargo only twenty-seven tons of palm-oil remained unaffected by contracts for sale, entered into by B's firm before the date of the delivery order:—Held, that the delivery order was an assignment of and a valid security upon fifty tons of palm-oil, the first that should arrive belonging to the firm of B & Co., in the ships named in the order. *Rayner v. Harford*, 27 Law J. Rep. (n.s.) Chanc. 703.

A stock and share broker of the city of London gave a bond to the corporation for the due performance of his office; he appropriated to his own use large sums of money intrusted to him for investment. After his decease, upon a claim filed by a simple contract creditor,—Held, that the defrauded creditors had no priority by virtue of the bond; and that the amount due upon such bond was equitable assets for the benefit of all the creditors. *Naish v. Bryant*, 27 Law J. Rep. (n.s.) Chanc. 748; 25 Beav. 533.

Where a ship has been mortgaged for a debt a creditor who has got judgment against the registered owner of the ship cannot take and sell the ship in execution, for to do so would defeat the rights of the mortgagee to make the ship available as a security for his debt, given him by the Merchant Shipping Act, 1854. *Kitchen v. Irvine*, 28 Law J. Rep. (n.s.) Q.B. 46.

A judgment creditor is not bound by an estoppel precluding the judgment creditor from claiming the goods seized under the judgment. *Richards v. Johnson*, 28 Law J. Rep. (n.s.) Exch. 322; 4 Hurl. & N. 660.

M stood by and allowed H to assign goods as his own to the plaintiff, H having and still continuing to retain possession. The goods were then seized by the defendant under a judgment against M. On an interpleader issue between the plaintiff and the defendant, whether the goods were the plaintiff's, as against the defendant, the jury found that there was no transfer from M to H:—Held, that the defendant was not estopped, and that, as against him, the goods were M's when seized. *Ibid.*

A simple contract debt does not carry interest, unless by virtue of some contract express or implied;

and, therefore, where one partner was indebted to another for money drawn out of the firm, and there was no evidence of any contract or custom of dealing, it was held, that he could not be charged with interest in a suit for the administration of the latter's estate. *Rhodes v. Rhodes*, 29 Law J. Rep. (n.s.) Chanc. 418; John. 653.

A deed executed for the sole purpose of securing a debt, will not convert a simple contract into a specialty debt; and, although the deed acknowledged the debt, the Court refused to imply a covenant for its payment, or to vary the position of the parties. *Marryat v. Marryat*, 29 Law J. Rep. (n.s.) Chanc. 665; 28 Beav. 224.

B died equitably indebted to A. After B's death it was arranged between C, who was his executor and devisee, and A and C, who admitted that he took under the devise real assets enough to pay B's debts, and that he was liable to pay A's claim out of them, should not be called upon for immediate payment of the principal, but should pay interest on it. A afterwards filed a bill to enforce payment, either by C or out of B's assets, and obtained a decree against C personally for payment of the money due, which decree reserved further consideration, and liberty to apply, but did not give any remedy against the assets. A suit was subsequently instituted by a mortgagee, to whom C had mortgaged one of the devised estates, and the estate was sold in this latter suit:—Held, that A had not, by obtaining a personal decree against C lost her rights as a creditor against the assets of B, and that her claim against the surplus proceeds of the sale in the mortgagee's suit had priority over that of a judgment creditor of C, though the judgment was prior in time to the decree in A's suit. *Semble*—if necessary, A might in her own suit, under the reservation of further consideration and liberty to apply, have enforced her claim against B's assets. Whether the decree in A's suit was right in ordering payment by C personally—*quære*. *De Sorbein v. Bland*, 2 De Gex & J. 168.

A B effected a policy for securing a judgment debt due from him to C D. C D afterwards obtained a second judgment against A B for a second debt. A B then conveyed real estates to trustees for sale, and to pay A B's two judgments. After this C D obtained a third judgment against A B. C D subsequently recovered the amount of the policy, and, concealing the fact, he received the whole amount of the first two judgments from the trustees:—Held, that he was entitled to retain all the monies so received in payment of the three judgment debts, and could not be compelled, at the suit of A B or his representatives to apply the policy money in satisfaction of the first judgment, and refund the difference between the sum paid by the trustees and the policy money. *Spalding v. Thompson*, 26 Beav. 637.

R P H J, the eldest son and heir apparent of Sir R P J, on his marriage effected insurances on his life for 10,000*l.*, and settled them for the benefit of his wife. In 1853 he made his will leaving his real and personal estate to B and T, in trust to pay his debts, and then in trust for his wife; and appointed B and T executors. In 1854, being unable to keep up the premiums on the policies, he arranged with B and T, and afterwards with T alone, to pay the premiums due and to become due, and that he,

R P H J, should give T a bond for 14,000*l.*, payable, if R P H J should survive his father, Sir R P J. T paid the premiums, and then he insured the whole life of R P H J for 14,000*l.* R P H J died in 1855, in the lifetime of his father, having had pecuniary transactions with B and T. A suit was instituted by the widow of R P H J (who had subsequently married again) for the purpose of administering the estate of her late husband, for an account of all dealings and transactions between him and B and T, and for a declaration that the 14,000*l.* policies formed part of his personal estate, and for other purposes. The bill charged fraud in the transaction of the 14,000*l.* insurance; and at the hearing of the cause it was argued, that there was a contract between R P H J and T that the latter was to effect the insurance. Stuart, V.C. decided that the 14,000*l.* formed no part of the personal estate of R P H J:—Held, on appeal, affirming so much of that decision, that there was no evidence of express contract to insure; that the insurance was effected by T for his own protection, and not as a trustee for R P H J, and that, therefore, the 14,000*l.* formed no part of the personal estate of R P H J; and that if there had been fraud in effecting the policy, it was a fraud on the office, and the benefit of the policy would belong to the office, and not to the estate of R P H J. *Freme v. Brade*, 27 Law J. Rep. (N.S.) Chanc. 697; 2 De Gex & J. 582.

Under an agreement to discharge a debt, the debtor and his surety gave a bond for payment of the amount by instalments. It was also agreed that the creditor should insure the life of the debtor, and the premium of the first year was included in the amount secured by the bond. The debtor paid seven instalments of the debt, and the surety two, but neither of them paid the premiums on the policy for the two subsequent years; the debtor subsequently lost his life at sea, and the surety took out letters of administration to his estate, and in a suit instituted by him, the Master of the Rolls held, that he had no lien upon the policy, as it was abandoned after the first year; that the creditor subsequently paid the premiums for his own benefit, and that he was entitled to the whole of the money which he had received upon the policy; but upon appeal it was held, that the debtor could not be treated as having abandoned the policy, but that his representatives were entitled to redeem it on payment of the debt, premiums, interest at 5*l.* per cent. and costs. *Drysdale v. Piggott*, 25 Law J. Rep. (N.S.) Chanc. 878; 22 Beav. 238.

(B) CHARGING ORDER.

[See JUDGMENT.]

A judgment creditor obtained an order *nisi*, under the 1 & 2 Vict. c. 110. ss. 14, 15, charging the debtor's reversionary life interest in 45,000*l.*, public stock, standing in the names of trustees; before the judgment had been obtained, but before the order, the debtor, having a contingent life interest in the dividends of the said stock, assigned all his interest, together with other property, to fresh trustees, on trust to sell and raise 65,000*l.*, such sum to be applied to discharge certain debts, &c. of the debtor, the surplus to be invested in fresh stock, and, subject to a present life interest, in trust for the debtor:—Held, that, whatever the interest the debtor might

take under the assignment, the creditor was entitled to an order absolute, *valeat quantum*. *Baker v. Tynte*, 29 Law J. Rep. (N.S.) Q.B. 233.

It is doubtful whether a mining company formed on the cost-book principle is a public company within the 1 & 2 Vict. c. 110. s. 14, and whether the interest of a registered proprietor in certain shares in a company can be charged by a Judge's order made under that section, if the shares have been sold previously to such order, but no notice of the sale has been given to the pursuer of the mine, and the shares are still remaining in the name of the judgment debtor. In such a case, therefore, the Court confirmed a Judge's order for charging the debtor's interest in such shares, as this Court would not decide such matter on a summary application from which there was no appeal. *Nicholls v. Rosewarne*, 28 Law J. Rep. (N.S.) C.P. 278; 6 Com. B. Rep. N.S. 480.

(C) ASSIGNMENT OF DEBTS.

A owed B money upon a contract. The money was payable by instalments. B gave an order upon A for payment of a portion of such money to C. A, at the request in writing of B, made two payments under the order to C, but refused to be personally bound by the terms of it. B became insolvent, and some money was still due to C under the order. C filed a bill against A and the assignees of B for an account and payment:—Held, that the order operated as an equitable assignment, and that C was entitled to an account of the money then due under it, without regard to any payments made by A. *McGowan v. Smith*, 26 Law J. Rep. (N.S.) Chanc. 8.

The original order was not stamped. It was made an exhibit in the cause, but not produced at the hearing. The signature to it and the contents of it were admitted by the answer:—Held, that it need not be produced at the hearing. *Ibid.*

F and G assigned a debt due to them from M to J and B as a security for a debt due from F and G to J and B. M received notice of this assignment and promised in writing to act upon it. After this F and G sued M at law for the debt. M offered to pay J and B if they would indemnify him, which they declined to do, upon which M paid F and G, taking an indemnity:—Held that M, though he might have no defence at law against the action, was not discharged, but must be decreed to pay to J and B, and that their having refused him an indemnity did not alter the case. *Jones v. Farrell*, 1 De Gex & J. 208.

The course to be pursued by a debtor who receives notice of an equitable assignment of the debt considered. *Ibid.*

(D) DISCHARGE OF DEBTS.

The rector of a parish died insolvent, leaving the rectory-house dilapidated. He was indebted to W, who, with other creditors, received a composition for their debts from the widow and administratrix of the deceased, and they executed a general release by signing their names against the amount stated in the schedule. W succeeded to the rectory, and he made a further claim of 200*l.* against the estate of the insolvent for dilapidations. The insolvent's widow, afterwards, by her will, charged her real and personal estate with the payment of her husband's debts. In a suit for the administration of her estate,

—Held, that the release discharged all the claims of W against the estate of the insolvent, and that the claim for dilapidations was not payable under the will of the testatrix. *Bisett v. Burgess*, 26 Law J. Rep. (N.S.) Chanc. 697; 23 Beav. 278.

(E) DEED OF INSPECTORSHIP.

A deed of inspectorship contained many clauses referring to a division and winding up of the debtor's estate as if he had become bankrupt, but some clauses were not quite consistent with that intention:—Held, on the general construction, that the intention was to deal with the matter as if in bankruptcy. *Kingsford v. Swinford*, 4 Drew. 705.

A deed of inspectorship recited that it had been resolved to prepare such a deed for winding up the estate of the debtor according to the rules in Bankruptcy, and declared that the surplus monies should, after payment of costs and expenses, be divided among creditors as if the debtor had become bankrupt; and generally that the assets should be distributable, and the rights and equities between the creditors and between the creditors and the debtors be the same as if the debtor had been made bankrupt. It provided also that nothing in the deed should prevent the parties to it from having the benefit of any mortgages, claims, charges, or liens on any estate. A creditor who held a policy proved for and received dividends on the whole debt and retained his policy. Held, that he was not entitled to do so, and that he could not be allowed to sue the debtor for breach of covenant in not paying further premiums, the construction of the deed shewing on the whole the intention of the parties that they were to deal with each other as if the matter were in bankruptcy. *Ibid*.

(F) ASSIGNMENT TO CARRY ON TRADE FOR BENEFIT OF CREDITORS.

S, by deed of arrangement for the benefit of his creditors, assigned all his estate real and personal to A B, C D, E F and G H, of the second part, as trustees, upon trust to stand possessed of the property, to collect debts, to carry on the business under the name of the S Iron Company, to sell iron, and with power to take new leases and erect new buildings; to pay all the charges incurred in carrying on the business, and to divide the net residue of the profits rateably among the creditors, parties of the third part. There was a resulting trust in favour of S. The deed contained a provision for the resignation of trustees and the appointment of new trustees, and also a clause that a majority of the creditors at a meeting might alter the trusts of the deed, or direct the works to be discontinued. All the trustees were creditors, and executed the deed as such, as parties of the third part. The plaintiff supplied goods to the S Iron Company, and bills of exchange drawn by him on the company were accepted by A B, one of the trustees (who was authorized to accept bills,) thus, "Per proc. S. Iron Company, A B." C D never acted as trustee. E F acted for a short time, and then resigned, and his resignation was effected pursuant to the deed long before the bills were accepted. The plaintiff sued C D and E F on the bills of exchange:—Held, by *Coleridge, J.*, *Erle, J.* and *Crompton, J.*, affirming the judgment of the Court below (25 Law J. Rep. (N.S.) C.P. 277; 18 Com. B. Rep. 617), that the trustees were merely agents and

managers for the creditors, and that all the creditors who executed the deed were liable as partners in the S Iron Company, since the deed was not for the purpose of winding up the business, but contemplated the carrying it on indefinitely, and the creditors were to share the net profits among them: consequently, that the defendants were liable as partners in the firm, being parties to the deed as creditors—Held, contra, by *Martin, B.*, *Bramwell, B.* and *Watson, B.*, that the persons parties to the deed as creditors were not liable as partners to the S Iron Company, and that the S Iron Company was composed of the trustees only: consequently, that as the defendants, or at least as the defendant E F, had ceased to be trustee at the time the bills were accepted, the action could not be maintained. *Hickman v. Cox* (Ex. Ch.), 27 Law J. Rep. (N.S.) C.P. 129; 3 Com. B. Rep. (N.S.) 523, 528.

(G) OFFER OF COMPOSITION.

An offer of composition to be effectual under section 230. of the Bankrupt Act (12 & 13 Vict. c. 108.) must be made to all the creditors, and not confined to nine-tenths in number and value of the creditors who agree to accept the same. Per *Bramwell, B.*—The offer must be to pay in money, not by bills. *Taylor v. Pearce*, 26 Law J. Rep. (N.S.) Exch. 371; 2 Hurl. & N. 36.

(H) COMPOSITION AGREEMENTS.

It is a general principle that when parties enter into any agreement, and the understanding is, that it is to be reduced into writing, or if it is already in a written form, that it is to be signed before it is acted upon, or is to take effect; it is not binding upon them until it is so written or signed. And, hence, although an agreement by less than the whole number of a party's creditors to accept a composition may be binding upon them—*Norman v. Thompson*; yet, if the agreement into which they enter is to sign a composition deed, those who do not execute the deed may not be bound by the agreement; at all events, if it appears to have been understood that the agreement was not *per se* to have any effect, and that the creditors were to be bound only by the deed. And, in such a case, though in a plea alleging that the plaintiff and divers other creditors agreed to accept the composition, it might be sufficient to shew that the plaintiff and one other creditor so agreed, the allegation that they agreed cannot be supported by proof that the plaintiff agreed to sign the deed, provided that others signed it; even although, on the understanding that he would sign it, the rest refusing so to do. *Boyd v. Hind*, 25 Law J. Rep. (N.S.) 246: (in error) 1 Hurl. & N. 988.

Quære—if such other creditor would be bound by the deed under such circumstances. *Ibid*.

Semble—it would be in the nature of an escrow; and, at all events, as regarded those who did not sign it, the transaction would be *in fieri*. *Ibid*.

The defendant being unable to pay his debts, an agreement for a composition with his creditors was prepared, by the terms of which each of the undersigned creditors, in consideration of the agreement therein contained on the part of the others, agreed with the others, and with the defendant, to accept a composition of 10s. in the pound. Some creditors having signed it, the plaintiff, who was a creditor, said

to D, the defendant's agent, that he would not sign it until L, another creditor, had signed it. D thereupon induced L to sign the paper, but the plaintiff refused to sign it notwithstanding:—Held, that a mere promise by the plaintiff to the defendant that he would sign it if L signed, did not prevent the plaintiff from suing the defendant for his original debt; nor was there any defence to the action, even if it was to be assumed that D, as the plaintiff's agent, and by his authority, induced L to sign the document, on the faith that the plaintiff would afterwards sign it, since the paper, in express terms, purported to be an agreement between those creditors only who signed, consequently that L, by signing the document, entered into no agreement with the plaintiff, who had not signed. The plaintiff, however, on the above assumption, that D was his agent, might be liable to an action for a breach of the promise to sign the composition deed. *Buller v. Rhodes* questioned. *Boyd v. Hind* (Ex. Ch.), 26 Law J. Rep. (n.s.) Exch. 164; 1 Hurl. & N. 938.

(I) COMPOSITION DEEDS.

(a) When Binding or Invalid.

An agreement was come to between L and his creditors for a composition of 12s. in the pound, to be secured by the promissory notes of L for 2s. of the amount, and the remaining 10s. by bills of exchange, accepted by B; who, by agreement with L, was to have the counter security of an assignment of L's effects. Afterwards, a composition deed was duly made and executed between and by L and B and six-sevenths in number and value of L's creditors, for carrying out the arrangement that had been agreed upon, and in accordance with the deed each of the creditors received three bills accepted by B, each for 3s. 4d. in the pound of their respective debts, and promissory notes of the plaintiff for 2s. in the pound. The first acceptance when due was not paid by B until after an action had been brought against him by W, one of the creditors. W also sued L for the balance of his original debt, after deducting the amount of the dishonoured bill. L pleaded to the action, but afterwards withdrew his pleas, and allowed judgment by consent to pass against him. By a subsequent deed, L assigned the whole of his stock and effects to B to secure the sums already paid by B, or which he might afterwards have to pay in respect of the said bills accepted by him. L was afterwards adjudged a bankrupt:—Held, in an action by L to recover his goods and effects from the assignees in bankruptcy, first, that nothing appeared to make the composition deed void; and although it suspended the right of the creditors to the original debts until default made in payment of one of the bills or promissory notes, yet upon default, the creditor's right to sue revived, and that, allowing judgment to pass by consent in the action by W, was an acknowledgment of the debt, by which L was conclusively bound; and that the original debt, therefore, constituted a good petitioning creditor's debt. Secondly, that the assignment made of L's effects, as a counter-security to B, could not be considered as one for which L had received an equivalent, and was therefore an act of bankruptcy. *Leake v. Young*, 25 Law J. Rep. (n.s.) Q.B. 266; 5 E. & B. 955.

Where a deed of composition with and assignment in trust for creditors was construed to include a re-

lease of a debt guaranteed, it was held in an action against the surety, to be no answer, either on legal or equitable grounds, to a plea setting out the release, that the plaintiffs executed, not as creditors, but as trustees, and solely for the purpose of accepting and declaring the trusts, and not with the intention of releasing the debt; that they did not sign the list of creditors; and that if the deed operated to release the debt, it was executed by mistake and in ignorance that such would be its legal effect. *Teed v. Johnson*, 25 Law J. Rep. (n.s.) Exch. 110; 11 Exch. Rep. 840.

To a declaration containing the common money counts, the defendants pleaded that they were traders, and that they had entered into a composition deed, which was signed by and on behalf of six-sevenths in number and value of their creditors, within the meaning of the Bankrupt Law Consolidation Act, 1849; that the plaintiff was a creditor, and did not sign the deed. The deed was set out in the plea, and by it the defendants assigned all their joint and separate real and personal estate to trustees, upon trust, after paying expenses, &c., to pay and divide all the remainder of the said trust monies unto and among themselves and all the other creditors, and upon further trust to pay the ultimate surplus, if any, and also the dividends of such of the creditors as should not execute the deed, to the defendants. The plaintiff replied, that there were separate creditors of the defendants to the amount of more than 10l. The defendants traversed and demurred to the replication:—Held, that the deed set out in the plea was invalid, on the grounds, first, that it directed the distribution of the joint and separate estate of the defendants amongst the joint creditors only; and, secondly, because the estate ought to be divided amongst those who did not sign as well as amongst those who did sign the deed. *Leonard v. Sheard*, 28 Law J. Rep. (n.s.) Q.B. 183; 1 E. & E. 667.

A creditor assigned property by deed to trustees upon trust to sell and apply the clear proceeds in payment of the debts owing by him to such of his creditors as should, before a certain day, execute the deed, and the surplus if any to the assignor; and the deed contained a release by the creditors. The assignor and the trustees, who were also creditors, executed the deed at once. No other creditor executed it before the stipulated day, but notice of the deed was given to them all, and they forebore to sue, and fifteen years afterwards some were permitted to execute—the trustees meanwhile having taken possession of and sold part of the property:—Held, that the deed was binding on the assignor, and that the creditors were entitled to have the trusts of it carried into effect. *Nicholson v. Tutin*, 2 Kay & J. 18.

A creditors' deed contained a covenant on the part of the creditors to indemnify the inspectors:—Held, that the creditors who had not executed the deed, but had come in or acceded to the arrangements thereby made, were bound by the covenant. *Cheesborough v. Wright* (No. 2), 28 Beav. 283.

Composition arrangements with creditors form an exception to the rule that an agreement to accept part of a debt in discharge of the whole, is no legal satisfaction of the remainder. *Pleger v. Browne*, 28 Beav. 381.

If upon a composition between a man and his creditors, one accepts the composition and in addition agrees that the debtor shall keep up a policy on his

life for the ultimate payment of the remainder of the debt, such an agreement is void unless every creditor assents, and the policy belongs to the representatives of the debtor. *Pfeger v. Browne*, 28 Beav. 391.

(b) *What Creditors entitled to Benefit of.*

A debtor by deed conveyed real and personal property to trustees upon trust for the benefit of creditors who should sign the deed, with a proviso that such creditors as should not execute or assent in writing to take the benefit of the deed, on or before the 22nd of July then next, or within such time, not exceeding thirty days, as the trustees should appoint, should be excluded from all benefit under the deed. At the time of the execution of the deed by the debtor, R, a creditor to a considerable amount, was in America; but on the 22nd of July W, as his attorney, wrote to the trustees, assenting to the deed on his behalf. On the 15th of August W received a power of attorney from R, who was still in America, authorizing him to execute the deed for him; and upon W claiming to execute the deed accordingly, the trustees and the other creditors refused to allow him to do so:—Held, that it was the duty of the trustees, under the circumstances, to have enlarged the time as soon as they had notice of R's claim; and that R was entitled to execute and have the benefit of the deed. *Raworth v. Parker*, 25 Law J. Rep. (N.S.) Chanc. 117; 2 Kay & J. 163.

Certain trust-deeds were prepared for the benefit of creditors, and a time was fixed within which the creditors were to execute or be excluded from the benefit of such deeds, the trustees having discretion to allow creditors to sign after the period fixed. A judgment creditor relying upon his claim as paramount to the deeds, declined to execute during twenty-two years. The judgment subsequently turned out to be invalid, and he now petitioned the Court, in a suit instituted for carrying into effect the trusts of the deeds, to be allowed the benefit of such deeds, and offered to execute them:—Held, that there was no such case of mistake or misapprehension as to constitute an equity, and the petition was dismissed. *Brandling v. Plummer*, 27 Law J. Rep. (N.S.) Chanc. 188.

Creditors who sign or assent to a composition-deed are entitled to such dividends as are made previous to the insolvency of the debtor. *Biron v. Mount*, 27 Law J. Rep. (N.S.) Chanc. 191; 24 Beav. 642.

Creditors who assent to a composition-deed will be allowed to sign and take the benefit of the deed after the insolvency of the debtor. *Ibid.*

If creditors neglect or refuse to execute or claim the benefit of a composition-deed, they will not be allowed to come in after the insolvency of the debtor; but any dividends which they might have entitled themselves to before the insolvency will be paid to the provisional assignee, and they will be left to such legal remedies as they may have. *Ibid.*

A creditors' deed was executed in 1849. The plaintiff, a creditor who had executed the deed, insisted on an alleged settled account and refused to verify his claim as required by the deed. A dividend was paid the other creditors in 1854, and in 1856 the plaintiff instituted a suit for the performance of the trusts of the creditors' deed. There being no valid settled account, the Court held that the plaintiff was entitled to the benefit of the deed, but only on the terms of

not disturbing any dividend already made. *Field v. Cook*, 23 Beav. 600.

(c) *Order of Payment of Debts.*

The firm of J F & Sons, as agents of the plaintiffs, supplied goods to the firm of S & W, upon the footing of the latter becoming debtors to the plaintiffs. They also supplied the same firm with other goods on their own behalf. They made no distinction in their accounts between the goods supplied by them as agents of the plaintiffs and those which they supplied on their own behalf. E F was a partner in both firms:—Held, that communications made by the firm of J F & Sons to the plaintiffs, admitting a large debt to be due from the firm of S & W, and undertaking that E F would use his influence as a partner with S & W to secure its reduction, upon the faith of which communication the plaintiffs forbore to sue S & W, precluded that firm from treating their debt to the plaintiffs as one which had been liquidated by the appropriation of the payments made by them to the firm of J F & Sons in order of date. *Wickham v. Wickham*, 2 Kay & J. 478.

Held, also that under a deed of inspection by which it was agreed that the several estates of the two firms should be administered upon the principles and according to the rules and practice of the bankrupt law, and as if acts of bankruptcy had been committed by the members of such firms respectively, the plaintiffs were entitled to prove for the debts of S & W both against that firm and against the firm of J F & Sons; and that this right was not affected by the circumstance that E F had survived the last of his partners in the firm of S & W upwards of two months at the time when the act of bankruptcy was taken to have been committed. *Ibid.*

DECEIT.

[See ACTION (A) (i); *Collins v. Cave*, *ante*, page 6—FRAUD AND MISREPRESENTATION.]

DEED.

[See DEBTOR AND CREDITOR; Composition Deeds—RELEASE—WATER; *Rawston v. Taylor*—Certain unnecessary Forms in the Framing of Deeds in Scotland abolished by 19 & 20 Vict. c. 89.]

(A) EXECUTION.

(a) *Incomplete Delivery.*

(b) *By Principal on faith that Surety would Execute.*

(B) VALIDITY.

(a) *Deed Substituted for one Tainted with Illegality.*

(b) *Voluntary and Fraudulent Conveyance.*

(C) CONSTRUCTION AND OPERATION.

(a) *In general.*

(b) *What Property passes—“Appurtenances.”*

(c) *Recitals.*

(d) *Parcels—False demonstration.*

(D) REGISTRATION.

(E) REFORMING FOR MISTAKE.

(A) EXECUTION.

(a) *Incomplete Delivery.*

[See CONTRACT (C) (k) *Furness v. Meek*, ante, p. 127.

A lease of premises from the plaintiff to P, containing the usual words "signed, sealed and delivered," was executed by both parties, pursuant to a previous agreement to let, in which the annual rent was stated to be 55*l.*, and by which it was agreed that P should pay 100*l.* for the plaintiff's goodwill and fixtures, and that the lease should not be delivered, but remain in the plaintiff's possession until the whole of the 100*l.* was paid. P paid 50*l.* of that sum and entered into possession and carried on the business of a baker, the plaintiff keeping possession of the lease. P became bankrupt without paying the remaining 50*l.*, the lease still remaining with the plaintiff. The defendant became assignee in bankruptcy.—Held, in an action for use and occupation (it appearing that the defendant had accepted the tenancy), that the evidence warranted the jury in finding that there had been no delivery of the deed so as to operate as a lease, and that until the payment of the remaining 55*l.* only a tenancy from year to year existed, and, therefore, that the defendant was liable for rent in an action for use and occupation. *Gudgen v. Beeset*, 26 Law J. Rep. (N.S.) Q.B. 36; 6 E. & B. 986.

In an action upon an apprenticeship deed, by the master against the father, the declaration stated that the indenture of apprenticeship was sealed by the defendant and his son, and that during the term the son absented himself, and refused to continue in the service. Pleas, that the indenture was not the deed of the defendant; that it was not the deed of the plaintiff; that it had not been executed by the plaintiff; and that it had been executed by the defendant and delivered to one W only as an escrow. It appeared that, when the defendant executed the deed at the office of W, the attorney who prepared it (the plaintiff not being present), he requested that the plaintiff should not be allowed to execute it until an arrangement was made as to expenses; and W made a memorandum on the deed to that effect, and acted upon it, declining to allow plaintiff to execute it when he called to do so, and he never had executed it.—Held, that, though the jury found the defendant intended that the deed should bind him, and delivered it as a complete deed, the evidence shewed that the deed was delivered as an escrow, and that the action could not be maintained. *Millership v. Brookes*, 29 Law J. Rep. (N.S.) Exch. 369; 5 Hurl. & N. 797.

(b) *By Principal on Faith that Surety would Execute.*

By an indenture expressed to be made between G of the first part, the defendant and two others, as sureties of G, of the second part, and the plaintiffs of the third part, G, the defendant, and the two other sureties, jointly and severally covenanted to repay the plaintiffs monies advanced by them to G. The defendant, having been sued for a breach of his covenant, pleaded that he executed the indenture in the faith that P (one of the sureties) should join therein and execute the same; and that P never did join therein or execute the same.—Held, a bad

plea. *Cumberlege v. Lawson*, 26 Law J. Rep. (N.S.) C.P. 120; 1 Com. B. Rep. N.S. 709.

(B) VALIDITY.

(a) *Deed substituted for one Tainted with Illegality.*

Where, upon an advance of money, a security has been taken, which is tainted with usury or other illegality, and afterwards another security is taken for the same advance, untainted with the illegality, and obviating any necessity of resorting to the former one for the recovery of the money, such substituted security is valid; and the money really advanced can be recovered thereon. *Attorney General v. Hollingworth*, 27 Law J. Rep. (N.S.) Exch. 102; 2 Hurl. & N. 416.

It is questionable whether the old law as to usury applied to a bare transfer of stock by a proposed lender (the proposed borrower being under no obligation to sell it and convert it into money), it being of the essence of usury that there should be an advance of money. Where, therefore, there had been such a transfer of stock, and a covenant by a transferee to re-transfer it on request, and pay the dividends in the mean time, a bond being also taken for the then value of the stock and interest,—*Scoble* (per Pollock, C.B. and Martin, B.), that this did not amount to usury; and held, by the whole Court, that a subsequent security by way of mortgage and covenant to re-transfer the stock on request, and in the mean time to pay the dividends, was valid. *Ibid.*

(b) *Voluntary and Fraudulent Conveyance.*

There may be a valid provision in a marriage settlement for an illegitimate child of the settlor. A widow, who had a child by her first husband before her marriage with him, entered into marriage articles with a second husband, the settlement reciting that she was seized in fee of certain lands, and that on the treaty for the intended marriage it was agreed that the lands, &c. should be settled as therein mentioned, and then the property was settled to her separate use for life, remainder to the use of the husband for life, remainder in fee to the child, described as her son by her late husband begotten. The husband and wife afterwards joined in mortgaging the property, and the mortgagees, under powers of sale, had sold. In ejectment by the illegitimate child against the purchasers.—Held, that the limitation in favour of the plaintiff was not void as voluntary and fraudulent within the statute 27 Eliz. c. 4, and that he was entitled to recover. *Dickenson v. Wright*; *The same v. Levers*, 29 Law J. Rep. (N.S.) Exch. 150; 5 Hurl. & N. 401.

Held, also, that the wife's receipt of rent on one or two occasions was sufficient proof of her seisin. *Ibid.*

A deed may be void as against creditors, though full consideration is given for it, if it be in such a form as to defeat the creditors and be executed with that intention. *Bott v. Smith*, 21 Beav. 511.

In June 1854 the plaintiff recovered a judgment against E S as overseer of a parish for 238*l.*, and three days after an order nisi issued for an attachment. In September following E S conveyed all his estate and effects to his son in consideration of his lodging, maintaining and clothing him for life, and paying 75*l.* on his death and indemnifying him against a mortgage debt on the property, and which

he secured by bond. The full consideration was not given, but the difference was not great. The Court being of opinion that the deeds were made with a view of defeating the plaintiff's execution, set aside the transaction as against the creditors. *Ibid.*

Form of decree on setting aside deeds partially, viz. as against creditors only. *Ibid.*

(C) CONSTRUCTION AND OPERATION.

(a) *In general.*

By a trust deed the trustees were empowered by sale or mortgage of the trust estates to pay specified debts, and secondly, the mortgages on the trust estates, with a direction "out of the rents or any other monies held by them upon the trusts of the deed" to pay an annuity to A until the mortgages should be paid off:—Held, upon the import of the whole instrument that "other monies" had reference to those *ejusdem generis*, and that the annuity was payable out of income only. *Clifford v. Arundell*, 1 De Gex, F. & J. 307.

Limitation in a deed to trustees "and their heirs" (without words restricting it to the lives of preceding tenants for life) upon trust to preserve contingent remainders:—Held, that although the omission of such words was perhaps probably an oversight, yet, the instrument being a deed, the Court could not construe the limitation as restricted, notwithstanding an estate in fee was a larger estate than was required for the purposes of the trust, and the limitation was repeated in a subsequent part of the deed, and was followed by a term of years in a third party upon trust to raise portions and by a power for the tenants for life to grant leases. *Lewis v. Rees*, 3 Kay & J. 132.

To justify the Court in restricting such a limitation by deed to an estate *pur autre vie*, it must be shewn that the intention of the parties as manifested by the deed, cannot be carried into effect unless the limitation be so restricted. *Ibid.*

Distinction in this respect between deeds and wills. In the latter a greater latitude is allowed in the construction of legal terms, the testator being supposed *inops consilii*. *Ibid.*

In 1844, A B agreed to give to his creditor a security on the debt then due "or which might thereafter become due to him" from a company. This was carried into effect by a deed in 1845, which, after reciting the agreement, assigned all sums claimed to be due and which he might thereafter recover:—Held, that the deed passed all sums due at its date, but nothing subsequent. *Scott v. Scott*, 24 Beav. 263.

Affidavits held inadmissible to control the operation of a deed. *Cowlisham v. Hardy*, 25 Beav. 169.

(b) *What Property passes—"Appurtenances."*

H and P, being seised of undivided moieties in the N and N V estates, entered into a deed of partition, by which the N V estate was conveyed to H, and the N estate to P. A way had existed for many years, leading from a farm on the N estate, occupied by the plaintiff, over his land, and over land occupied by the defendant on the N V estate. The way had been used by the occupiers of the plaintiff's farm before and after January 1820, in which month the deed of partition was executed. By the deed H conveyed his undivided moiety in

the N estate to P, and as part of it the farm occupied by the plaintiff, with others, "with their and every of their rights, members, easements and appurtenances." P also conveyed his undivided moiety in the N V estate to H. The plaintiff and his predecessors used the way up to January 1859, when it was obstructed by the defendant:—Held, in an action brought by the plaintiff in respect of such obstruction, that the way in question did not pass under the words used in the deed of partition, and that the plaintiff could not recover. *Worthington v. Gimson*, 29 Law J. Rep. (N.S.) Q.B. 116.

(c) *Recitals.*

An indenture between the plaintiff and the defendant, after reciting that the defendant had commenced an action against the plaintiff for the recovery of 100*l.*, and that the plaintiff, being desirous of staying such action and securing the payment, had agreed to convey certain premises to the defendant, upon trust, &c., further recited that it had been also agreed that the defendant should be at liberty to sign judgment in the said action, but that no execution should issue thereon until a certain period. It was then witnessed, that in pursuance of the said recited agreement the plaintiff conveyed, &c.:—Held, that the further recital amounted to a covenant by the defendant not to issue execution until the certain period had arrived. *Parrell v. Hilditch*, 28 Law J. Rep. (N.S.) C.P. 221; 5 Com. B. Rep. N.S. 840.

S, being seised in fee, mortgaged four closes of land in D to N in fee. S afterwards, in 1809, devised to her children all the seams of coal lying under her lands in D, which she had let to W for a long term of years, at 105*l.* rent; and devised all her other lands, except the said seams of coal, to A, B and W in fee in trust to sell. In 1812 S demised to B and W all those two seams of coal under four closes in D and other closes for fifty years, from the 1st of January 1813, at a rent of 105*l.* S died in 1814, and B and W paid the 105*l.* rent to the children of S. In 1815, A, B and W and the assignee of N, by a deed, which recited that the former had put up the real estate of S to sale, and that K was the highest bidder for certain lots (comprising the four closes in D), except the seams of coal under the said closes, granted, bargained and sold to K in fee "all the four closes of land before mentioned, with all houses, edifices, buildings, gardens, yards, paths, watercourses, ditches, quarries, woods," &c., "other than and save and except and reserved to S and W, during the term of thirty years to be computed from the 1st of January then last, all the mines and beds of coal lying and being within and under those four closes thereinbefore described and therein intended to be granted and conveyed." The defendants, who took under K, claimed all the coal under the four closes, except the two seams demised to B and W:—Held, that none of the coal under the four closes passed to K by the deed. *Denison v. Holiday* (Ex. Ch.), 28 Law J. Rep. (N.S.) Exch. 25; 8 Hurl. & N. 670.

General words in the operative part of a deed controlled by the recitals. *Childers v. Eardley*, 28 Beav. 648.

A mother had an exclusive power of appointment over a fund in favour of her children, and which in

default was divisible equally, the shares of the daughters to vest at twenty-one or marriage. She had a son and a daughter, and she appointed 10,000*l.* to her son on his marriage. His marriage settlement recited that he was entitled to the 10,000*l.*, and was also contingently entitled to the other moiety in the event of his sister dying unmarried under twenty-one; and it recited an agreement to settle the 10,000*l.* and "all other his part, share and interest, as well vested as contingent," in the trust funds. He then assigned his interest in the same terms. The daughter attained twenty-one and died; and the mother afterwards appointed the residue of the fund to her son:—Held, that such residue did not pass under his settlement. *Ibid.*

(d) *Parcels—False Demonstratio.*

A lease of land, described by admeasurement, "with the houses now erected, or being erected thereon," (it being found as a fact that at the time the lease was executed the foundations of the houses had been laid), is in effect the same as though the lease had been of a specific house; and, though the dimensions considerably exceeded those stated, the Court held, that it was merely *falsa demonstratio*. *Manning v. Fitzgerald*, 29 Law J. Rep. (N.S.) Exch. 24.

(D) REGISTRATION.

The form of conveyance of land to the Ecclesiastical Commissioners under the Church Building Acts given by the 3 Geo. 4. c. 72. s. 2. is a deed-poll, and by the 8 & 9 Vict. c. 70. s. 24, in order to give validity to any conveyance under the acts, their assent must be testified by affixing their seal thereto; the Registration Act (for Middlesex, 7 Ann. c. 20. ss. 1, 5.) requires the memorial of a deed to be under the hand and seal of one of the grantors, or of one of the grantees, attested by two witnesses, one of them to be one of the witnesses to the execution of the deed. A conveyance to the Commissioners by deed-poll having been executed by the grantor, the seal of the Commissioners was affixed to the deed and to the memorial in the presence of the same two witnesses. The registrar having refused to register the memorial, as insufficiently attested, —Held, on motion for a mandamus, that the attestation of a witness to the execution of the deed by the grantor was necessary to the memorial before the registrar could be called upon to register it. *The Queen v. the Registrars of Deeds for the County of Middlesex*, 28 Law J. Rep. (N.S.) Q.B. 77; 1 E. & E. 322.

(E) REFORMING FOR MISTAKE.

A settlement, dated in 1824, gave a power of appointment over lands to A and B, by deed and a power of appointment to B by deed or will. The donees of the power by a deed, dated in 1825, executed for the purpose of rectifying a mistaken omission of certain limitations in the settlement, made an appointment, and reserved a power of revocation and of new appointment to B by deed or will. B, by will, dated in 1827, exercised the power of appointment in favour of A. After this it was discovered that a mistake had been made in the deed of 1825, by the omission of certain limitations. Instructions were given to a solicitor to prepare a

deed to rectify the same, but he was not informed of the existence of the will. A deed was prepared and executed in 1840, which, after exercising the power of revocation, contained the limitations omitted in the deed of 1825, and (with the exception of certain limitations to issue rendered needless by the age of the wife, B) repeated the limitations of the deed of 1824, including among them the power to appoint by will. B did not republish her will. The Master of the Rolls held that the deed of 1840 rendered the appointment by the will of 1827 inoperative. Upon an appeal from this decree, the Lords Justices gave leave to amend the bill, and to produce evidence as to the error in the preparation of the deed of 1840, and ultimately held that the deed of 1840 should be rectified, so far as it went beyond the correction intended, and beyond the intention of the parties, and therefore established the will. *Walker v. Armstrong*, 25 Law J. Rep. (N.S.) Chanc. 402, 788; 21 Beav. 284.

A B, under the mistaken notion that he was, as heir-at-law of his father, entitled to shares in a joint-stock company as realty, executed a deed, by which he joined in indemnifying the directors in respect of certain advances made by them. It turned out upon inquiry that the shares were personal estate, and A B filed his bill to be relieved from the deed, and the Court made a decree in his favour, which decree was upon appeal affirmed. *Broughton v. Hutt*, 28 Law J. Rep. (N.S.) Chanc. 167; 3 De Gex & J. 501.

For the purpose of reforming an instrument clear and unambiguous evidence must be produced not merely shewing a mistake, but shewing the deed in its proposed state to be in conformity with the intentions of all the parties at the very time of its execution; and a denial by one of the parties that the deed as it stands was not according to his intentions at the time ought to have considerable weight. *Fowler v. Fowler*, 4 De Gex & J. 250.

A deed of compromise between a mother and son recited a letter of the mother's (who was a widow) written before the son's marriage, stating that by her will her residuary estate would be divided equally between her four sons. The deed also recited, that the mother was seised or had power to dispose of real estate, the particulars whereof were specified in a schedule to the deed. It further recited disputes as to the effect of the ante-nuptial letter, and that to end them the arrangement was entered into effected by the deed. By the witnessing part, the mother covenanted that her executors should at her death pay to the son such a sum as should be found to be the amount to which he would have been entitled if her real and personal estate had consisted of the particulars specified in the schedule, and she had died without altering her will as it stood when the letter was written. The descriptions in the schedule comprehended not only property of which she could dispose, but other property of which she was tenant for life only, and which was intermixed with the former, and this was noticed in the schedule:—Held, first, that there was not sufficient controlling context to restrict the covenant to the value of her own property; secondly, that without conclusive evidence of an intention, on the part of both parties, at the execution of the deed to enter into some other contract, it will not be reformed thirdly, that until the

amount to be paid was ascertained there was no debt carrying interest. *Ibid.*

DEFAMATION.

[See BRAWLING—LIBEL—SLANDER.]

DESCENT.

An ante-nuptial son, born in Scotland, of Scotch parents, who was legitimized according to the law of Scotland by the subsequent marriage of his parents, settled in England and purchased freehold property. The son died intestate and unmarried, leaving his father surviving him:—Held, that the father was incapable, under the act, 3 & 4 Will. 4. c. 106, of inheriting real estate from his son, although that son was legitimate by the law of England as to his personal status. The property, therefore, escheated to the Crown. *In re Don's Estate*, 27 Law J. Rep. (n.s.) Chanc. 98; 4 Beav. 194.

The right of a presumptive heir to the rents which accrue due between the death of an ancestor and the birth of a posthumous heir extends to all rents which have accrued due in the interval, whether actually received or not, and whether in respect of fee-simple or entailed estates. *Richards v. Richards*, 29 Law J. Rep. (n.s.) Chanc. 836; John. 754.

DETINUE.

(A) WHEN MAINTAINABLE.

- (a) *For Title Deeds.*
- (b) *For Deeds lost by an Attorney.*
- (c) *Gift of Specialty without Legal Transfer.*

(B) PAYMENT INTO COURT.

(C) PLEADING: GENERAL ISSUE.

(A) WHEN MAINTAINABLE.

(a) *For Title Deeds.*

The general rule of law being, that the party who has a freehold estate has a right to the title-deeds, a mortgagee in fee, with whom the mortgagor deposited the counterfeited of a conveyance to himself (the mortgage purporting to convey the deeds), is entitled to recover the genuine deed from a third party, with whom the mortgagor had subsequently deposited it as security for advances. *Newton v. Beck*, 27 Law J. Rep. (n.s.) Exch. 272; 3 Hurl. & N. 220.

Under the old Bankruptcy Law, 5 Geo. 2. c. 30, a commission of bankruptcy issued against a person entitled in remainder to real property, and an assignee was appointed; but neither under that act nor under the 6 Geo. 4. c. 16. was any bargain and sale of the future real estate executed by the Commissioners. In 1844, after the death of the assignee, the estate vested in the bankrupt in possession, and he afterwards (before the Bankruptcy Act, 1849) conveyed it to the defendants. In 1853 the bankrupt, without having obtained his certificate, died. No assignee had been re-appointed since the estate came to him until 1859, when the plaintiffs were appointed assignees, and they, having recovered the

property in ejectment, demanded the deeds, and on refusal brought detinue against the defendants, who pleaded, denying the plaintiffs' property and also the Statute of Limitations:—Held, that the action was maintainable, and that there was no defence under the statute. *Plant v. Cotterell*, 29 Law J. Rep. (n.s.) Exch. 198; 5 Hurl. & N. 430.

(b) *For Deeds lost by an Attorney.*

If an attorney who has received his client's deed to keep for him loses it, and nothing appears respecting the cause of the loss, he is liable to an action of detinue on the part of his client. *Reeve v. Palmer* (Ex. Ch.), 28 Law J. Rep. (n.s.) C.P. 168; 5 Com. B. Rep. N.8. 91: affirming the judgment below, 27 Law J. Rep. (n.s.) C.P. 237; 5 Com. B. Rep. 84.

(c) *Gift of Specialty without Legal Transfer.*

A gift of a specialty may be good in law, although there is no legal transfer of the debt or property of which it is the security. *Barton v. Gainer*, 27 Law J. Rep. (n.s.) Exch. 390; 3 Hurl. & N. 387.

In detinue, by executors for railway debentures, which the defendant alleged to have been given to her by the testator, although no legal transfer had been executed, the jury, having found that he had given her the debentures, a verdict entered for the defendant was sustained. *Ibid.*

(B) PAYMENT INTO COURT.

To an action for detaining the plaintiff's goods and claiming their return or their value, it is not competent for the defendant to pay money into court. *Allan v. Dunn*, 26 Law J. Rep. (n.s.) Exch. 185; 1 Hurl. & N. 572.

(C) PLEADING: GENERAL ISSUE.

In an action of detinue the defence that the articles claimed were delivered by the defendant to a third person, with the plaintiff's consent, may be given in evidence under *non detinet*. *Anderson v. Smith*, 29 Law J. Rep. (n.s.) Exch. 460.

DEVISE.

[See LEGACY—WILL.]

(A) CONSTRUCTION OF, IN GENERAL.

- (a) *General Limitations of Estates.*
- (b) *Condition.*
- (c) *Period of Vesting.*
- (d) *Residuary Devise.*
- (e) *Separate Estate of Wife.*
- (f) *Power of Jointuring.*
- (g) *Contingent Remainders.*
- (h) *Implication of Cross-remainders.*
- (i) *Meaning of Words.*
 - (1) "Dying before his Mother."
 - (2) "Heirs."
 - (3) "Heirs Male of the Body."
 - (4) "Issue."
 - (5) "Leaving Issue."
 - (6) "Likewise."
 - (7) "Living."
 - (8) "Or."
 - (9) "Residuary Legatee."
 - (10) "Use and Occupation."
- (k) *Who take as Devisees.*

(B) WHAT PROPERTY PASSES BY THE DEVISE.

- (a) *In general.*
- (b) *Leaseholds.*
- (c) *Legal Estate in Mortgage.*
- (d) *Contingent Interest.*
- (e) *Reversion.*
- (f) *Parcel or no Parcel.*

(C) PARTICULAR LIMITATIONS.

- (a) *Legal or Equitable.*
- (b) *Trust or Beneficial.*
- (c) *Joint Tenancy or Tenancy in Common.*
- (d) *Fee Simple.*
- (e) *Estate Tail.*
- (f) *Estate for Life.*
- (g) *Vested or Contingent Estate.*
- (h) *Clause of Forfeiture.*
- (i) *Shifting Clause.*
- (k) *Executory Devise.*

(D) RIGHT OF PRE-EMPTION.

(E) CHARGES.

(F) DEVISE FOR PAYMENT OF DEBTS.

(G) VOID DEVISE.

- (a) *Remoteness.*
- (b) *Lapse.*
- (c) *Uncertainty.*
- (d) *Trust for Accumulation.*

(H) REVOCATION OF.

(A) CONSTRUCTION OF, IN GENERAL.

(a) *General Limitations of Estates.*

A testatrix devised to trustees certain freehold premises in trust to receive the rents, and after paying thereout all proper outgoings, and applying thereout, if they thought fit, any money towards the maintenance of F S, to let the residue accumulate until F S should attain twenty-one, and then to pay such accumulations to him; but if he should die under such age, without leaving issue living at his decease, then such accumulations should be applied for the benefit of the person to whom, and in the like manner and form as, the premises were limited in the like event, and when F S should have attained twenty-one, then the trustees were to stand seised of the premises in trust for him in fee; but if he should not leave any issue living at his decease, then the trustees should stand seised of the premises in trust for A S in fee; and if A S should not leave any issue living at her decease, then over. F S attained twenty-one, and died without ever having had issue:—Held, on the construction of the will, that the premises vested in F S in fee on his attaining twenty-one subject to be divested in the event of his dying without issue, which event having happened the limitation over in favour of A S took effect. *Smith v. Spencer*, 6 De Gex, M. & G. 681.

A devise of all the testator's residuary real estate to trustees in fee, upon trust to pay the rents to A for life, and after his death upon trust to convey the same residuary real estate to such person as should answer the description of the testator's heir-at-law, breaks the descent of real estate which had descended to the testator *ex parte maternâ*, and vests it in his heir-at-law as equitable devisee. *Davis v. Kirk*, 2 Kay & J. 391.

Lands, parcel of the Duchy of Cornwall, and governed by the custom of that Duchy, the tenure of

which was originally a holding or convention from seven years to seven years, which ultimately grew into a holding to the tenant and his heirs and assigns, subject to the payment of a fixed fine every seven years, under a penalty of forfeiture, no surrender to the uses of a will being required,—Held, to pass by a general devise made previously to the act, 55 Geo. 3. c. 192. *Ustick v. Peters*, 4 Kay & J. 437.

And the circumstance of such general devise being followed by a devise of all testator's Duchy lands to one for life,—Held, not to prevent its passing the reversion.

N devised an estate at R to such of the children of J as J should by will appoint, and in default to them equally. By the death of four of J's children J took half the estate as heir of his deceased children. J, by his will, devised all his real estate to his children equally, and he directed that the estate at R, devised by the will of N, over which he might have any power of appointment by will, should not be included or affected by his own will, but should go according to the limitation contained in N's will:—Held, that J's moiety in the R estate passed under the residuary devise in his will, and did not descend to his heir. *Atherton v. Langford*, 25 Beav. 5.

Devise to the children of A, B and C who should be living when the youngest attained twenty-one, with a direction that "the present yearly rents" should be paid to the persons who brought up the children of C:—Held, upon the context, that, until the contingency happened, the rents were to be paid to such persons in trust, not only for the children of C, but of A and B. *Sanders v. Miller*, 25 Beav. 154.

Power of maintenance of "the person for the time being entitled" to the estate:—Held, to include persons "absolutely or presumptively entitled." *Sidney v. Wilmer*, 25 Beav. 260.

There is no case in which the contingent estate of a remainderman has been accelerated for the purpose of giving him a right to rent accrued prior to the time when his estate took effect. Where, therefore, an estate was limited to the children of A born within fifteen years, with remainder to the plaintiff, and A had no child, and the fifteen years had not expired, it was held that the plaintiff had no right to the present rents. *Ibid*.

An estate was devised to trustees for 500 years, with remainder to persons still unborn, with remainder to the plaintiff. The trustees had active duties as to the management of the estate and large discretionary powers, and they were authorized "during the minority of any person absolutely or presumptively entitled" to apply the surplus income for the benefit of such person, accumulating the surplus:—Held, that the plaintiff, who had attained her majority, had no right to any part of the surplus rents accruing prior to her estate being vested in possession. *Ibid*.

The doctrine of *cyprès* is not to be extended. The *cyprès* doctrine is inapplicable when the limitation to unborn children gives them a fee. *Hall v. Pew*, 25 Beav. 335.

A devised property to the children of B in like manner as they were entitled under the "will" of B (deceased),—Held, that A referred to the will and codicils together of B. *Pigott v. Wilder*, 26 Beav. 90.

A father, having eight children, devised his estate to six of them equally. Afterwards the wife's father devised another property unto her children, to be vested at the like times, with the benefit of survivorship and provision for maintenance, and in like manner in all other respects, so far as the nature of the property and the difference of time would permit, as the said children were entitled to the estate of their father under the dispositions and limitations contained in his will:—Held, that the eight children participated in the second devise. *Ibid.*

A testator devised freeholds to two and their heirs as tenants in common, and in case either should die without leaving lawful issue surviving her, then he devised her part "unto the survivor":—Held, that "survivor" was to be read in its ordinary sense, and not in the sense of other. *Greenwood v. Percy*, 26 Beav. 572.

The trustees of a settlement had vested in them a power of leasing during the minority of the beneficial owners, a power of sale and exchange at the request of the tenants for life, and a power to cut timber; but they had no legal estate, except to preserve contingent remainders. The first tenant for life devised his own estates to other trustees in fee to the same uses and subject to like powers as the settled estates stood limited:—Held, that the powers over the devised estates were exercisable by the trustees of the settlement, and not by the trustees of the will. *Taylor v. Miles*, 28 Beav. 411.

Devise to five in fee, to be equally divided between them "if more than one." One died in the testator's life:—Held, that there was no lapse, but that the four survivors took equally. *Sanders v. Ashford*, 28 Beav. 609.

(b) Condition.

A testator by his will settled estates and declared that the same should be forfeited and go over in the event of the party entitled for the time being to possession not repairing a column which he was building, but which he left incomplete at his death. Upon a bill for the administration of the testator's estate, —Held, that the party entitled to possession of the estates was not liable to complete the column, and that no contract could be implied to make the testator's residuary estate liable to the expenses of completing it. *Jolliffe v. Teyford*, 28 Law J. Rep. (n.s.) Chanc. 93; 26 Beav. 227.

Held, though all the questions except those relating to the column and the payment of costs had been settled by agreement between the parties, that the suit remained an administration suit, and that the costs must be paid out of the residuary estate of the testator. *Ibid.*

(c) Period of Vesting.

A devise of land to trustees in fee, upon trust to pay the rents to the testator's daughter for life, and after her death to apply them in the maintenance of all and every her child and children during their minority, and when and as soon as all such children, if more than one, should have attained twenty-one, upon trust to sell and to pay the proceeds of such sale "to and amongst all and every such child or children, share and share alike, if more than one, and if but one, then the whole thereof to such only

child":—Held, that one of several children who survived the testator, having died under twenty-one, took no share. *Lloyd v. Lloyd*, 8 Kay & J. 20.

(d) Residuary Devise.

The rule that a testator's real estate specifically devised, his real estate devised by way of residue, and his personal estate specifically bequeathed, are to contribute in rateable proportions to make up the deficiency of his residuary personal estate for payment of his debts, —Held, not to have been altered or affected by the Wills Amendment Act (1 Vict. c. 26.) *Eddals v. Johnson*, 27 Law J. Rep. (n.s.) Chanc. 302; 1 Giff. 22.

A residuary devise of real estate since the Wills Amendment Act (1 Vict. c. 26.) is not specific. Therefore, where the personal estate proved deficient for the payment of debts, the real estates devised by way of residue were held chargeable with the payment of the debts in priority to the real estates specifically devised. *Dady v. Hartridge*, 1 Dr. & Sm. 236.

Since the Wills Amendment Act (1 Vict. c. 26.) real estate passing by a residuary devise is subject to debts in priority of specific legacies, that statute rendering a residuary devise no longer specific. *Rotherham v. Rotherham*, 26 Beav. 465.

Semble—that every devise of lands, whether in particular or general terms, is, since the Wills Amendment Act (1 Vict. c. 26.) came into operation, as it was before that period, specific. *Pearmain v. Twiss*, 29 Law J. Rep. (n.s.) Chanc. 802; 2 Giff. 130.

(e) Separate Estate of Wife.

A testatrix, having a daughter who was then unmarried, by her will devised real estate to trustees in fee simple, "in trust for the use and benefit of my daughter, the rents and profits of which she shall receive from the tenants herself while she lives, whether married or single." There were subsequent trusts for the issue of the daughter, and in default of issue the testatrix directed that no sale or mortgage of the real estate or the rents should take place during the life of the daughter. The daughter married after the death of the testatrix, and had issue. The husband and wife made an equitable mortgage, and the mortgagee filed a claim to enforce his security. The Master of the Rolls decided that the devise to the daughter was not to her separate use, and that the clause in restraint of anticipation was therefore void, and made a decree in the plaintiff's favour; but, on appeal, —Held, that as the intention to create separate estate was manifest upon the face of the will, the decision must be reversed. *Goulden v. Camm*, 29 Law J. Rep. (n.s.) Chanc. 135; 1 De Gex, F. & J. 146.

The husband of the daughter became bankrupt, and his assignees were made defendants, but they never appeared, either to the claim or at the hearing, and had not been served with notice of the appeal. Their Lordships, nevertheless, decided on the appeal in their absence, giving no opinion whether the order would be effectual in their absence. *Ibid.*

(f) Power of Jointuring.

Devise of real estate to tenants for life in suc-

cession, with remainders over, with power to the several tenants for life when and as they should severally and successively be in possession, to appoint, by way of rentcharge, a jointure of a certain amount to any woman or women with whom they might respectively intermarry. One of the tenants for life covenanted on the occasion of his marriage, that, if he should come into the possession of the devised estates, he would execute the power of jointuring in favour of his wife. After this, and before coming into possession of the estates under the devise, he became of unsound mind and continued so until his death, before which, however, he had become entitled to the possession of the estates:—Held, that his widow was entitled to have the rentcharge enforced by way of jointure against the devised estates, under the covenant made by her deceased husband on his marriage with her. *Affleck v. Affleck*, 26 Law J. Rep. (n.s.) Chanc. 358; 3 Sm. & G. 394.

(g) *Contingent Remainders.*

A testator devised real estate to his then unmarried daughter S M for life, remainder to her children in fee simple, with proviso for survivorship and accruer in case of the death of any or either of them under twenty-one and without issue; and if there should not be any child of S M, or if any or all such children should die under twenty-one and without issue, the testator devised the same real estate to the heirs and assigns of S M. At the testator's death, S M was married, but had no issue:—Held, by the Vice Chancellor, that the devise to the heirs and assigns of S M was a contingent remainder. *Crofts v. Middleton*, 25 Law J. Rep. (n.s.) Chanc. 513; 8 De Gex, M. & G. 192; 2 Kay & J. 194.

The daughter and her husband in 1840, by deed, acknowledged by her, pursuant to the directions of the statute 3 & 4 Will. 4. c. 74. (the Fines and Recoveries Act), in consideration of the expenditure by her husband of money on the lasting improvement of the estate, conveyed and settled the same to the use of herself for life, with remainder to the use of her children in fee, with remainder to such uses as the husband should appoint, with remainder to the use of the husband in fee. The husband and wife joined in mortgaging the estate:—Held, overruling a decision of the Vice Chancellor, that under the 77th section of the Fines and Recoveries Act, the wife had power to convey her contingent remainder by deed acknowledged. *Ibid.*

Held, also (in accordance with the decision of the Vice Chancellor), that the settlement was one for valuable consideration; but, held (overruling a decision of his Honour), that it was binding in equity by way of contract for valuable consideration, even supposing the legal estate not to have passed. *Ibid.*

Where a person has a legal as well as an equitable title, this Court will grant an injunction to restrain an ejectment brought against him by a party who, if successful in the action, would be a trustee for him. *Ibid.*

(h) *Implication of Cross-remainders.*

A testator gave his residuary real and personal estate to trustees, upon trust, as to one-fifth, for each of the testator's five children for life, and after his or her decease for his or her children which he or she should leave at his or her decease; but provided,

that if any child should die without leaving any child at his or her death, such share was to go to the testator's other children for their lives and the issue of any then dead, as before directed; and after the death of his five children in trust for their children equally, *per capita*. One of the testator's children died, leaving a son, who died before the last of the testator's children:—Held, affirming the decision of the Master of the Rolls, that the persons claiming through the son had no interest in the rents and income during the lives of the surviving children of the testator; that that one-fifth was undisposed of, and that cross-remainders were not, in the event which had happened, to be implied. *Rabbeth v. Squire*, 28 Law J. Rep. (n.s.) Chanc. 565; 4 De Gex & J. 406.

(i) *Meaning of Words.*

(1) *"Dying before his Mother."*

A testator, in 1834, devised a certain sum of money to be secured so as to raise an annuity of 2,000*l.* for his wife, "and on her decease the sum set apart for such payment to become the property of my son, G C, so far as he shall receive the interest on the said sum during his life, and on his demise the principal to become the property of any child or children he may leave born in lawful wedlock, and in such sums as my said son shall will and direct; but in case of my son dying before his mother, then and in that case the principal sum to be divided between the children of my daughters." This son married and had a son during the life of the testator, and died before the testator:—Held, (affirming the decree of the Master of the Rolls, *Lord Cranworth* and *Lord Wensleydale dissentientibus*) that this son was entitled to the fund, for that the whole context of the will required that "dying before his mother" must be read "dying without issue before his mother." Two appeals were presented, each set of appellants having the same interest. No costs were given. *Abbott v. Middleton; Ricketts v. Carpenter*, 28 Law J. Rep. (n.s.) Chanc. 110; 7 H.L. Cas. 68; affirming 25 Law J. Rep. (n.s.) Chanc. 113; 21 Beav. 143.

(2) *"Heirs."*

Devise of freeholds to six persons equally for life, and after the death of the survivor to sell, "and the money to be equally divided amongst their several heirs":—Held, that their children, and not their heirs-at-law, were intended. *Bull v. Comberbach*, 25 Beav. 540.

(3) *"Heirs Male of the Body."*

Devise to W for life, and after his decease "to the heirs male of his body, for their several natural lives in succession, according to their respective seniorities, or in such parts and proportions, manner and form, and amongst them, as the said W, their father, should, by deed or will appoint, and in default of such issue male of the said W," over:—Held (*dubitante Williams, J.*), that the words "heirs male of the body of W" were to be construed as words of purchase, and meant "sons," and that, therefore, W took an estate for life, and not an estate tail. *Jordan v. Adams*, 29 Law J. Rep. (n.s.) C.P. 180; 6 Com. B. Rep. N.S. 718; and 5 Com. B. Rep. 748.

(4) "Issue."

[*Parker v. Clarke*, 7 Law J. Dig. 247: affirmed 6 De Gex, M. & G. 104.]

(5) "Leaving Issue."

By his will a testator (who died in 1819) devised and bequeathed the residue of his real and personal estate to E W, to hold to her and to her heirs and assigns for ever, provided that in case E W should die without lawful issue born of her body and living at the time of her decease, then to M P, her heirs and assigns for ever; provided also in case E W and M P should both die without leaving issue lawfully born of their bodies then the same estate should go unto the testator's nieces. By a codicil the testator devised to the said M P all the testator's freehold estate called H (forming part of the residue devised by the will) "unto and to the only proper use and behoof of the said M P, her heirs and assigns for ever; provided, nevertheless, that in case the said M P shall depart this life without leaving lawful issue of her body," then the testator gave and devised the same "in manner and form given and devised" by him in and by his will:—Held, that under the codicil M P took an estate tail, and consequently that, by suffering a common recovery, she acquired a fee simple. *Biss v. Smith*, 26 Law J. Rep. (N.S.) Exch. 295; 2 Hurl. & N. 105.

(6) "Likewise."

A devise commencing with the word "likewise" held to be subject to the contingency mentioned in the preceding gifts of the same estate. A testator devised an estate to his son until he attained twenty-one, and to the testator's widow for life, in case his son died under twenty-one. This was followed by a gift of the produce of the estate to his nephews, which commenced with the word "likewise":—Held, upon the context, that the gift to the nephews was governed by the same contingency as that to the widow, and the son having attained twenty-one, that the gift to the nephews failed. *Paylor v. Pegg*, 24 Beav. 105.

(7) "Living."

The word "living" is sufficient to pass the advowson; but it may be restricted to the next presentation. The context must determine which is its meaning. *Webb v. Byng*, 2 Kay & J. 669.

Devise to a minor of "the livings of Q and C, should he like the possession and be qualified for them":—Held, to shew an intention to confer on the devisee a personal benefit; therefore, that the devise was confined to a single presentation, and did not extend to the advowson. *Ibid*.

(8) "Or."

A testator, after certain legacies, devised as follows:—"In case my daughter should have no lawful issue, after her death I will that my property that shall be remaining to return to my relations, viz., to my nephew, T J, 100l.; likewise I leave, in case my daughter has no issue, to my nephew T S and my niece A S 80l. each; likewise I leave to W J and T D 10l. each, under the restrictions as my nephew and niece. The remainder of my personalty I leave to my daughter's disposal if she lives to maturity.

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As to my real estate, if my daughter dies before she arrives at lawful age, or have no lawful issue, then I leave my real and all my other property to my brother J J, and D H, equal between them; but in case my daughter shall have lawful issue, then I leave the whole of my property, real and personal, to her and her heirs":—Held (*Martin, B. dissentiente*), that the word "or" should be read "and," and that the daughter, on attaining twenty-one, took an indefeasible estate in fee simple:—Held, per *Martin, B.*, that the will was to be read as it stood, and that the daughter having died without ever having had a child, J J and D H took by way of executory devise. *Johnson v. Simcock*, 29 Law J. Rep. (N.S.) Exch. 478.

A testator devised specific shares in an estate to several persons *nominatim*, to hold the same as tenants in common, and not as joint-tenants; and in the event of any of them dying before having heirs of their body, "or" making a particular disposition of his or her property, then his or her share was to go to the survivors:—Held, that the devisees did not take estates tail, but estates in fee; that the gift over could only take effect on the happening of two events; that the word "or" must be read "and," although in effect it introduced a condition repugnant to the estate previously given, and made the gift over void. *Greated v. Greated*, 28 Law J. Rep. (N.S.) Chanc. 756; 26 Beav. 621.

Held, also, that the shares of those devisees who died in the testator's lifetime were undisposed of, and passed to the heir-at-law. *Ibid*.

(9) "Residuary Legatee."

A testator, by his will, after giving legacies to his children, including one of his younger sons, E, gave all his freehold, copyhold and leasehold hereditaments unto and to the use of his two elder sons, T and A, equally as tenants in common, their heirs, &c., and he gave all the residue of his personal estate, after payment of legacies, to his said two sons, T and A, whom with a nephew he appointed executors. The eldest son, T, died in the testator's lifetime, and afterwards, by a codicil, the testator, after reciting the death of T, appointed his son E executor in his place, jointly with A, and his daughter M as executrix in the room of his nephew, and then proceeded thus: "I do also revoke the legacies to my aforesaid two sons, A and E, and do appoint them residuary legatees, share and share alike":—Held, (affirming a decision of the Master of the Rolls, but *dissentiente Lord Justice Knight Bruce*), that the appointment of E as "residuary legatee" did not vest in him the moiety of the freehold and copyhold estates devised by the will to T, but that such moiety was undisposed of, and passed to A as heir-at-law and customary heir of the testator. *Windus v. Windus*, 26 Law J. Rep. (N.S.) Chanc. 185; 6 De Gex, M. & G. 549; 21 Beav. 373.

The words "legacy" and "residuary legatee" *prima facie* have reference to personal estate only, unless the context clearly shews that the testator intended to apply them to real estate. *Ibid*.

(10) "Use and Occupation."

A testator devised a house and premises to trustees upon trust to offer the use and enjoyment of them to the eldest of his children for the time being,

rent free, so long as he or she should please; but on refusal, death, or ceasing to occupy, the offer was to be made to the eldest of his other children in succession, and on the refusal, death, or ceasing to occupy of all the children, then upon other trusts:—Held, that a personal occupation was intended; that occasional residence would be sufficient if the house was kept furnished, and in the occupation of a servant, but that the premises could not be let. *Maclaren v. Stainton*, 27 Law J. Rep. (N.S.) Chanc. 442.

A testator desired that his two sons might have the use and occupation of certain lands, they paying a stated rent, and that, in default of payment, or if they converted the arable land into tillage, they should no longer have possession thereof:—Held, affirming the decision of the Master of the Rolls, that the personal use and occupation was not necessary, and that they might underlet the property. *Rabbeth v. Squire*, 28 Law J. Rep. (N.S.) Chanc. 565; 4 De Gex & J. 406.

(k) Who take as devisees.

A testator, who had several natural children by his housekeeper, devised real estate to each of them, by name. He then devised certain real estate "to such other child, if any, that might be born of his housekeeper in his, the testator's lifetime, or in due time after his death," and to such child's heirs and assigns:—Held, that a child born after the date of the will took no interest under the devise. *Medworth v. Pope*, 28 Law J. Rep. (N.S.) Chanc. 905; 27 Beav. 71.

Under a devise of land "to my nearest-of-kin by way of heirship":—Held, that the heir was entitled. *Williams v. Ashton*, 1 Jo. & H. 115.

A devise to trustees in trust for a person who is an alien is a trust incapable of taking effect either for the benefit of the alien or of the Crown, and the beneficial interest results to the heir of the testator. *Riddison v. Sterdy*, 3 Sm. & G. 280.

(B) WHAT PROPERTY PASSES BY THE DEVISE.

(a) In general.

Testator, by his will, in 1847, devised specific real estate to his daughter M, and after making several specific bequests, devised and bequeathed *all other real and personal estate of which he might die possessed*, to M and others of his children. M died in his lifetime:—Held, that the devise expressed by the words "all other," &c., was a residuary devise within 1 Vict. c. 26, s. 25, and included the real estate devised to M. *Cogswell v. Armstrong*, 2 Kay & J. 227.

A testator, after the Apportionment Act, 4 Will. 4. c. 22, devised freehold lands to two trustees, their heirs and assigns, upon trust to pay thereout to his widow an annuity for her life, and after her decease then upon trust for A and B, their heirs and assigns as tenants in common:—Held, that the legal estate in the trustees was not restricted to the life of the widow. *Fennick v. Potts*, 8 De Gex, M. & G. 506.

A testator gave all his real and personal property of whatever nature and kind soever to trustees, upon trust for his sister; provided always, and he thereby directed that three several farms, therein respectively described, should be sold, and the proceeds applied to purposes prohibited by the Statute of

Mortmain:—Held, that the farms so directed to be so held passed to the testator's sister as part of the general devise for her benefit. *Carter v. Haswell*, 26 Law J. Rep. (N.S.) Chanc. 576.

A devise before 1838 of "all my estates in the occupation of A in the parish of B to C," without words of limitation, conferred upon C the fee simple. *White v. Coram*, 3 Kay & J. 652.

On a gift by a testator of all his freehold house and property situate in Wright's Road, the Court held, that scaffolding and building materials situate on the ground near the house did not pass. *Conway v. Vernon*, 2 Giff. 277.

A testator devised all the freeholds to which he might be entitled at his decease "situate in the parish of C with their appurtenances":—Held, it did not pass pieces of land in two other parishes which had always been let with the lands in C as one farm, and occupied by the same tenant. *Evans v. Angell*, 26 Beav. 202.

As to what extent extrinsic evidence is admissible in such a case. *Ibid*.

(b) Leaseholds.

A testator, having freehold and leasehold property at F occupied by one tenant, at an entire rent of 70*l.* per annum, the freehold being of the value of 14*l.* per annum, and the leasehold being for 2,000 years, and of the value of 56*l.* per annum, by his will, made before the 1 Vict. c. 26, gave all his real estate at F to trustees, to hold to them "for ever, or otherwise, according to the natures and tenures thereof":—Held, reversing the decision of the Master of the Rolls, that both the freehold and leasehold property passed by this devise. *Swift v. Swift*, 29 Law J. Rep. (N.S.) Chanc. 121; 1 De Gex, F. & J. 160.

(c) Legal Estate in Mortgage.

Testator, by his will, in 1832, gave all his money, securities for money, household furniture, &c. and all other the rest and residue of his personal estate and effects, subject to the payment of debts and legacies, to his wife, her executors, administrators and assigns absolutely:—Held, that the legal estate of certain mortgaged hereditaments which was vested in the testator at the date of his will, passed under the term "securities for money"; and that the concurrence of the testator's heir was not necessary to make an effectual conveyance of the mortgaged premises to a purchaser. *Knight v. Robinson*, 2 Kay & J. 503.

Gallies v. Moss (9 B. & C. 267; 7 Law J. Rep. (N.S.) K.B. 109) must be treated as overruled by subsequent decisions. *Ibid*.

(d) Contingent Interest.

A contingent interest in real estate transmissible to heirs may be disposed of by a residuary devise made in general words, though the testator could not become entitled to such real estate, except on events depending on his own death without issue. *Inglby v. Amcotts*, 25 Law J. Rep. (N.S.) Chanc. 769; 21 Beav. 585.

(e) Reversion.

Testatrix, seized in fee, devised her real estate to E for life, and after her death to her children or child living at her death, and the issue of any child

then dead, in fee, and in case of their being no such child, then to H in fee; and all the residue and remainder of her estate not before disposed of she devised to E in fee. E by lease and re-lease conveyed all her estate to J in fee, and died never having been married:—Held, that the reversion passed by the residuary devise to E, and that by the conveyance to J E's life estate and reversion were both vested in him, and by the merger thus occasioned the contingent remainder to H was destroyed. *Egerton v. Massey*, 26 Law J. Rep. (N.S.) C.P. 10; 3 Com. B. Rep. (N.S.) 838.

(f) *Parcel or no Parcel.*

Where a testator devises his lands situate in a particular parish or place, parol evidence is admissible to shew what lands were then reputed to lie in such parish or place for the purpose of determining the sense of the description used by the testator; therefore, where a testator devised all his messuages and lands in the parish of D, parol evidence was admitted to shew that, although in point of fact some part of his land was situate in the parish of W, yet that, at the date of his will and death, that part was generally reputed to lie in D. In answer to evidence of the payment of rates by recent occupiers of the land in question to the overseers of W, the former rate-books of W were tendered to prove that the names of the former occupiers did not appear in them:—Held, that such evidence was admissible. *Astute v. Nelms*, 26 Law J. Rep. (N.S.) Exch. 5; 1 Hurl. & N. 225.

A testator devised "his messuage or dwelling-house and premises, with the piece of land thereto adjoining." The testator was seised of a field next adjoining the dwelling-house and garden, which he called "the Pear-tree piece," and which had been fenced off by him from another field, of which it had once formed part, and which after such fencing he called "the Second Grass piece." This last communicated with two other adjoining fields of the testator. There were gates between the different fields, and the testator used to call the pieces "grounds":—Held, that the devise included not only the dwelling-house, garden, and "the Pear-tree piece," but also the three other fields, they being all contiguous. *Josh v. Josh*, 28 Law J. Rep. (N.S.) C.P. 100; 5 Com. B. Rep. (N.S.) 454.

A, being possessed of a field called Tip Brook, by an award under an inclosure act, acquired some land adjoining, part of an open common field, called "Raunds Nether Field." This allotted land he divided into two fields, from one of which he made an opening into Tip Brook, and kept the lands of both as sward, the cattle passing freely from one to the other. By his will, A devised "all that piece of sward land in Raunds Nether Field called Tip Close, being part of an allotment awarded to me at the time of the inclosure of Raunds Field":—Held, that the devise was not necessarily confined to the land allotted, but that evidence was admissible to shew that Tip Close included Tip Brook. *Harrison v. Hyde*, 29 Law J. Rep. (N.S.) Exch. 119; 4 Hurl. & N. 805.

(C) PARTICULAR LIMITATIONS.

(a) *Legal or Equitable.*

The testator, by his will, desired his debts to be

paid, and then devised all his residuary copyhold estates to trustees and the survivors and survivor of them, and the heirs of such survivor, upon trust to pay the rents to his wife and two daughters in equal shares for their respective lives, with survivorship amongst them, and after their deaths upon certain trusts for the issue of his said daughters, and in the event of the deaths of both daughters without leaving issue, then he devised his said copyhold estates to the right heirs of the survivor of his said daughters for ever. The trustees were also appointed executors of the will, to the uses of which, the testator having in his lifetime surrendered to such uses, they were after his death duly admitted as tenants. Both daughters survived the wife of the testator, and died without having been married:—Held, upon demurrer to the bill filed by the customary heirs in gavelkind of the copyholds of the survivor of the daughters, put in by the right heir of such survivor, that there was a charge of debts created upon the residuary copyholds by the will, and that such charge coupled with the legal estate devised to the trustees, vested the legal estate in fee simple in such trustees, and made all the estates limited after the devise to them, equitable estates. *Creaton v. Creaton*, 26 Law J. Rep. (N.S.) Chanc. 266; 3 Sm. & G. 386.

Semble—had there not been a charge of debts, the fee simple in the trustees would have determined on the death of the survivor of the tenants for life for whose benefit alone they would have been trustees. *Ibid.*

(b) *Trust or Beneficial.*

M P devised a real estate to trustees and their heirs, upon trust for her son absolutely when he should attain twenty-one; but in case he should die before attaining twenty-one, leaving issue, then for such issue; but in case he should die under twenty-one, without leaving issue, then to the children of P and E. The son attained twenty-one, and died unmarried in the lifetime of his mother. She left no heir-at-law:—Held, that the devise vested the estate in the trustees; that the subsequent trusts for P and E failed; and that the surviving trustee was seised of the estate to his own use beneficially. *Cox v. Parker*, 25 Law J. Rep. (N.S.) Chanc. 873; 22 Beav. 168.

(c) *Joint Tenancy or Tenancy in Common.*

A testator devised real estate to trustees for 500 years in trust to pay life annuities, and the residue of the rents to his two sons "in equal shares," and subject thereto, he devised them to his two sons in fee as joint tenants:—Held, that during the term they were tenants in common, and secondly, that the employment by the two sons of the estates in their partnership trade had not the effect of making them tenants in common of the fee. *Brown v. Oakshott*, 24 Beav. 254.

(d) *Fee Simple.*

A will devised real estates to trustees and their heirs in trust for the use of testator's daughter during her life, and after her death to the use of the heirs of her body, with remainders over. Then followed a clause, that, if the daughter married, her husband was to have no power of intermeddling with the estate, and her receipts were to be a full discharge to the trustees. The testator then gave some pecuniary

legacies, and bequeathed his personal estate to the trustees, directing them to sell it and apply the proceeds in payment of his debts and legacies. He also ordered that the surplus of the rent of his real estate above what the trustees should expend in the maintenance of the daughter, should be applied during her minority in paying debts and legacies; and he further added, that in case these provisions were insufficient, then, in order to supply the deficiency, he charged the real estates with the payment thereof; and he further directed the executors to reimburse themselves out of the premises devised to them any sums they might expend in performance of the will:—Held, that the will gave the trustees either an estate in fee or, at least, a power to lease and mortgage the real estate; and *semble*—that the will gave them an estate in fee. *Poad v. Watson* (in error), 25 Law J. Rep. (n.s.) Q.B. 396; 6 E. & B. 606.

By will B devised lands to devisees to uses, to the use of his brother C for life; and after a limitation to trustees to preserve contingent remainders, from and after the decease of his brother C, to the use of his nephew J, the eldest son of C, for life, with like limitations to trustees to preserve, &c.; and after the decease of J, to the use of the first son of the body of J lawfully to be begotten, and of the heirs male of the body of such first son, lawfully issuing; and for default of such issue, to the use of the second, third, fourth, fifth, &c., and all and every other son and sons of the body of J successively in tail male; and for default of such issue a corresponding series of limitations to C, the second son of his brother C, and his first and other sons in tail male; and for default of such issue a corresponding series of limitations to T, the third son of his brother C, and his first or other sons in tail male; and in default of such issue, to the fourth, fifth, &c., and all and every the sons of the body of his brother C, in successive estates of tail male; and for default of such issue, to the use and behoof of all and every the daughter and daughters of his brother C, lawfully to be begotten, and her or their heirs for ever, to take as tenants in common (if more than one), and not as joint tenants; and for default of such issue to the use of all and every the daughter or daughters of his said nephew J, lawfully to be begotten, and her or their heirs for ever, to take as tenants in common (if more than one), and not as joint tenants; and for default of such issue, corresponding limitations in favour of the daughter or daughters of his nephew C; and in default of such issue, corresponding limitations in favour of the daughter or daughters of his nephew T; and for default of such issue, over to other uses in favour of the testator's sisters. T, after the death of the testator, had two daughters, who died in their infancy:—*Semble*—that these two daughters would, under the foregoing limitations, have taken estates in fee simple, had the will contained no other provisions. *Biddulph v. Lees* (Ex. Ch.), 28 Law J. Rep. (n.s.) Q.B. 211; E. B. & E. 289: affirming the judgment below, 27 Law J. Rep. (n.s.) Q.B. 273; E. B. & E. 289.

A clause in a subsequent part of the will provided, that if at any time thereafter all or any of the daughter or daughters, to be begotten by the testator's brother C, or by his said nephews J, C or T, or by any or either of such after-born son of his brother C, should enter into religion and become a nun or nuns,

that then and in such case and immediately thereupon, the uses before limited and declared as to such the daughter or daughters of his brother C, or of his nephews J, C and T, and of such after-born sons or his brother C as should so enter into religion, and become professed nun or nuns as aforesaid, should cease and determine, and become absolutely null and void to all intents and purposes whatsoever: and that the person or persons next in reversion to take according to the afore-mentioned limitation should immediately thereupon enter into and upon the lands, &c., and enjoy the same in as full manner and to all intents and purposes, &c. as he, she, or they would have been entitled to have held and enjoyed the same, in case the person or persons so entering into religion as aforesaid had been then dead without issue of his, her, or their body or bodies as aforesaid:—Held, that this clause shewed that the meaning of the limitations to the daughter was, that they should take estates tail only; and that in the limitation after the limitation to the daughters and their heirs, the expression "in default of such issue," meant in default of issue of the bodies of the daughters. *Ibid.*

Devise to trustees upon trust for the testator's grandson S for life; and after his decease in trust for all and every the child and children of S, who, being a son or sons, should respectively attain the age of twenty-one years, or, being a daughter or daughters, should live to attain that age or be married, equally to be divided between them, if more than one, and their respective heirs and assigns, and if there should be only one such child, then in trust for such only child, his heirs and assigns; but in case S should die without leaving lawful issue, then upon similar trusts for others of his grandchildren and their children successively, with an ultimate trust for the testator's right heirs. The trustees were empowered, immediately after the death of the first tenant for life of the devised estates, to apply the rents for the maintenance of the person or persons next beneficially entitled thereto. S died leaving an only child, an infant, him surviving:—Held, that such child was, under the limitations in the will, devisee of an estate in fee simple, determinable in case of his dying under the age of twenty-one. *Browne v. Browne*, 26 Law J. Rep. (n.s.) Chanc. 635; 3 Sm. & G. 568.

Devise in 1820 of estates A and B to the testator's wife for life, and after her death estates A B and C to the testator's son J, without words of limitation. Subsequently, a devise of an annuity of 10*l.* to D for life, to be paid out of estate A by J:—Held, that J took an estate in fee simple in A, but a life estate only in B and C. *Matthews v. Windross*, 2 Kay & J. 406.

Devise of copyholds to a married woman to be her sole and separate property, and with power to her to appoint the same to her children and her husband, in such way and in such proportions as she may think fit:—Held, that she was devisee in fee, and that the execution of the power was not made a duty, and therefore no trust in favour of the husband and children. *Brook v. Brook*, 3 Sm. & G. 280.

(e) Estate Tail.

[See *ante* (A) (i) (5) and *ante* (C) (d) *Biddulph v. Lees*.]

A testator, after giving his wife a life interest in the whole of his freehold property, devised it as follows:

—I give to my grandson R P that house and garden now in the tenure of H K; also I give to my granddaughter A P this house which I now live in; also I give to her a ground called W; also I give to my two granddaughters S P and J P a house at T; also I give to the said S P and J P a piece of arable land in B, all to be equally divided; also I give to my grandson R P 600*l.*; also I give to my granddaughter A P 600*l.*; also I give to my granddaughters S P and J P 400*l.* each. In case either of them die without issue that portion to be divided amongst the survivors:—Held, that the granddaughter, A P, took an estate tail in the real property devised to her. *Butt v. Thomas*, (Ex. Ch.), 25 Law J. Rep. (N.S.) Exch. 256; *nom. Thomas v. Butt*, 1 Hurl. & N. 109: affirming the judgment below, 24 Law J. Rep. (N.S.) Exch. 275; 11 Exch. Rep. 235.

A testatrix seized in fee of a messuage and mill, subject to the life estate of W C, directed the same to be conveyed to the use of W C for life, with remainder to his first and other sons in tail, and directed her trustees to stand possessed of 2,000*l.* stock, upon trust to apply the dividends from time to time in the repairs of the said messuage and mill, at the request in writing of W C, and from and after the decease of the said W C, upon the application or request in writing of the person or persons who for the time being might be entitled under the limitations thereinbefore directed, to the end and intent that the said stock or sum, and the interest and dividends thereof, might be, and be continued as long as the rules of law and equity would permit, as a fund for keeping the said messuage and mill at all times in good and substantial repair for the benefit of the person or persons who might from time to time be so in possession thereof or entitled thereto as aforesaid. The property was settled in accordance with the directions of the will, and the first tenant in tail died in the lifetime of W C without having barred the entail. On the death of W C,—Held, that the person who then came into possession as tenant in tail was entitled to the fund, and not the executors of the first tenant in tail. *Cox v. Sutton*, 25 Law J. Rep. (N.S.) Chanc. 815.

A testatrix devised thus:—"I give in trust to my executors for my niece M A B and her children my estates, provided she takes the name of C and arms, and her children, with my mansion-house, furniture," (and other articles) "as heir-looms with my estate":—Held, (affirming a decision of one of the Vice Chancellors) that M A B took an estate tail. *Webb v. Byng*, 26 Law J. Rep. (N.S.) Chanc. 107; 2 Kay & J. 669.

A testatrix devised all her real estate to trustees upon trust for three persons for life, with remainder to their issue in tail, "and for default of such issue, then upon trust for the right heirs of my grandfather, Sir T B, Bart., deceased, by Mary, his second wife, also deceased, for ever":—Held, affirming the decision of Vice Chancellor Kindersley, that the ultimate limitations created an estate tail special, and not a fee simple. *Vernon v. Wright*, 28 Law J. Rep. (N.S.) Chanc. 198; 7 H. L. Cas. 35: affirming 23 Law J. Rep. (N.S.) Chanc. 881; 2 Drew. 439.

A testator devised real and personal estate to his son, J R M, his heirs, executors and administrators, his will being that his son should not have power to sell the estates and lands, but that they should go to

his son's lawful issue absolutely; and if he should not have any issue him surviving, then over:—Held, that the son was tenant in tail of the estates, and that the costs of a special case rendered necessary by the objections raised by a purchaser of part of the estates must be paid out of the testator's residuary estate. *Marshall v. Grime*, 29 Law J. Rep. (N.S.) Chanc. 592; 28 Beav. 375.

A testator left all his property to his "brother B and his children in succession":—Held, that this gave to B an estate tail in the realty, and an absolute interest in the personalty. *The Earl of Tyrone v. the Marquis of Waterford*, 29 Law J. Rep. (N.S.) Chanc. 486; 1 De Gex, F. & J. 613.

A devise by will to A for life; remainder to A's children and their heirs as tenants in common. Devise by codicil of after-purchased estates to A for life, remainder to the heirs of his body lawfully begotten for ever, equally share and share alike, sons or daughters, but if A should die without heirs or heir, then over:—Held, that A took an estate tail in the property devised by the codicil. *Grimson v. Downing*, 4 Drew. 125.

A testator devised to trustees to the use of eight persons successively for life, and afterwards in trust to convey to all the sons and daughters of the eight who should be then living, and the heirs of their bodies, "respectively in a due course of entail," and he empowered his sister to cut down the estates of children "thereafter born," of the eight to life estates. The plaintiff was a child of one of the eight born at the date of the will:—Held, that though the trust was executory she was tenant in tail and not tenant for life. *Randall v. Daniel*, 24 Beav. 193.

Devise to A for life, with remainder to B and his heirs, but if B died in the life of A, "without leaving lawful issue," then immediately after the death of A the lands were to be sold and the produce divided. And in case B should outlive A, and die "without leaving any lawful issue," then the lands were to be sold by B's "executors," and the proceeds divided. B survived A:—Held, that he took an estate tail, and not an estate in fee, with an executory devise over, and therefore that he could make a good title to a purchaser. *Peakes v. Standley*, 24 Beav. 485.

General intent to create estates tail, held to prevail notwithstanding inconsistent expressions. *Jenkins v. Lord Clinton*, 26 Beav. 108.

(f) Estate for Life.

[See ante (A) (i) (3).]

A testator devised freehold premises to his son J "to hold to him and the heir male of his body lawfully begotten, and the heirs and assigns of such heir male for ever," subject to certain charges. The will then proceeded:—"In case my said son J shall happen to die without leaving any son of his body lawfully begotten, then and in that event I give, devise and bequeath the said messuage, farm, lands and hereditaments unto my son R, his heirs and assigns for ever, but subject, nevertheless, not only to the charges and payments, hereinbefore made thereupon and thereout, but also subject and charged with the payment by my said son R of 300*l.* unto the daughters of my said son J, or to such of them as shall be living at the time of his decease in equal shares and proportions, and if there shall be but one such daughter then the whole to such only daughter":

—Held, that the will gave J an estate for life, with a contingent remainder in fee to the person, if any, who at J's death should answer the description of heir male of his body, with a limitation over to R in fee if there should be no such heir male. *Chamberlayne v. Chamberlayne* (in error), 25 Law J. Rep. (n.s.) Q.B. 357; 6 E. & B. 625: affirming the judgment below, 25 Law J. Rep. (n.s.) Q.B. 187.

In ejectment, by the heir of J T, for two acres of land, it appeared that the father of J T, more than fifty years before, had devised four acres (comprising the two in question) to his widow, for life, and then to J T and his sister S in remainder in fee. For more than twenty years J T, by arrangement between his mother and S, occupied the two acres in question, and devised them to his widow for life, and on her death or marriage to his daughter; and then there was a devise in similar terms on the same event to his son, the heir. The daughter had occupied with her husband until her death, and he now, without giving any notice as tenant in common, under the Common Law Procedure Act, 1852, s. 188, claimed to defend the action:—Held, first, that the daughter only took an estate for life; secondly, that although there was no deed of partition, the long occupation inevitably barred the title of S as tenant in common, under 3 & 4 Will. 4. c. 71. s. 12. *Tidball v. James*, 29 Law J. Rep. (n.s.) Exch. 91.

A testator devised real estates to trustees and their heirs upon trust, to permit A and his wife to receive the rents during their lives, and apply them for the maintenance of his four granddaughters, and after the decease of A and his wife the testator devised the estate to his four granddaughters as "tenants in common, and not as joint tenants during the term of their respective natural lives, with benefit of survivorship," with remainder to the trustees and their heirs to support contingent remainders, with remainder to the issue male of his four granddaughters successively, with remainder to his own right heirs:—Held, that the granddaughters took estates for life as tenants in common, with benefit of survivorship, with several inheritances to their respective issue in tail. *Haddeley v. Adams*, 25 Law J. Rep. (n.s.) Chanc. 826; 22 Beav. 286.

Held, also, that the estate given to the trustees was not a general estate in fee simple, and that no trust was created for the issue. *Ibid.*

Devise to A for life with remainder to his first son who should attain twenty-one in fee, and in default to all his daughters in fee; but in the event of A dying without any issue male who should attain twenty-one or any issue female, then over:—Held, that A took for life only, and that his estate was not enlarged by the gift over in default of issue. *Sanders v. Ashford*, 28 Beav. 609.

(g) *Vested or Contingent Estate.*

J H devised all his estates, &c. to his wife for life, and ordered that, after her death, his brother, R H, should "part and share out, or divide, all and singular," &c., "in such manner, amongst all my children, sons and daughters, as they shall severally arrive at their ages of twenty-one years, &c. He also ordered that, in case his wife should survive R H, she should make her will and devise the said estates "amongst all my children, in the best and fairest manner that she can." All the children died

in the lifetime of the wife, who died before R H:—Held, that no estate of inheritance vested in the younger children of J H, as there was no devise to them, and as all the children had died before the power of appointment accrued. *Halfhead v. Shepherd*; *Same v. Hall*; *Same v. Tyler*, 28 Law J. Rep. (n.s.) Q.B. 248.

A testator devised his real estate to trustees, their heirs and assigns, upon trust to apply the rents for the maintenance of his daughter till twenty-one, and then to convey the estates to his daughter, her heirs and assigns; and in case his daughter should die under twenty-one leaving issue, then upon trust for the absolute use and benefit of such issue as tenants in common; but if she should die under twenty-one without issue, then upon trust to sell the property and pay the proceeds to a charity. The daughter died under twenty-one, without issue, and the gift over being void under the Statute of Mortmain, it was held, upon the authority of *Doe v. Bloomfield v. Eyre*, that the original devise to the testator's daughter, assuming that she took an absolute vested estate in fee simple, was divested by the subsequent gift over, although that gift had failed, and that the trustees of the will became entitled to the estate. *Robinson v. Wood*, 27 Law J. Rep. (n.s.) Chanc. 726.

On a devise to the use of A for life, remainder in default of appointment to the use of all and every the children of A, who being sons should live to attain twenty-one, or being daughters should live to attain that age or be married, but in case A should have no child who being a son should live to attain twenty-one, or being a daughter should live to attain that age or be married, then over. *Quære*—whether the remainders were vested or contingent: *Feeling v. Allen* discussed. *Quære*—whether the distinction between a remainder to a class if they shall attain twenty-one and one to all of a class who shall attain twenty-one can be sustained. *Re Mid Kent Rail. Act, 1856, Ex parte Styan*, John. 38.

Testator gave property to trustees on trust for his son for his life, until he should become bankrupt or insolvent or compound with his creditors, and after any such events, over. There were powers to lease during the son's life, and general powers of sale:—Held, that the limitations over were not contingent on the happening of bankruptcy, insolvency, &c., only, but took effect on the death of the son. *Etches v. Etches*, 3 Drew. 441.

(h) *Clause of Forfeiture.*

A testator devised his estates to trustees in trust for A B, upon attaining the age of twenty-five, for life, with remainder to the heirs male of his body, and with ultimate remainders over; and he directed that the persons who should severally come into possession, if they should be of the age of twenty-one years, or if under that age then within twelve months after attaining that age, should assume the surname and arms of the testator, they respectively not being of that name; and in case any of such persons should refuse or discontinue to take, assume and use such surname and arms respectively for the space of twelve months after they should severally become entitled, then the estate of any person so offending should, from and after the expiration of the said twelve months, cease and determine, and should go over to the next person entitled. A B,

upon attaining twenty-one, assumed the name and arms of the testator, and came into possession of the estates at twenty-five years of age. Some years afterwards A B discontinued to use the required name and arms for above twelve months:—Held, that a forfeiture had taken place, and that the estate determined and went over. *Blagrove v. Bradshaw*, 27 Law J. Rep. (N.S.) Chanc. 440; 4 Drew. 230.

A testator gave certain property to trustees to pay the rents and profits thereof to his son for life, subject to a proviso, that in case he should at any time or times thereafter become bankrupt or insolvent, or should make any assignment for the benefit of his creditors, or should convey, assign, charge or incur, or otherwise part with his interest in the said rents, issues and profits, or if the rents, &c. should by the act or default of the son, or by operation of law, or otherwise howsoever, become vested in or payable to any person other than the son, then the aforesaid trusts were to cease and become void, and the rents, &c. were to be paid to the persons next in remainder. The son became insolvent some years before the date of the will, and a warrant of attorney was given and judgment was entered up subsequently to the testator's death:—Held, that the rents, &c. had not become vested in or payable to the assignees in insolvency, but the insolvency which happened before the date of the will operated as a forfeiture of the life estate under the proviso, and the property went to the children of the son who were next in remainder. *Seymour v. Lucas*, 29 Law J. Rep. (N.S.) Chanc. 841; 1 Dr. & Sm. 177.

A testator by his will, dated in 1859, devised and bequeathed his freehold house and estate in his own occupation, with his household furniture, plate, linen, china, glass, books, pictures and other articles of a like nature, which, at his decease, should lie in and about his dwelling-house, to trustees, to permit his wife to occupy and enjoy the same during her life, rent free, if she should so long continue a widow, and after her decease, or if she should marry again or refuse to occupy his said dwelling-house, he directed his trustees to sell his said house, furniture, &c., and stand possessed of the proceeds in trust for his two daughters; and the testator gave the residue of his estate real and personal to the trustees, subject to the payment of his just debts, funeral and testamentary expenses, for the purposes therein specified:—Held, that farming-stock and implements were not included in the gift to the wife of household furniture, &c., and articles of a like nature; that it was incumbent upon the widow to occupy the dwelling-house, but not the farm, in order to avoid the clause of forfeiture; and that a mortgage debt upon the devised estate must be paid out of the general residuary estate, and not thrown upon the mortgaged estate. *Stons v. Parker*, 29 Law J. Rep. (N.S.) Chanc. 874; 1 Dr. & Sm. 212.

A direction in a will that an equitable life interest in real estate thereby devised shall cease and determine if the devisee should attempt to alienate it, is valid, whether there be a gift over of his interest on that event or not. *Joel v. Mills*, 8 Kay & J. 458.

A clause of forfeiture in case of the devisee not making the mansion-house "his usual and common place of abode and residence," is not void for uncertainty. *Wynne v. Fletcher*, 24 Beav. 430.

A testatrix devised an estate to A for life with

divers remainders over. She provided that A and every other person who should by her will "become possessed or entitled" to the estate, should make and use the mansion-house as his "usual common place of abode and residence," and keep the same and the gardens, and demesne lands thereto belonging, in a suitable and proper state of repair, condition and cultivation. And in case A or any other person who should be so possessed or entitled, should refuse or neglect to reside at and make use of the mansion-house as his common place of abode and residence, or should wilfully suffer the same to fall into decay, or should convert or alter the garden or demesne lands to other purposes than those for which the same were then used and occupied, unless with the express consent of his trustees, then the limitation in his favour should cease:—Held, that the trustees could not dispense with the condition as regarded residence, their power being limited to the case of an alteration of the garden and demesne lands. *Ibid.*

Whether under such a condition upon a forfeiture happening, the person next in remainder is bound to enter and reside, or can waive the forfeiture without himself forfeiting his own estate—*quære*. *Ibid.*

(c) *Shifting Clause.*

A testator devised his real estates to his only daughter for life; remainder to her husband for life; remainder to their second son for life, and afterwards to his first and other sons in tail; remainder to his daughter's eldest son for life; remainder to trustees to preserve contingent remainders; remainder to his second and other younger sons in tail; remainder to the plaintiff (his eldest granddaughter) for life; remainder to trustees to preserve; remainder to her sons and daughters in tail. The will contained a shifting clause, that in case any tenant for life or in tail should become entitled to the Turton estates, then in possession of the husband of the testator's daughter, the limitations in favour of such person should cease, as if he or she were dead, and the estates so limited were to go to the person next entitled in remainder, it being the testator's intention that both estates should not vest in the same person. In the events that happened, the eldest son of the testator's daughter became entitled to the Turton estates, and he was the person next entitled to the devised estates, in case the shifting clause did not take effect. He had only one son:—Held, that the effect of the shifting clause was to divest him of the devised estates; that the Court would effectuate the testator's intention, that the property should go to the unborn sons of the tenant for life whose estate had so ceased; that the trustees to preserve took the estate, as the persons next in remainder, to support contingent remainders; and that the intermediate rents accruing between the time when the estate of the tenant for life ceased, and the birth of a son entitled under the limitations, belonged to the residuary devisee or heir-at-law. *Lambard v. Peach*, 28 Law J. Rep. (N.S.) Chanc. 569.

By the will of M T, the T estates were settled on E T for life, with remainder to his first and other sons in tail male. He had three children only, a son, E H T (the plaintiff in the first suit), a daughter, Mrs. L (the plaintiff in the second suit), and a son, R C T, who died an infant and a bachelor.

By the will of R B L, the L estates were settled (among other limitations) upon E H T for life, with remainder to trustees to preserve contingent remainders, with remainder to the second and other sons of E H T in tail; and among the subsequent limitations was one to Mrs. L for life. The will contained a proviso that if any of the tenants for life or in tail should become possessed of the T estates, the limitations in his, her or their favour should from the time of his, her or their being so possessed cease and determine as if he, she or they were dead; and the L estates were to go over to the person next entitled in remainder, it being the express wish of the testator, R B L, that both estates should not vest in the same person. E H T, on the death of his father, became tenant in tail of the T estates, and but for the last-mentioned shifting clause would have become tenant for life of the L estates, on the death of the former tenant for life, in May 1858. At that time E H T had only one son, so that the limitation to the second and other sons, under the will of R B L could not then take effect. Mrs. L, who was the sole residuary devisee and legatee of the former tenant for life, set up a claim to the rents of the L estates accruing during the life of E H T. During the progress of the two first-mentioned suits R B T, a second son of E H T, was born, and on his behalf, by the third suit, a claim to the same rents during the life of E H T was made. E H T claimed the same rents against both Mrs. L and R B T, notwithstanding the shifting clause. The first and second causes came on before the Lords Justices, on motion by the respective plaintiffs for decree, when it was held, that the trustees to preserve contingent remainders were the persons "next entitled in remainder" under the will of R B L; but the proviso of the shifting clause excluding E H T, those rents would go to such trustees, not for the benefit of the heir-at-law, but in trust for the next remainderman at the time; and there being no second son of E H T in existence at the death of the former tenant for life Mrs. L was entitled to the rents till the birth of R B T, the second son; and that such second son would be entitled to those rents so long as he continued such second son during the life of E H T. *Turton v. Lambard*; *Lambard v. Turton*; and *Turton v. Turton*, 29 Law J. Rep. (n.s.) Chanc. 361; 1 De Gex, F. & J. 495.

The Court abstained from expressing any opinion in whom the beneficial title to the rents would reside, in the event of the death of R B T, the second son, or of the death of the eldest son of E H T. *Ibid.*

(k) Executory Devise.

Devise (previous to the passing of the 1 Vict. c. 26.) to S, in consideration that she pay to A C or her heirs, 50*l.*, but in case S dies without lawful issue, then to T, or his heirs, in consideration that he pays to J, or his heirs, 250*l.* within twelve months after S's decease:—Held, a devise in fee to S, with an executory devise over in default of issue living at her death. *Blinston v. Warburton*, 25 Law J. Rep. (n.s.) Chanc. 468; 2 Kay & J. 400.

(D) RIGHT OF PRE-EMPTION.

A testator directed his trustees to offer his real estate to his brother M for 2,500*l.*; but in case M

should not be living at the time of his decease, or should not within one calendar month after that event signify to the trustees his intention to take the estate at that sum, or should not at the expiration of two calendar months from the time of signifying such his intention pay the sum of 2,500*l.* to the trustees, the trustees were to sell the estate. M signified his intention to accept within the month after the testator's death, and he asked for an abstract of title. Nothing further was done until after the expiration of the two months. It was held, by one of the Vice Chancellors, and affirmed on appeal, that the right of pre-emption was gone. *Brooke v. Garrod*, 27 Law J. Rep. (n.s.) Chanc. 226; 2 De Gex & J. 62; 3 Kay & J. 608.

A testator, by his will, gave all his real and personal estate to be enjoyed by his widow for life, and after her death to be sold, and the proceeds to be divided among his ten children equally. The testator directed that one of his sons should have a right of pre-emption for 450*l.* of a particular parcel of garden land, part of the real estate. After the death of the testator, and before that of the widow, the parcel of garden land was purchased by a railway company under their compulsory powers; the compensation money paid therefor, when freed from incumbrance, being represented at the death of his widow by the sum of 882*l.* 18*s.* 2*d.* standing in court:—Held, by the Lords Justices (reversing the decision of one of the Vice Chancellors), that the testator's son to whom the right of pre-emption was given was entitled to the compensation money, subject to the deduction of the price fixed by the testator. *In the matter of James Cont's Estate*; *In the matter of the Lands Clauses Consolidation Act*; and of the *Eastern Union and Harwich Rail. Co.*, 28 Law J. Rep. (n.s.) Chanc. 641; 4 De Gex & J. 503; 1 Giff. 12.

(E) CHARGES.

Devise to the wife of the testator of the rents and profits of three houses, which were subject to a yearly chief rent, and after the wife's devise of the same houses to the testator's daughter (without words of limitation), subject to the payment of the yearly chief rent:—Held, that the charge was not upon the person of the devisee so as to enlarge the life estate by implication into a fee, but upon the estate only. *Turnough v. Stock*, 25 Law J. Rep. (n.s.) Exch. 26; 11 Exch. Rep. 37.

A B, having mortgaged certain real estate, gave by his will all his real and personal estate to his widow. The widow survived A B for two days only, and died on the 21st of December 1854 intestate and without having proved the will. The heir-at-law of the widow claimed to have A B's real estate exonerated out of the personal assets of A B; but it was held, that he must take the estate *cum onere*. *Swainson v. Swainson*, 26 Law J. Rep. (n.s.) Chanc. 119; 6 De Gex, M. & G. 648.

A testator, by will, dated in June 1855, directed that "all his debts should be paid by his executors out of his estate":—Held, that such direction exonerated a mortgaged estate devised by his will from the payment of the mortgage debt, the testator's personal estate being sufficient for the payment of all his debts, including the mortgage debt. *Woolstencroft v. Woolstencroft*, 29 Law J. Rep. (n.s.)

Chanc. 511; 2 Giff. 192: reversed on appeal, 30 Law J. Rep. (n.s.) Chanc. 22.

A testator devised an estate (X) to trustees upon trust to raise, in aid of his personal estate, sufficient to satisfy his debts and the mortgages on his estate (Y), which he devised to his daughters; and he declared that the incumbrances on Y should be payable out of X "in exoneration of" Y. On the testator's death, a real estate (Z) descended to his heir-at-law:—Held, that, as between X and Z, the former was primarily liable to pay the mortgage and other debts. *Phillips v. Parry*, 22 Beav. 279.

A prohibition against raising by sale a charge held also to prevent its being done by mortgage. *Bennett v. Wyndham*, 23 Beav. 521.

Devise of real estate to trustees in fee, upon trust "out of the rents, issues and profits" thereof to pay two annuities, "and by the same ways and means, or by such other ways and means (except a sale or sales) as they may think proper to levy and raise," sufficient to pay off the charges on the estate; and subject to the trusts aforesaid to A for life, with remainders over:—Held, that the trustees could not raise the charges either by sale, by mortgage, or by leases or fines, but that they must be raised out of the rents and profits of timber and mines, the trustees exercising a discretion so as not to exhaust the whole income, and leave nothing for the tenant for life:—Held, that it was not proper to keep up the mansion on a settled estate as a residence during the minority of the tenant for life. *Ibid*.

A B mortgaged estate X for 800*l*., and on the same day he charged estate Y in aid to the extent of 200*l*. A B died, having devised estate Y, but intestate as to estate X:—Held, that the whole 800*l*. was, as between the devisees and heir, primarily chargeable on estate X. *Stringer v. Harper*, 26 Beav. 33.

An estate was subject to mortgages of 7,000*l*. created by the testator, and 13,000*l*., created by his ancestor, but the testator had consolidated them into one mortgage for 20,000*l*., which he had covenanted to pay. The testator directed his debts to be paid out of his personal estate, but if insufficient, he charged them on his real estate. He devised his real estates "subject, nevertheless, to the mortgages affecting the same." The testator died in 1840:—Held, that the devisee of the estate did not take *cum onere*, but was entitled to have the whole mortgage debt paid out of the testator's personal estate. *Townshend v. Mostyn*, 26 Beav. 72.

When a testator devises his real estates to his executors, and directs them to pay all his debts, that constitutes a charge on the real estate, although they take no beneficial interest in it. *Hartland v. Murrell*, 27 Beav. 204.

(F) DEVISE FOR PAYMENT OF DEBTS.

[*Simmons v. Rose*, 7 Law J. Dig. 262; 21 Beav. 37: affirmed 6 De Gex, M. & G. 411.]

Testator devised his estate upon trust during lives, out of the rents to pay his debts, &c., to keep up the mansion-house, to pay an annuity to his daughters, and, subject thereto, to pay the rents to his wife and daughters. There were mortgages which exhausted the rents:—Held, that one of the daughters and the wife might have part of the estates sold

to pay off the mortgages. *Cook v. Cholmondeley*, 4 Drew. 244.

(G) VOID DEVISE.

(a) Remoteness.

Devise of leaseholds to C, his executors and administrators, with an executory devise over if C or his issue male should become entitled to estates under the limitations in the will of J N; which were to A for life, remainder to his first and other sons in tail general, with the like remainders for life and in tail general to B and C and their first and other sons respectively:—Held, that the executory devise over in the event of C's issue becoming entitled was too remote. *Harding v. Nott*, 26 Law J. Rep. (n.s.) Q.B. 244; 7 E. & B. 650.

A testator was possessed of leasehold estates; he created a term for thirty years, which he vested in trustees to pay debts and to accumulate rents until the legacies were paid, and then to permit his son Benjamin to take the rents "until the son of my son Benjamin (if he shall have a son) shall attain twenty-one," when this son of Benjamin was to take the rents for life, "and after his decease, to the heirs male of such son and the heirs male of their bodies." There were exactly similar provisions (in default of Benjamin having children) as to the next son, Lewis, and on failure of Lewis and his sons, then to the son of the testator's daughter Abigail. Benjamin and Lewis entered successively into possession of the rents, and died without issue. Abigail had a son who attained twenty-one:—Held, that the devise over was not void for remoteness, but that the rule as to freeholds applied in this case to leaseholds, and as in freeholds Abigail's son would have taken an estate tail, so here he took an absolute interest. Also, that as the only legacy in the will was to be paid to a person in being at the time of the testator's death on her attaining twenty-one, the direction to accumulate was not void. *Williams v. Lewis*, 28 Law J. Rep. (n.s.) Chanc. 505; 6 H.L. Cas. 1013: affirming *Lewis v. Hopkins*, 3 Drew. 668.

(b) Lapse.

A testator directed that freehold premises should be given to the inhabitants of B to found an asylum, and that his executors should call a meeting of the inhabitants to appoint a committee and trustees to carry out the same, but in the event of the said inhabitants not appointing a committee or not being willing to carry out the scheme, he willed all his said property so given to the said asylum should belong to W H W. The gift to the charity being void,—Held, that the devise to W H W took effect. *Warren v. Rudall*; *Hall v. Warren*, 28 Law J. Rep. (n.s.) Chanc. 70; 4 Kay & J. 603.

(c) Uncertainty.

A testator devised two freehold houses and his freehold lands to his wife for her life; and after her death he gave to his son John "one freehold house," &c. and "one freehold close of land in Ridgway Field, in W, and to his son George "one freehold house," and "freehold close of land situate in Ridgway Field, in W." He had suggested to his sons that they should "toss up" which of them should have the choice of the two houses and two fields;

and after his death they agreed to do so, and the younger son, George, won the choice, and his election was agreed to by the eldest son, John. After the death of the widow, the tenant for life, John, the heir, took possession of both the fields; but in ejectment by George for the one he had chosen,—Held, that the devise was not void for uncertainty; that the parol evidence was not material; that the case was one for election; that probably John, as first named, had the right of election, but that, at all events, there had substantially been an election; and that George was entitled to recover. *Duckmanton v. Duckmanton*, 29 Law J. Rep. (N.S.) Exch. 132; 5 Hurl. & N. 219.

(d) Trust for Accumulation.

Devise in 1826 of real estate to trustees in fee upon trust for one for life, and then for his first and other sons successively in tail, with a direction to the trustees during the minority of any *cestui que trust*, to receive the rents and invest and accumulate the same, and to hold such accumulations upon the same trusts as were declared concerning the real estate:—Held, that the trust for accumulation was void. *Turvis v. Newcome*, 3 Kay & J. 16.

(H) REVOCATION OF.

A B made his will, whereby he devised lands to C D for life, with remainders over. A B afterwards contracted to sell part of the lands to E F, and the contract partly described them, and partly referred to a plan. E F did not pay the whole purchase-money, but entered into possession of the land, and then became bankrupt. The Court of Review made an order in the bankruptcy declaring that A B had a lien for his unpaid purchase-money, and directed a sale. A B became the purchaser for a less sum than was due to him, and proved against E F's estate for the difference. A B entered into possession, and so continued until his death. The plan had never been stamped, and was lost:—Held, affirming a decision of one of the Vice Chancellors (but *Lord Justice Knight Bruce* not assenting), that the devise of so much of the lands as was contracted to be sold was revoked. *Andrew v. Andrew*, 25 Law J. Rep. (N.S.) Chanc. 779; 8 De Gex, M. & G. 386.

Held, also that there was so much merger of the equitable interest re-purchased by A B, in the legal interest remaining in him, as would confer such equitable interest upon the devisee; that there was such a part performance of the contract as would render it proper for the Court to admit parol evidence, if necessary, of the property comprised in it; that there was no abandonment of the contract, but even if otherwise, there would have been a revocation; and even if the property could not have been ascertained, still the revocation would have taken place as to such as could be ascertained; also, that parol evidence was not admissible to shew what was contained in the lost unstamped plan. *Ibid.*

DISCOVERY.

[See PRODUCTION AND INSPECTION OF DOCUMENTS.]

DISENTAILING DEED.

The execution of a disentailing deed by a married woman may be acknowledged by her at any time, the acknowledgment not being limited by the six months required for the enrolment of the deed by the 3 & 4 Will. 4. c. 14. *In re the London Dock Act*, 1853, 25 Law J. Rep. (N.S.) Chanc. 45; 7 De Gex, M. & G. 627; 24 Law J. Rep. (N.S.) Chanc. 606.

Where there is a tenant in tail in possession and a tenant in tail in remainder under the same settlement, the tenant in tail in possession is protector within the words of the 22nd section of the 3 & 4 Will. 4. c. 74. *In re Blewitt*, 25 Law J. Rep. (N.S.) Chanc. 393; 6 De Gex, M. & G. 187.

Circumstances under which the Lord Chancellor, as protector, in lieu of the tenant in tail in possession, a lunatic, will consent to a disentailing deed for the purpose of securing a part of the estate for the near relations of the lunatic. *Ibid.*

The 24th section of the Fines and Recoveries Act (3 & 4 Will. 4. c. 74.) is retrospective as well as prospective, and therefore a married woman having an estate settled to her separate use by an instrument executed before the passing of the act is alone a sufficient protector of the settlement. *Keer v. Brown*, 28 Law J. Rep. (N.S.) Chanc. 477; John. 138.

DISORDERLY HOUSE.

[See ALIHOUSE (B) (b): *Cole v. Coulton*, ante, page 18.]

By a section of a local act for the regulation of a borough, which recited that it was expedient to make regulations for preventing disorderly conduct in houses of public resort, the keeper of any place for refreshment, not being licensed, who should wilfully and knowingly permit drunkenness or other disorderly conduct in such place, or knowingly permit prostitutes or persons of notoriously bad character to meet together and remain therein, was made liable to a penalty. A magistrate dismissed a complaint under this section, and stated, on appeal, that the defendant knowingly permitted twenty prostitutes to meet together, and remain in his coffee-shop (being a place within the section), together with a number of men, and that he allowed them to remain after he had been warned and knew that they were prostitutes; but no disorderly conduct was proved to have taken place in the shop. The question for the Court was, whether the magistrate was bound on the above facts to convict:—Held, that proof of disorderly conduct was not necessary to justify a conviction; but that, as it did not appear that the prostitutes were allowed to remain in the shop beyond the time necessary for taking refreshment, the magistrate was not bound to convict. *Greig v. Bendeno*, 27 Law J. Rep. (N.S.) M.C. 294; E. B. & E. 133.

DISSENTERS' BURIAL-GROUNDS.

[See BURIAL.]

DISTRESS.

- (A) RIGHT TO DISTRAIN.
 - (a) *In general.*
 - (b) *Postponement of the Right.*
 - (c) *After Tender.*
- (B) ILLEGAL AND WRONGFUL DISTRESS.
 - (a) *Time of Day.*
 - (b) *Second Distress.*
 - (c) *Joint Distress for separate Rents.*
 - (d) *Re-entry by Breaking in.*
- (C) IRREGULAR DISTRESS.
 - (a) *Growing Crops.*
 - (b) *Execution of Warrant.*
- (D) EXCESSIVE DISTRESS.
- (E) IMPOUNDING.
- (F) RESTORATION OF GOODS UNSOLD.
- (G) CATTLE DAMAGE FRASANT.
 - (a) *Straying Cattle.*
 - (b) *Unfit State of the Pound.*

(A) RIGHT TO DISTRAIN.

(a) *In general.*

A borough rate having been levied on the township of H, and paid, was subsequently increased by the town council of the borough of L, of which the township of H formed part. The township of H having refused to pay this increased rate,—Held, that (assuming the rate to be valid) the town council might enforce payment by distress under the provisions of 7 Will. 4. & 1 Vict. c. 81; and the Court refused a mandamus to compel the township to pay such increased rate. *The Queen v. the Overseers of the Township of Hunstet*, 28 Law J. Rep. (n.s.) M.C. 180.

A rent in fee simple may be granted by way of charge upon a use to commence at a future time. Mortgagee and mortgagor of lands in fee simple conveyed the fee to the use of grantees, &c. upon mortgage, with power of sale, with a proviso that in the event of grantees or any person claiming under them, entering under that power, the lands should thenceforth for ever be charged with the payment to first mortgagee, his heirs and assigns, of an annual sum, to be recovered as rent by distress out of the lands. The deed was not executed by the grantees, the second mortgagees, who, in default, entered under the power, and sold to T, subject to the rentcharge, and he afterwards sold to the plaintiff, subject to the said rentcharge so far as it might legally affect the lands. The defendant, in whom it had become vested, distrained for arrears; and in replevin, it was held, that he was entitled so to do, the intention being that in the event which had happened the first mortgagee should have the rent in fee simple, and the charge not being open to any legal objection. *Gilbertson v. Richards*, 28 Law J. Rep. (n.s.) Exch. 158; 4 Hurl. & N. 277.

The wife of the defendant in replevin had, at the time of her marriage, the equity of redemption in the *locus in quo*, which was then settled to her separate use. She was allowed to enjoy the property; and she and the defendant (or he in her name), let it to the plaintiff, she receiving the rents until she died. The defendant then distrained for rent subsequently accruing:—Held, that it was not lawful

for him to do so, and that he was liable in replevin. *Hove v. Scarrott*, 28 Law J. Rep. (n.s.) Exch. 325; 4 Hurl. & N. 723.

(b) *Postponement of the Right.*

The right of distress is not so inseparable an incident to a rent-service that it cannot be postponed. Therefore, where A, a meane landlord, let premises to an under-tenant by a written agreement, which provided, among other things, that no distress should be made till after A had produced the receipt of the superior landlord, and A afterwards distrained for his rent without producing such receipt,—Held, in an action by the under-tenant against the broker who executed the distress, that A's right was postponed, and that the defendant was liable as a trespasser. *Giles v. Spencer*, 26 Law J. Rep. (n.s.) C.P. 237; 3 Com. B. Rep. N.S. 244.

Some time after the first agreement A and his under-tenant agreed by parol to substitute other premises for those originally taken, to be held on the same terms, and the under-tenant entered:—Held, that the taking of the second premises was a new contract, and not an alteration of the terms of the first. *Ibid.*

(c) *After Tender.*

A tender of a certain sum as being "all that is due" is bad. A demand of a certain sum, made up of two sums claimed on two distinct grounds, is not "a demand" of either. *Field v. the Newport, &c. Rail. Co.*, 27 Law J. Rep. (n.s.) Exch. 396; 3 Hurl. & N. 409.

Therefore, where a railway company, entitled to distrain for tolls, demanded a sum in gross made up of two sums, the one due for tolls, the other not so due, and the party tendered the amount due for tolls as being all that was due,—Held, that the company were not entitled to distrain, but were not precluded by the tender from recovering the toll. *Ibid.*

Where goods have been seized as a distress for rent, and before impounding a tender is made of the rent in arrear and costs, an action will lie for the subsequent detaining of the goods. *Loring v. Warburton*, 28 Law J. Rep. (n.s.) Q.B. 31; E. B. & E. 507.

An action is maintainable, upon the equity of the statute 2 W. & M. stat. 1. c. 5. s. 2, for selling goods seized under a distress for rent, where a tender of the rent and expenses has been made before the sale, and within five days of the seizure, although after impounding: overruling *Ellis v. Taylor*. *Johnson v. Upham*, 28 Law J. Rep. (n.s.) Q.B. 252.

The defendants, tradesmen at L, received, on behalf of the owners, the rent of a house of which the plaintiff was tenant. Rent being in arrear, the defendants signed, as agents for the owners, a warrant of distress, and delivered it to a broker to be executed. Before it was actually executed, the plaintiff tendered to the defendants the amount due, which they refused to receive, on the ground that a distress warrant had issued. The plaintiff subsequently tendered the amount to the broker, who refused to receive it, unless certain alleged costs of distress were also paid. The broker having subsequently distrained,—Held, that the distress was unlawful, and that the defendants were liable to the plaintiff for the damages sustained, including certain

excessive costs of distress made by the broker. *Bennett v. Bayes*, 29 Law J. Rep. (N.S.) Exch. 224; 5 Hurl. & N. 391.

(B) ILLEGAL AND WRONGFUL DISTRESS.

(a) Time of Day.

The old common law rule that a distress for rent must be taken in the daytime, and not in the night, must be taken to mean, not merely that it must not be taken in the dark, but that it must be between sunrise and sunset; and although there may be circumstances under which it may be difficult to determine what will be the proper evidence of sunrise or sunset, yet, ordinarily, the time by the clock, coupled with the almanac, will be some evidence, and, if unanswered, sufficient; and if by such evidence it clearly appears that in any view the distress was before the sun had risen or after it had set, the distress will be illegal. *Tutton v. Darke* and *Nixon v. Freeman*, 29 Law J. Rep. (N.S.) Exch. 271; 5 Hurl. & N. 647.

Therefore, in two cases, in one of which the distress was taken at near eight o'clock on an evening when, by the almanac, the sun set just after seven, and in the other it was taken between two and three o'clock on the morning of a day on which, by the almanac, the sun rose at shortly before half-past four; and there was no other evidence upon the point, nor any evidence as to whether in either case it was dark when the distress was taken; but the jury in both cases found that it was taken between sunset and sunrise.—Held, that the evidence was sufficient to sustain that finding, and that the distresses were therefore illegal. *Ibid.*

(b) Second Distress.

A bean-stack of the plaintiff being distrained for rates due from the defendant, was afterwards sold by auction and a valid contract of sale effected, but on the purchaser subsequently proceeding to remove it, he was forcibly prevented by the plaintiff, and never had an opportunity of taking it away. The purchaser not having paid for the stack, a second distress was made for the rates and other things distrained under it.—Held, that such second distress was lawful. *Lee v. Cooke* (Ex. Ch.), 27 Law J. Rep. (N.S.) Exch. 337; 2 Hurl. & N. 585; 3 Hurl. & N. 203.

(c) Joint Distress for Separate Rents.

In replevin for taking the goods of the plaintiff in a house and close, the defendant made separate avowries as to the house and close, avowing the taking in each as for rent in arrear in respect of each respectively; to which avowries the plaintiff pleaded in bar that the defendant took one joint distress upon the house and close for and in respect of the several arrears of rent.—Held, that the plea was bad. *Phillips v. Whittead*, 29 Law J. Rep. (N.S.) Q.B. 164.

(d) Re-entry by Breaking in.

The landlord of a house put A into possession under a distress for rent. A went out for some temporary purpose, with an intention to return. In his absence, the tenant locked the outer door, and refused to allow him to come in. A broke open the door of the house, and re-entered.—Held, in an action by the tenant, that A was justified in thus

re-entering. *Bannister v. Hyde*, 29 Law J. Rep. (N.S.) Q.B. 141.

(C) IRREGULAR DISTRESS.

(a) Growing Crops.

To entitle a tenant to recover, under the 11 Geo. 2. c. 19. s. 19, in an action for an irregular distress, actual damage must be proved. *Rogers v. Parker*, 25 Law J. Rep. (N.S.) C.P. 220; 18 Com. B. Rep. 112.

A declaration contained a count for an irregular distress of growing crops, and a count in trover. The facts were, that the defendant seized the plaintiff's growing wheat as a distress for rent, and sold it on the premises in a growing state; the purchaser cut and carried it away, and the surplus proceeds, after satisfying the rent, were paid over to the plaintiff. The jury found that the plaintiff sustained no damage by the transaction.—Held, that the plaintiff was not entitled to recover even nominal damages on either count. *Ibid.*

(b) Execution of Warrant.

A warrant of distress directed to two jointly in a matter *pro bono publico* may be executed by one. *Lee v. Vessey*, 25 Law J. Rep. (N.S.) Exch. 271; 1 Hurl. & N. 90.

By a local act, 2 Geo. 3. c. xxxii., for draining and preserving certain low lands in the county of Lincoln, and for restoring and maintaining the navigation of a river, Commissioners were authorized to impose rates for the purpose of such drainage, and, in case of default in payment after demand, to issue their warrant to their collector or collectors to levy the amount by distress. The Commissioners having issued their warrant under this act "to L the collector, and M bailiff," it was executed by M alone.—Held, that it was regularly executed, and that an action of trespass was not maintainable against the Commissioners or M. *Ibid.*

The act further provided, that a distress made under the act should not be deemed unlawful, nor the party or parties making the same be deemed a trespasser or trespassers on account of any defect or want of form in the warrant or other proceedings.—Held, per *Pollock, C.B.*, that, supposing the execution of the warrant by M had been irregular, this provision would have applied to cure the defect of the joint direction of the warrant. *Ibid.*

(D) EXCESSIVE DISTRESS.

A declaration alleged that the defendant wrongfully distrained the plaintiff's goods for alleged arrears of rent, and wrongfully remained in possession of the goods until the plaintiff was compelled to pay and did pay the amount of the pretended arrears to the defendant in order to regain possession of the goods, whereas only part of the alleged rent was due.—Held, (*Crompton, J. dissentiente*) that the declaration disclosed no cause of action; that if a landlord distrains for more rent than is due, the tenant's course is to tender the amount really due, and if the landlord refuse to accept that sum, to replevy the goods and try the disputed question of amount in the action of replevin. *Glyn v. Thomas* (Ex. Ch.), 25 Law J. Rep. (N.S.) Exch. 125; 11 Exch. Rep. 870.

A declaration stated that the plaintiff was tenant to the defendant; that the defendant wrongfully

seized certain goods and chattels of the plaintiff, to wit, of the value of 30*l.*, as a distress for certain arrears of rent, to wit, 13*l.* 10*s.*, pretended by the defendant to be due and in arrear from the plaintiff for rent of the premises; and that the defendant afterwards, on that pretence, wrongfully sold the said goods and chattels as such distress for the said alleged arrears of rent, and the costs and charges of the distress, whereas, in truth, at the time of the distress a small part only, to wit, 9*l.* of the said pretended arrears was due for rent. Plea, not guilty. Verdict for the plaintiff, 10*l.* 10*s.* damages.—Held, that the declaration was bad, though after verdict; and that the case was not distinguishable from that of *Tancred v. Leyland*. *French v. Phillips* (Ex. Ch.), 26 Law J. Rep. (N.S.) Exch. 82; 1 Hurl. & N. 564.

It is questionable whether, under the common count for an excessive distress, the plaintiff can shew that the defendant distrained for an amount of rent exceeding the rent due, but he cannot shew a distraining and selling for more than is due, and a count for such a complaint will not be allowed to be added at the trial, where it does not appear to have been the matter in dispute at the time of the trial. And whether or not the common count raises the question as to the amount of rent due, the attention of the Judge must be called to its effect, and he must be asked to leave the evidence upon it to the jury, in order to give the plaintiff any right to a new trial on the ground that it was not so left to them. *Lucas v. Turlington*, 27 Law J. Rep. (N.S.) Exch. 246; 3 Hurl. & N. 116.

In an action for excessive distress, and for seizing and taking the plaintiff's goods, it was proved, that in the notice of distress certain fixtures, as well as other effects, were stated to have been distrained for rent; and it was also proved that the defendants had published a handbill containing a notice of sale by them of the whole of the effects, including fixtures, on the premises. The plaintiff offered evidence of the sale; but as the sale had not taken place until after action brought,—Held, that the evidence was not admissible, although produced to shew the intention of the defendants to take the fixtures at the time of making the distress; since no such intention would alone constitute a cause of action. *Beck v. Denbigh*, 29 Law J. Rep. (N.S.) C.P. 273.

(E) IMPOUNDING.

On distraining for rent in a dwelling-house, which was chiefly occupied by lodgers, the distrainer took down in the kitchen, at the dictation of the tenant's wife, an inventory of furniture in the other rooms. A man was left in possession, a copy of the inventory, with a notice that the articles enumerated therein had been distrained for rent, being also left. The tenant called the same day, and thanked the distrainer for the mode in which the distress had been conducted.—Held, that the tenant, having assented to what had been done, could not object that this was not an impounding within the 11 Geo. 2. c. 19. s. 10, as against a subsequent tender by him of the rent. *Quære*—whether, independently of the assent, there was an impounding. *Semble*, per *Erle, J.*, that there was not. *Tennant v. Field*, 27 Law J. Rep. (N.S.) Q.B. 33; 8 E. & B. 336.

(F) RESTORATION OF GOODS UNSOLD.

A landlord or bailiff who has distrained, even if not bound (as *semble* he is) to restore goods remaining unsold to the premises on which he distrained them, is at liberty to do so; and his doing so will not be a conversion; even although they are the goods of third parties, and the bailiff has had notice of this from them, after the impounding, and has promised to act on the notice, both as to goods unsold and the surplus proceeds of goods sold: for such a promise does not impose any duty on the bailiff to deliver the goods to the right owner, neither will it sustain an action for money had and received to recover the surplus proceeds of the goods sold. *Evans v. Wright*, 27 Law J. Rep. (N.S.) Exch. 50; 2 Hurl. & N. 527.

(G) CATTLE DAMAGE FEASANT.

(a) Straying Cattle.

Cattle of the plaintiff were being driven along a road in the dark; some of them strayed into a field of the defendant's, through a gap in the fence; the driver went on with the rest and put them in a place of safety, and then returned to take those which had strayed, but which the defendant by that time had distrained. The defendant, in an action of trespass for the taking, pleaded that he had distrained the cattle damage feasant, and that he had not distrained until a reasonable time had elapsed to remove them:—Held (*dissentiente Bramwell, B.*), that a reasonable time meant not merely a reasonable time for the act of removal, but what was reasonable under all the circumstances of the case, and that this was for the jury to determine. *Goodwyn v. Cheveley*, 28 Law J. Rep. (N.S.) Exch. 298; 4 Hurl. & N. 631.

(b) Unfit State of the Pound.

A person who distrains cattle damage feasant is bound, at his peril, to take care that the place in which he impounds them is in a fit and proper state, and is liable for the consequences if it is not. *Bignell v. Clark*, 29 Law J. Rep. (N.S.) Exch. 257; 5 Hurl. & N. 485.

In an action for abusing sheep distrained damage feasant, by putting them into a pound which was in an unfit state, as the defendant well knew, the evidence was that some of the sheep died in consequence of the state of the pound, and that it was in an unfit and improper state:—Held, that it was not necessary to leave to the jury explicitly the question whether the defendant knew the unfit state of the pound, for that he was bound to know it, and, moreover, as it was obvious, he must be taken to have known it; and a verdict for the plaintiff was supported. *Ibid.*

DIVORCE AND MATRIMONIAL CAUSES.

[See the 20 & 21 Vict. c. 85, amending the law of Divorce and establishing the Court for Divorce and Matrimonial Causes.—Amendment of the Act, 20 & 21 Vict. c. 85, by 21 & 22 Vict. c. 108.—Further Provision concerning the Court for Divorce and Matrimonial Causes made by 22 & 23 Vict. c. 61.—The Procedure and Powers of the Court for

Divorce and Matrimonial Causes amended by 23 & 24 Vict. c. 144.]

(A) JURISDICTION AND POWERS OF THE COURT.

- (a) *Domicil.*
- (b) *Dismissal and Amendment of Petition.*
- (c) *Alimony Pendente Lite.*
- (d) *Marriage Settlement and Settlement of Wife's Property.*
- (e) *Transference of Jurisdiction.*

(B) NULLITY OF MARRIAGE.

(C) DISSOLUTION OF MARRIAGE.

- (a) *Parties to the Suit.*
- (b) *When the Suit is not maintainable.*
 - (1) *Discretionary Bar.*
 - (2) *Res Judicata and Lis Pendens.*
 - (3) *Wife's uncorroborated Confession of Adultery.*
 - (4) *Connivance and Collusion.*
 - (5) *Condonation.*
- (c) *When the Court will decree a Dissolution.*
 - (1) *Adultery and Cruelty.*
 - (2) *Desertion.*
 - (3) *Bigamy with Adultery.*

(D) JUDICIAL SEPARATION.

- (a) *Decree for, in Suit for Dissolution of Marriage.*
- (b) *Decree for, in favour of Respondent, whose Answer does not pray for a Judicial Separation.*
- (c) *When the Suit is not maintainable.*
 - (1) *Res Judicata.*
 - (2) *When instituted for a collateral Purpose.*
 - (3) *Condonation.*
- (d) *On what Grounds the Court will decree a Separation.*
 - (1) *Cruelty.*
 - (2) *Danger of Bodily Injury.*
 - (3) *Drunkenness.*
 - (4) *Desertion without Cause for two Years.*

(E) RESTITUTION OF CONJUGAL RIGHTS.

(F) ALIMONY.

- (a) *Permanent Alimony.*
- (b) *Pendente Lite.*

(G) ORDER TO GIVE SECURITY TO THE WIFE.

(H) CUSTODY OF CHILDREN.

- (a) *General Principles and Circumstances.*
- (b) *Guardianship for Nurture.*
- (c) *Violence and Cruelty.*
- (d) *State of the Applicant's Mind.*
- (e) *Interim Order.*

(I) PLEADING.

- (a) *Answer as to Part.*
- (b) *Allegation of Cruelty.*
- (c) *Uncertainty and Irrelevancy.*
- (d) *Material Facts, but no Evidence, should be pleaded.*
- (e) *Change of Suit in Answer.*

(K) EVIDENCE.

- (a) *Certified Copies of Public Documents.*
- (b) *Entries in Private Diary.*
- (c) *Notice to produce.*
- (d) *Other Matters.*

(L) PRACTICE.

- (a) *Mode of Hearing or Trying the Cause.*
 - (1) *Application as to.*

(2) *By Oral Evidences before the Court.*

(3) *On Affidavits.*

(4) *By a Jury.*

(5) *In Camera.*

(6) *On Appeal from Decree of the Judge Ordinary.*

(b) *At the Trial.*

(c) *Withdrawing and dismissing Petition.*

(d) *Amendment of Petition.*

(e) *Service of Citation.*

(f) *As to the Co-respondent.*

(1) *Appearance at Hearing not having answered.*

(2) *Damages against.*

(3) *Special Grounds for not making.*

(g) *Affidavits; Form of, and Entitling.*

(h) *Particulars of Acts of Adultery.*

(i) *Witness.*

(1) *Commission to examine.*

(2) *Competency of Wife to prove Desertion.*

(k) *Other Matters.*

(M) COSTS.

(a) *Of the Wife.*

(1) *On Decree silent as to Costs.*

(2) *De Die in Diem.*

(3) *Extent of Husband's Liability for.*

(b) *Wife condemned in Costs.*

(c) *Against the Co-respondent, when and to what Extent granted.*

(d) *Taxation of Costs.*

(e) *Fieri Facias to levy.*

(A) JURISDICTION AND POWERS OF THE COURT.

(a) *Domicil.*

The word "domicil" has various meanings, according as it is used with reference to succession, founding jurisdiction, and other purposes. *Yelverton v. Yelverton*, 29 Law J. Rep. (N.S.) Prob. & M. 34; 1 Sw. & Tr. 575.

A foreigner may retain his foreign domicil for the purpose of succession, and yet may have acquired an English domicil, so as to be subject to the jurisdiction of "The Court for Divorce and Matrimonial Causes"; but if he has never resided in England, except temporarily, and is not there at the time of the commencement of the suit, he is not subject to such jurisdiction. *Ibid.*

An Irishman, who never resides in England, does not, by enlisting in a regiment, the head-quarters of which are in England, acquire an English domicil, so as to make him subject to the jurisdiction. *Ibid.*

The domicil of the husband is that of the wife; she cannot acquire a separate domicil for herself, though the husband may have been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights. *Ibid.*

Y, whose domicil or origin was Ireland, came over to England when a minor, for the purpose of receiving a military education, obtained a commission in the Royal Artillery, and was afterwards stationed in Scotland. The head-quarters of the Royal Artillery have always been in England. Y subsequently married, in Scotland, L, whose domicil of origin was England; and was afterwards re-married to her, in Ireland, according to the rites of the Roman Catholic

Church. The parties cohabited together at various places, in Scotland, England and France, until April 1858, when Y deserted L in France, and returned to Scotland, where he had since remained, refusing to cohabit with L; and subsequently, in Scotland, married another woman:—Held, in a suit by L for restitution of conjugal rights, that, as Y was a foreigner by origin, had never acquired an English domicile, and had never resided in England except temporarily, and was not in England at the commencement of the suit, that he was not subject to the jurisdiction of the Court. *Ibid*.

The Court has jurisdiction to inquire into the validity of a marriage in England between foreigners domiciled abroad at the time of the marriage. *Simmons v. Mallas*, 29 Law J. Rep. (N.S.) Prob. M. & A. 97.

A natural-born English subject does not, by the acquisition of a foreign domicile, shake off his allegiance to the Crown of England, but continues liable to be affected by the laws of England. Two natural-born English subjects were married in England. The husband afterwards went to America, became domiciled there, and there committed bigamy and adultery. The wife petitioned for a dissolution of the marriage. The citation and a copy of the petition were personally served on the husband in America, but he did not appear:—Held, that notwithstanding the husband's change of domicile, the Court had jurisdiction to dissolve the marriage. *Deck v. Deck*, 29 Law J. Rep. (N.S.) Prob. M. & A. 129.

Quære—whether the Court has jurisdiction in a suit for dissolution of an English marriage against a foreigner, who is served abroad with a citation, to which he does not appear. *Bond v. Bond*, 29 Law J. Rep. (N.S.) Prob. M. & A. 143.

A, an Englishwoman by origin, petitioned for dissolution of an English marriage, on the ground of adultery and cruelty. The respondent was served with a citation in Ireland, but did not appear. At the hearing some facts were elicited, from which it might be inferred that the respondent's domicile of origin was Ireland, but the evidence not being conclusive, and it appearing that the respondent had lived with his wife in England, the Court, on proof of the charges in the petition, dissolved the marriage without expressing an opinion as to its jurisdiction, if it had clearly appeared that the respondent's domicile had been Ireland. *Ibid*.

The Court has jurisdiction to dissolve a marriage between parties domiciled in England, though the marriage and delictum may have taken place abroad. *Ratcliff v. Ratcliff*, 29 Law J. Rep. (N.S.) Prob. M. & A. 171; 1 Sw. & Tr. 467.

(b) *Dismissal and Amendment of Petition.*

Semble—that where a cause has been part heard before the full Court, and adjourned for further evidence, the Judge Ordinary sitting alone has not power to dismiss the petition, or to allow an amendment to be made thereon. *Bannister v. Bannister*, 29 Law J. Rep. (N.S.) Prob. M. & A. 53.

The Judge Ordinary has not jurisdiction to dismiss a petition for dissolution of marriage. *Evans v. Evans*, 27 Law J. Rep. (N.S.) Prob. & M. 31; 1 Sw. & Tr. 78.

Semble, first, that such petition should be addressed to the full Court, and not to the Judge Ordinary;

secondly, that when a petition is good on the face of it, it cannot be dismissed on a mere affidavit of facts, though such facts would furnish matter for a plea in bar; but that the facts must be embodied in a plea. *Ibid*.

(c) *Alimony Pendente Lite.*

Semble—that the Court has no power to allot alimony *pendente lite* in a suit in which the husband has not appeared. *Deane v. Deane*, 28 Law J. Rep. (N.S.) Prob. & M. 23.

The Court has no power to order that the husband should attend at the hearing of a petition for alimony *pendente lite*, that he may be cross-examined as to the statements in his answer as to the amount of his income. *Hopper v. Hopper*, 28 Law J. Rep. (N.S.) Prob. & M. 26.

Where such an answer is ambiguous (*e. g.*), where it does not appear what are the deductions made by the husband from his gross income, the Court will direct it to be reformed by inserting an explanation of the ambiguous statements. *Ibid*.

(d) *Marriage Settlement and Settlement of Wife's Property.*

[See post (L) (f) (2): *Bell v. Bell*.]

In decreeing dissolution of marriage, on the ground of the wife's adultery, the Court has no power, under section 45. of the 20 & 21 Vict. c. 85, to alter a settlement made on the marriage. *Norris v. Norris*, 27 Law J. Rep. (N.S.) Prob. & M. 72; 1 Sw. & Tr. 174.

The Court has no power, under the 45th section of the 20 & 21 Vict. c. 85, to order any part of the property of a guilty wife to be settled on her; but it may, by refusing to make any order with regard to a part, leave it in her possession. *Bacon v. Bacon*, 29 Law J. Rep. (N.S.) Prob. M. & A. 125.

In making arrangements with regard to a wife's property, the Court will take into consideration the costs with which she will be burdened in defending the suit for a divorce, for which her husband is not strictly liable. *Ibid*.

(e) *Transference of Jurisdiction.*

Where a decree for costs, made in 1854 against the husband, was still outstanding in the Chancery Court of York, the Judge Ordinary, on motion, directed the papers to be transferred to the registry, and the cause to be entered on the books of the Court, so as to enable it to enforce payment. *Leigh v. Leigh*, 1 Sw. & Tr. 164.

(B) NULLITY OF MARRIAGE.

[See post (I) PLEADING—(e) Change of Suit in Answer: *Humphery v. Williams*.]

In a suit of nullity of marriage by reason of the impotency of the man, it appeared in evidence that the marriage was solemnized in 1834, but was never consummated. Declarations were made by the man leading to the inference that this was owing to some incurable incapacity on his part. The parties lived together amicably till October 1838, when, in consequence of the father and mother of the petitioner having spoken to the respondent on the subject of his incapacity, he left his home, saying he would never meet the petitioner again, and she returned to

the house of her father. In November 1838, and repeatedly from that time until 1854, the petitioner in vain tried to effect a reconciliation, and asked to be allowed to live with the respondent again. Until the spring of 1854 she maintained herself without any allowance from the respondent, but then, being ill, applied to him for assistance, which was refused. By the advice of a solicitor, she then contracted debts for necessities, and by arrangement with the creditors the respondent was compelled to pay them. The respondent then made her an allowance until October 1858, when he proposed to reduce its amount in consequence of an alteration in his circumstances. In November 1858, acting on her solicitor's advice, the suit of nullity was instituted. The respondent did not appear. The usual motion to the respondent to submit to personal medical inspection was not extracted. As to the condition of the wife, the only medical evidence was that of a physician, whom she had consulted for a disease of the womb, in 1849, who stated that, in his opinion, consummation had not then taken place; that there was no imperfection on her part to render it impossible; and that he had to submit the petitioner to an operation which destroyed all traces of virginity:—Held, by the *Judge Ordinary* and *Williams, J.*,—considering the length of time that had elapsed since the marriage and since the separation; the knowledge which the petitioner then had of her husband's imperfection; her request repeated continually for sixteen years afterwards to be received back by him; her arrangement with creditors to sue him as her husband for the debts contracted by her; the negotiation for and the receipt of an allowance for several years, and the institution of the suit on an intimation that the allowance would be reduced;—considering also the imperfect nature of the medical testimony adduced, and that much more precise and certain testimony might have been had if the suit had been commenced within a reasonable period,—that the petitioner was not entitled to a decree annulling the marriage:—Held, by *Bramwell, B.*,—considering that the evidence shewed that the husband was incurably impotent; that assuming the decree not to be a matter of right to the petitioner, but discretionary with the Court, and that it should not be pronounced, unless the Court is satisfied that the petitioner is *bona fide* seeking to get rid of the grievance occasioned by her marriage, there was nothing to shew that she was influenced by other motives, and that there would be no injustice done to the respondent in making the decree,—that the petitioner was entitled to have a decree of nullity of marriage pronounced. *H—, falsely called C—, v. C—*, 29 Law J. Rep. (N.S.) Prob. M. & A. 81; 1 Sw. & Tr. 605.

A marriage in England, between two foreigners domiciled abroad, if celebrated in conformity with the law of England, is, by the law of this country, valid, although such marriage has been contracted by them in England with the intention of evading the law of their own country, and on that ground has been there declared void. *Simonin v. Mallac*, 29 Law J. Rep. (N.S.) Prob. M. & A. 97.

Under 43 Eliz. c. 2. s. 7. the grandfather and grandmother may be called upon to maintain a pauper grandchild not able to work. If a father, who, in virtue of his possible liability under this

statute to maintain his grandchildren, is entitled to maintain a suit for the purpose of obtaining a decree annulling his child's marriage, dies pending such a suit, neither the mother or the father's executor can revive the abated suit: the mother, because she had no interest in the suit when it commenced; the executor, because the statutory liability is merely personal. *Bevan v. M'Mahon*, 28 Law J. Rep. (N.S.) Prob. & M. 127.

(C) DISSOLUTION OF MARRIAGE.

[See *Burt v. Burt*, title BIGAMY—Mode of Hearing, see *post*, PRACTICE.]

(a) Parties to the Suit.

A person not having a personal and private interest in a suit for dissolution of marriage cannot be made a party to such suit for the purpose of communicating to the Court, by placing it on the record, matter which might legitimately be inquired into by the Court, *mero motu*, and irrespective of the pleadings between the parties, and which if proved would legitimately influence their judgment; whether such matter constitute an absolute bar to the prayer of the petition or enable the Court to exercise its discretion thereon. *Ex parte Veraz, in re Chaddock v. Chaddock*, 29 Law J. Rep. (N.S.) Prob. & M. 55.

Semble—that the Court has no power to admit any other parties to appear in a suit for dissolution of marriage than those pointed out by the 27th and 28th sections of the 20 & 21 Vict. c. 85. *Ibid*.

Y petitioned for a dissolution of her marriage on the ground of her husband's desertion and adultery; he did not appear to the citation. D, having no legal private interest, prayed to be allowed to prove at the hearing that Y had herself been guilty of adultery. The Court held, that neither the Divorce Act, nor the Rules and Orders made under its provisions, gave the Court any authority to admit such intervention; but refused to direct the affidavits on which the motion was founded to be removed from the file, or to give the costs of appearing to show cause in the first instance. *Y— v. Y—*, 1 Sw. & Tr. 598.

(b) When the Suit is not maintainable.

(1) Discretionary Bar.

[See *post* (4) *Misconduct and Convivance*.

In a suit for dissolution of marriage, on the ground of the wife's adultery, it appeared that the petitioner, a draper's assistant, then twenty-one years of age, married in 1853 a woman whom he well knew to be a prostitute. A month after the marriage they removed from the lodgings to the house of the petitioner's father, from which, after a stay of a few weeks, they were compelled to remove in consequence of the wife exhibiting bad temper and making herself disagreeable to the family. Ten days afterwards, the husband went to America, not on business, but because he lived unhappily with his wife, leaving her without any means of subsistence, and supplying her with none during an absence of four years. After he left, his family had given the wife a small pittance on one occasion, and had promised to give her further assistance, but in consequence of her annoying them, all intercourse with her was broken off. The wife, after her husband left, returned to her former way of life. The Court, under these circumstances,

held, that there was a wilful separation of the husband from the wife before the adultery complained of, and that it was without reasonable excuse; and in exercise of the discretion given them by 20 & 21 Vict. c. 85, s. 31, refused to decree the dissolution of the marriage. *Coulthart v. Coulthart*, 28 Law J. Rep. (n.s.) Prob. & M. 21.

Where the case of the petitioner, in a suit for dissolution of marriage on the ground of adultery, has been proved, and the Court do not find that he has been accessory to or conniving at the adultery, or that there had been condonation or connivance, they are bound to pronounce a decree dissolving the marriage, unless it is established affirmatively that the petitioner has been guilty of one of the acts which, under the proviso to the 31st sect. of 20 & 21 Vict. c. 85, give the Court a discretionary power to refuse to dissolve the marriage. *Hanwell v. Haswell*, 27 Law J. Rep. (n.s.) Prob. & M. 21; 1 Sw. & Tr. 502.

Where it appears doubtful on the evidence in the suit whether or not the conduct of the petitioner has been such as to give the Court such discretionary power, the Court will, for the purpose of satisfying their minds, examine the petitioner adversely under the 43rd section, but will not in a suit instituted on the ground of adultery examine him or permit him to be examined for the purpose of proving his own case. After the Court has examined the petitioner adversely, his counsel will be permitted to suggest questions to the petitioner for the purpose of clearing up what the Court may have elicited adversely to the case. *Semble* (per the Judge Ordinary), that "deserted," in the proviso to the 31st section, is equivalent to "left destitute." Ibid.

In a suit for a dissolution of marriage, on the ground of the wife's adultery, it appeared from the evidence in support of the petition, that the husband had "wilfully separated himself from his wife" shortly after the marriage; but it was doubtful whether or not he did so "without reasonable excuse," the only evidence as to the cause of the separation being a statement made by the wife, that "her husband had left her because he had caught her with a young man." The Court, thinking that the petitioner might not have had reasonable excuse for leaving her, examined him, when it appeared that he had found her submitting to indecent liberties, and had immediately broken off all intercourse with her:—Held, that as, under these circumstances, it did not appear affirmatively that there was not reasonable excuse for the separation, the Court had no discretionary power, but were bound to dissolve the marriage. Ibid.

The "wilful misconduct" intended by the 31st section of the Divorce Act, which, in a suit for dissolution of marriage, gives the Court an option as to dissolving the marriage, although the case of the petitioner may have been proved, if he has been guilty of "such wilful neglect or misconduct as has conduced to the adultery," is misconduct amounting to a breach of marital duty. *Cunnington v. Cunningham*, 28 Law J. Rep. (n.s.) Prob. & M. 101; 1 Sw. & Tr. 475.

A, shortly after his marriage, was convicted of felony, and sentenced to transportation. Whilst he was undergoing penal servitude, his wife committed adultery with a man who resided in the house where

she went to board. She had been previously much attached to her husband; and from the circumstances of the case there was no reason to doubt that, but for her husband's absence, caused by his own misconduct, she would have remained faithful to him:—Held, in a suit by the husband for dissolution of marriage (*Pollock, C.B. dubitante, sed non dissentiente*), that the felony committed by the petitioner, not being a violation of marital duty, was not "misconduct," within the meaning of the 31st section; and, therefore, that the case of the petitioner having been proved, the Court was bound to dissolve the marriage. Held, also, per *Lord Campbell, C.J.*, that the felony did not conduce to the adultery, as, though a *sine quâ non*, it was not directly or indirectly a *causa causans*. Ibid.

A shortly after his marriage was, with his wife, residing in the house of his mother. The wife, in consequence of some disagreement with her mother-in-law, insisted on leaving the house, and on her husband declining to do so, she, with his consent, left and took lodgings elsewhere, where she remained three months. During this time her husband continued to reside apart from her, allowing her a small sum weekly for her maintenance, and visiting her occasionally, but only passed the night with her three times. On calling at her lodgings he frequently found her absent as late as eleven and twelve o'clock at night, she having no occupation which necessitated her absence, but he made no inquiries as to the mode in which she spent her time, nor remonstrated with her on her absence from home. The wife having committed adultery whilst living apart from her husband, the Court, under section 31. of the Divorce Act, refused to dissolve the marriage at the suit of the husband, although his case was proved, on the ground that he had been guilty of wilful neglect, which had conduced to the adultery. *Groves v. Groves*, 28 Law J. Rep. (n.s.) Prob. & M. 108.

The unreasonable delay in presenting or prosecuting a petition for dissolution of marriage, which, under section 31. of the Divorce Act, gives the Court a discretion as to dissolving the marriage, though the case of the petitioner has been proved, is delay from which it would appear that the petitioner is insensible to the injury of which he complains. *Pellev v. Pellev*, 29 Law J. Rep. (n.s.) Prob. & M. 44; 1 Sw. & Tr. 553.

B, a domiciled Englishman, intermarried with C, a Scotchwoman, at Greta Green, and at St. George's, Hanover Square, in August 1837. B and C cohabited together in Wales, England, and Scotland, but principally in the latter, till March 1841, soon after which date C eloped with P, whereupon B obtained a sentence of divorce in the Court of Session in Scotland, on the 3rd of July 1841. On the 26th of July 1841, C intermarried with P at Glasgow, and lived with him till his death in June 1855. B at first supposed the sentence of the Scotch Court to be of universal operation, and that supposition was confirmed by opinion of counsel in 1846. In 1854, he obtained the opinions of two counsel to the effect that the Scotch sentence would have no validity in England; in consequence of which he presented a petition for leave to bring into the House of Lords a Bill declaring his marriage with C absolutely void since the 3rd of July 1841, which petition

Ward, 27 Law J. Rep. (n.s.) Prob. & M. 63; 1 Sw. & Tr. 185.

G, in 1851, left his wife, and never afterwards lived with her or contributed to her support. He visited her occasionally, and at an interview in 1854 the wife offered to renew cohabitation, provided he would give up gambling and drinking. He refused to do so, and only twice went to her again, on one occasion asking her to sign a paper undertaking not to trouble him any more. Prior to the wife's conditional offer to renew cohabitation, G had formed an adulterous connexion with another woman, with whom he continued to live, refusing in 1858 to leave her, and stating that he had washed his hands of his wife, and would have no more to do with her:—Held, that though the wife had annexed a condition to a renewal of cohabitation, the refusal of the husband to abandon his bad habits, when viewed in connexion with the other facts of the case, amounted to desertion from that time. *Gibson v. Gibson*, 29 Law J. Rep. (n.s.) Prob. & M. 25.

A, on the 4th of October 1854, deserted his wife, without reasonable excuse, and never returned to her again. On the 16th of November 1856 he was arrested on a charge of felony, and was subsequently convicted and sentenced to four years' penal servitude. Between the 4th of October 1854 and the 16th of November 1856, he was twice imprisoned for debt; on the first occasion for seven, on the second for nineteen days. The above facts having been proved in a suit by the wife, commenced before the expiration of the term of penal servitude, for dissolution of marriage, on the ground of adultery and desertion,—Held, after consideration, that the husband had been guilty of desertion for two years and upwards. *Astrop v. Astrop*, 29 Law J. Rep. (n.s.) Prob. & M. 27.

(3) Bigamy with Adultery.

Semble (per *Pollock, C.B.*), that in a suit for dissolution of marriage, on the ground of bigamy with adultery, the adultery and bigamy must be committed with the same woman; and, consequently, some evidence beyond the mere solemnization of the bigamous marriage should be given, e.g. that the parties cohabited as man and wife. Proof of a bigamous marriage with A and adultery with B is not sufficient. *Horne v. Horne*, 27 Law J. Rep. (n.s.) Prob. & M. 50.

A girl, sixteen years of age, left her home one morning, and without the consent or knowledge of any of her friends married a man aged thirty-six, with whom they were unacquainted. Immediately after the ceremony she returned home and informed her mother of the marriage. Inquiries having been made as to the character of the husband, it was found that he was not a suitable husband for her. Her friends accordingly immediately removed her to the Continent, where she remained some years. She never cohabited with her husband, and never saw him after the marriage, nor did he make any attempts to get her to live with him. The husband having subsequently been guilty of bigamy with adultery, the Court dissolved the marriage at the suit of the wife—holding, that, under the circumstances, there was reasonable excuse for the separation. *Du Terreaux v. Du Terreaux*, 28 Law J. Rep. (n.s.) Prob. & M. 95; 1 Sw. & Tr. 555.

(D) JUDICIAL SEPARATION.

(a) Decree for, in Suit for Dissolution of Marriage.

In a suit by the wife for dissolution of marriage, on the ground of adultery and desertion, it appeared that the parties were married in 1848, and that shortly afterwards the husband became drunken and dissipated, and on many occasions ill-treated his wife. In January 1852 he sold off part of their furniture to buy drink, told his wife that she might go on the streets for a living, and then left her, telling her that he was going to leave B, where they resided, and that she would never see him again. He then left B, and was absent some years. The wife stayed in the house a fortnight after her husband had left her, and then removed, and took up her abode with her sister, who lived in B, with whom she has since resided, maintaining herself, without ever receiving any assistance from her husband. She made no inquiries after him until 1858, when, having discovered that he was living with another woman at B, application was made to him on her behalf to do something towards her support. He refused. It did not appear that the husband knew where his wife resided after he left her. The Court, upon these facts, refused to decree a dissolution of marriage, holding that desertion was not proved, as there was no evidence that when the parties separated the husband went away against the will of the wife, but, on the contrary, it appeared highly probable that they parted by mutual consent. It is competent for the Court to decree a judicial separation, although the petition prays only for a decree of a dissolution of marriage, if the facts proved at the hearing will entitle the petitioner to the former but not to the latter decree. The petition of a wife prayed simply a decree of dissolution of marriage, on the ground of adultery and desertion. At the hearing, adultery having been proved, but not desertion, the Court decreed a judicial separation. *Smith v. Smith*, 28 Law J. Rep. (n.s.) Prob. & M. 27; 1 Sw. & Tr. 359.

(b) Decree for, in Favour of Respondent whose Answer does not pray for a Judicial Separation.

Quere—will the Court make a decree of judicial separation in favour of a respondent, who has proved an answer entitling respondent to a judicial separation unaccompanied by a prayer for the same? *Pearman v. Pearman*, 29 Law J. Rep. (n.s.) Prob. M. & A. 54; 1 Sw. & Tr. 601.

(c) When the Suit is not maintainable.

(1) *Res Judicata*.

Quere—whether a husband or wife, who has obtained a divorce *à mens et thoro* in an Ecclesiastical Court, can maintain a suit for judicial separation for the same cause. *Ciacci v. Ciacci*, 29 Law J. Rep. (n.s.) Prob. & M. 30.

A spouse, who has obtained a decree for a divorce *à mens et thoro* in an Ecclesiastical Court, cannot maintain a suit for judicial separation on the same grounds. *Ciacci v. Ciacci*, 29 Law J. Rep. (n.s.) Prob. M. & A. 06.

(2) When instituted for a collateral Purpose.

Lapse of time is not an absolute bar to a suit for a judicial separation, on the ground of cruelty; but,

taken with other circumstances, may shew that the suit is not instituted for the protection of the wife, but for some collateral purpose. If the Court is satisfied that such is the case, the petition will be dismissed. *Matthews v. Matthews*, 29 Law J. Rep. (n.s.) Prob. M. & A. 118; 1 Sw. & Tr. 499.

In a suit by the wife for a judicial separation, on the ground of cruelty prior to October 1853, there was conflicting evidence as to the cruelty; and it also appeared that the parties had been living separate from October 1853 until the petition was presented in 1859, under a deed of separation; and that the wife, though she had the means, had taken no steps to obtain a divorce *à mensâ et thoro*. The Judge Ordinary dismissed the petition, on the ground that the circumstances of the case shewed that the suit was not instituted for the purpose of protecting the wife's person, but for some collateral purpose; and, on appeal, his judgment was affirmed. *Ibid*.

(3) *Condonation.*

Condonation is forgiveness of a conjugal offence on the full knowledge of all the circumstances. It is not a question of law, but of fact, depending on the circumstances of each particular case. When the issue of condonation is to be tried before a jury, it is a question entirely for their determination. *Peacock v. Peacock*, 27 Law J. Rep. (n.s.) Prob. & M. 71; 1 Sw. & Tr. 183.

To entitle a person to a decree of judicial separation on the ground of cruelty the acts relied on must be of such a nature as to shew that further cohabitation is unsafe—there must be proof of ill-treatment and bodily injury, or of a reasonable apprehension of such bodily injury. Acts of cruelty condoned and not revived by subsequent misconduct would not be a legitimate foundation for a decree of judicial separation, though condonation were not pleaded. Condonation is not absolute forgiveness, but forgiveness on the implied condition that the misconduct condoned shall not be repeated. Harsh and insulting treatment, though unaccompanied by personal violence, constitutes a breach of such implied condition in a case of cruelty. Cruelty generally consists in a series of acts, therefore condonation is not lightly to be presumed from a continuance of cohabitation after one or even several acts of cruelty. Continuance of cohabitation does not necessarily constitute condonation; it may be caused by the apprehension of some evil which is considered greater than personal injury, e.g., the privation of children. Acts of violence committed under the influence of an acute disorder, such as brain fever, where, the disorder having been subdued, there is no danger of their recurrence, would not be a ground for a decree of judicial separation. *Alien*—if the result of such disease were a new condition of the brain, rendering the party liable to ungovernable fits of passion, which would make further cohabitation dangerous. *Curtis v. Curtis*, 27 Law J. Rep. (n.s.) Prob. & M. 73; 1 Sw. & Tr. 192: Judgment affirmed, 28 Law J. Rep. (n.s.) Prob. & M. 55.

The adultery of the wife, if it has been condoned by her husband, is no bar to a suit by her for judicial separation on the ground of adultery subsequently committed by him. *Seller v. Seller*, 28 Law J. Rep. (n.s.) Prob. & M. 99; 1 Sw. & Tr. 482.

Condonation, though not pleaded, if clearly proved,

may bar the right of the petitioner to relief; but in such case evidence of subsequent misconduct reviving that condoned will be received, though not alleged in the petition. *Suggate v. Suggate*, 29 Law J. Rep. (n.s.) Prob. M. & A. 167; 1 Sw. & Tr. 492.

(d) *On What Grounds the Court will Decree a Separation.*

(1) *Cruelty.*

Where there have been acts of violence followed by condonation, threats subsequently uttered constitute sufficient ground for a decree of judicial separation, if they are of such a nature and so expressed as to satisfy the Court that further cohabitation would be attended with danger to the party threatened, but not otherwise. *Bostock v. Bostock*, 27 Law J. Rep. (n.s.) Prob. & M. 86; 1 Sw. & Tr. 221.

When a question of cruelty comes before a jury as a ground for judicial separation, the jury are to determine, not only whether the acts complained of were done, but whether they constitute legal cruelty. Bodily injury, reasonable apprehension thereof, or injury to health, are the general tests of legal cruelty. *Thomkins v. Thomkins*, 1 Sw. & Tr. 168.

On the wife's petition for judicial separation by reason of her husband's cruelty towards her, certain acts of violence on his part being admitted which took place in disputes between the parties arising at least in part out of the wife's jealousy of a maid-servant, the Court took into consideration the position in which the wife was placed in the family by reason of any authority or control exercised over her by the servants by the direction of the husband, and the state of the wife's feelings arising from reasonable suspicion of undue familiarity between the husband and a maid-servant. *Anthony v. Anthony*, 1 Sw. & Tr. 594.

(2) *Danger of Bodily Injury.*

Bodily injury inflicted on a wife by her husband whilst suffering from attacks of *delirium tremens*, is a ground for judicial separation, if the Court is satisfied that, although the acute disorder may have subsided, the wife could not return to cohabitation with her husband without incurring great peril of a renewal of such bodily injury. *Marsh v. Marsh*, 28 Law J. Rep. (n.s.) Prob. & M. 13; 1 Sw. & Tr. 312.

The husband will be entitled to the protection of the Court, where the wife's passions, from whatever cause, are so little under control that she is in the habit of using personal violence to the husband, from which habit he may be in danger of bodily injury, though no actual serious injury has been inflicted. *White v. White*, 1 Sw. & Tr. 591.

(3) *Drunkenness.*

Drunkenness, even when accompanied by acts of considerable violence, is not a substantial ground for a decree of judicial separation. *Scott v. Scott*, 29 Law J. Rep. (n.s.) Prob. M. & A. 64.

(4) *Desertion without Cause for Two Years.*

To entitle a wife to a judicial separation, on the ground of desertion without cause for two years and upwards, the husband must have wilfully absented himself from her in spite of her wish. *Thompson v. Thompson*, 27 Law J. Rep. (n.s.) Prob. & M. 65; 1 Sw. & Tr. 231.

In 1842 A, having failed in business at Leeds, sent his wife and children to her father, who lived there, and went to London for the purpose of obtaining employment. In the course of that year he wrote several letters in affectionate terms, expressing a hope that they might soon be able to live together again, and in the latter ones complaining that she did not answer his letters. She answered none of them; and no communication took place until 1850, when he went to Leeds and saw his wife, and said that he should come the next day, but did not do so. They never afterwards met or communicated with each other. From the time A first left Leeds he never contributed to the support of his wife or children, nor had his wife expressed to him a desire to live with him again. The wife having presented a petition for judicial separation, on the ground of desertion without cause for two years and upwards,—Held, by the Judge Ordinary, refusing to grant judicial separation, first, that there was no desertion in the first instance, the husband not having wilfully absented himself, but of necessity; secondly, that the continuance of his absence, considering the conduct of the wife, did not constitute desertion. *Ibid.*

In November 1848, A, having a residence at Birkenhead, went to Birmingham. His wife joined him there, and after staying with him at an inn for a short time, by his direction, went to pay a visit to a friend, he saying that he should soon join her. He did not do so, and the wife returned to Birkenhead, when she found an execution in their house. She wrote to A, but got no answer, and the furniture was sold under the execution. She then went into lodgings, and on his refusing to return to her, took a situation as a governess, and had since entirely maintained herself. In 1844 A wrote a letter to his wife, containing a vague intimation that she might rejoin him, but not making a definite offer of another home. She replied that it would be time enough to talk of that when he could place her in as good a position as she was able to maintain herself in. In 1848 A wrote to his wife, bidding her "farewell for ever":—Held, by the Judge Ordinary, that as the husband deserted his home in 1843, and never afterwards made any definite offer to provide another for his wife, she was entitled to a judicial separation, on the ground of desertion without cause for two years and upwards. *Cudlipp v. Cudlipp*, 27 Law J. Rep. (n.s.) Prob. & M. 64; 1 Sw. & Tr. 229.

Desertion without cause for two years and upwards gives a wife a right to a judicial separation under section 16. of 20 & 21 Vict. c. 85, of which she cannot be deprived without her concurrence. A *bond fide* offer by the husband after that right has accrued to renew the cohabitation will not *per se* take away such right. *Cargill v. Cargill*, 27 Law J. Rep. (n.s.) Prob. & M. 69; 1 Sw. & Tr. 235.

Semble, first, such an offer would not take away the right of a wife to a dissolution of marriage for adultery coupled with desertion, without excuse, for two years and upwards, under section 27. Secondly, that the offer of a husband who has deserted his wife to return to and provide for her, would take away her right to have an order made, under section 21, for the protection of property acquired by her since the desertion. *Ibid.*

The 16th section of the 20 & 21 Vict. c. 85, is not retrospective so as to entitle to a judicial separation a spouse who, prior to that act coming into operation, has been deserted for two years and upwards, but the desertion in such a case must continue after the act came into operation. If, therefore, before that date a spouse so deserted has received a *bond fide* offer to renew cohabitation, the desertion having thereby been put an end to, a suit for a judicial separation cannot be maintained. *Brookes v. Brookes*, 28 Law J. Rep. (n.s.) Prob. & M. 38; 1 Sw. & Tr. 326.

A husband in 1833 deserted his wife without cause. They never afterwards lived together. In 1850 the wife rejected an offer made to her by the husband to live with her again:—Held, that the wife was not entitled to a judicial separation on the ground of "desertion without cause for two years and upwards." *Ibid.*

(E) RESTITUTION OF CONJUGAL RIGHTS.

[See *ante* (A) JURISDICTION AND POWERS OF THE COURT, (a) Domicil—*post*, PRACTICE.]

The doctrine of the canon law that, where husband and wife have both been guilty of adultery, there is a *compensatio criminum*, and both are restored to the position of innocent parties, is not part of the law of England. Therefore, a suit for restitution of conjugal rights cannot be sustained by a wife who has committed adultery, although the husband also has committed adultery. *Hops v. Hops*, 27 Law J. Rep. (n.s.) Prob. & M. 43; 1 Sw. & Tr. 94.

The wife libelled for restitution of conjugal rights. The husband alleged the wife's insanity and a morbid hatred towards himself, which rendered cohabitation unsafe. The wife's responsive allegation allowing that she had been insane, but asserting her recovery and denying the facts on which the husband relied to shew continuance of insanity, admitted to proof. *Hayward v. Hayward*, 1 Sw. & Tr. 81.

(F) ALIMONY.

(a) Permanent Alimony.

The order for permanent alimony under section 32. of the 20 & 21 Vict. c. 85. must be embodied in the decree dissolving a marriage. If such a decree has been pronounced and registered. *Vicars v. Vicars*, 29 Law J. Rep. (n.s.) Prob. & M. 20.

A obtained a sentence of divorce *à mens et thoro*, in 1847, by reason of her husband's cruelty. 300*l.* per annum was taken by consent as permanent alimony. Upon her father's death, A having received an accession of income (to the extent of 144*l.* per annum, as admitted by herself), her husband applied for a reduction of alimony:—Held, that no case was made out by the husband for a reduction of alimony. His income did not appear, and *non constat* that 300*l.* would not have been originally allotted by the Court, even if A had then been in possession of 144*l.* per annum. *Saunders v. Saunders*, 1 Sw. & Tr. 72.

(b) Pendente Lite.

In the Ecclesiastical Court one-fifth of the husband's net income was usually allotted as alimony *pendente lite*, and was made payable from the date of

the return of the citation, the statement in the husband's answers to the wife's allegations of faculties being assumed to be correct unless the wife disputed it and examined witnesses. *Hayward v. Hayward*, 28 Law J. Rep. (N.S.) Prob. & M. 9; 1 Sw. & Tr. 85.

The outlay on permanent improvements, such as reinstating dilapidated buildings, should not be deducted from income, but should be charged on the capital. *Ibid.*

The husband is liable for necessities supplied to his wife pending the suit, and before the decree of alimony, but he is liable only to a reasonable amount, and therefore, if the wife during that period incurred debts to an extravagant amount, that circumstance cannot be taken into account as a ground for diminishing the amount of alimony. *Ibid.*

Where 50*l.* had been paid on account of alimony *pendente lite* before the decree, the Court made the sum allotted payable from the date of the decree instead of from the date of the return of the citation. *Ibid.*

In a suit for dissolution of marriage instituted by the husband, who has previously obtained a divorce *à mens et thoro* in an Ecclesiastical Court on the ground of his wife's adultery, the wife is not entitled to alimony *pendente lite*. She is, however, entitled to costs *de die in diem*. *Holt v. Holt*, 28 Law J. Rep. (N.S.) Prob. & M. 12.

Where, in his answer to a petition for alimony *pendente lite*, the husband alleges that the wife's income exceeds his,—if the wife dispute this, the proper course for her to adopt is to deny the allegation by her replication on oath. *Watts v. Watts*, 28 Law J. Rep. (N.S.) Prob. & M. 124.

In a suit for dissolution of marriage, on the ground of the wife's adultery, alimony *pendente lite* will be allotted the wife at any time before the case comes on before the full Court, even though, on an issue raised by her in the suit, a jury may have found that she has been guilty of adultery. *D'Oyley v. D'Oyley*, 29 Law J. Rep. (N.S.) Prob. M. & A. 165.

Where before the Rules of the 11th of January 1860 a husband, respondent, appeared in the suit, but filed no answer to the wife's petition for alimony *pendente lite*, the Court made an order that he should file one within a specified time, in order that, if disobeyed, he might be proceeded against for contempt. *Roberts v. Roberts*, 29 Law J. Rep. (N.S.) Prob. M. & A. 158.

Since the Rules of the 11th of January 1860, under such circumstances, the wife may, after notice, examine witnesses in support of her petition for alimony. *Ibid.*

The Court will order the payment of the wife's costs in matrimonial suits, the husband's poverty notwithstanding; but, *semble*, it will not allow an attachment to issue for disobedience of such order, if satisfied of the husband's inability, through poverty, to comply with it; but will allow a *fiat* *facias* to issue for the purpose of levying the amount of taxed costs. *Ward v. Ward*, 29 Law J. Rep. (N.S.) Prob. & M. 27; 1 Sw. & Tr. 484.

Where the husband, a common labourer, dependent on his weekly earnings, and possessed of no property, except furniture of the value of 4*l.*, had failed to pay alimony *pendente lite*, the Court refused to allow an attachment to issue against him; but

permitted the wife to sue out a writ of *fiat facias* for the purpose of levying the arrears. *Ibid.*

In April 1857, in a suit for nullity of marriage brought by the husband against the wife, alimony *pendente lite* was agreed upon at 300*l.* per annum, and confirmed by order of Court. On application for reduction of such rate of alimony, on the husband's affidavit that his income in 1857 was 1,200*l.*, and now only 949*l.*, but not explaining how such reduction had been caused, nor stating when or how a certain sum of 10,000*l.* had been spent, the Court refused to interfere. *Shirley v. Wardrop*, 1 Sw. & Tr. 317.

(G) ORDER TO GIVE SECURITY TO THE WIFE.

[See post (H) CUSTODY OF CHILDREN (a): *Robotham v. Robotham*.]

The Court will not order a husband, who has obtained a decree of dissolution of marriage, to secure to the wife a gross or annual sum of money under section 32. of 20 & 21 Vict. c. 85, unless proof of the husband's ability to pay it be given. *Ratcliff v. Ratcliff*, 29 Law J. Rep. (N.S.) Prob. M. & A. 171; 1 Sw. & Tr. 467.

(H) CUSTODY OF CHILDREN.

(a) General Principles and Circumstances.

In a suit for dissolution of marriage, on the ground of the husband's bigamy and adultery, the Court was asked, on decreeing dissolution, First, To order, under section 32. of 20 & 21 Vict. c. 85, that a sum of money standing in the names of the husband and wife in a savings bank should be paid to the wife; secondly, That the custody of the children should remain with the wife. The Court, first made an order that the husband should secure to the wife the sum of money in the bank, that being all they had power by section 32. to do; but, secondly, declined to make any order as to the custody of the children, on the grounds that there was no present necessity for it, the husband being in America and not likely to interfere with the custody of the children; that no Court would aid him to wrest them from the wife; and that the order could not afterwards be modified, though circumstances might arise which would render such a modification desirable. *Robotham v. Robotham*, 27 Law J. Rep. (N.S.) Prob. & M. 61; 1 Sw. & Tr. 190.

Quere—whether the Court for Divorce in exercising the power given it by section 35. of 20 & 21 Vict. c. 85, to make provision for the custody, maintenance and education of children, should act in accordance with the rules and principles by which the Court of Chancery is guided in such cases, or is vested with an absolute discretion. *Curtis v. Curtis*, 27 Law J. Rep. (N.S.) Prob. & M. 73; 1 Sw. & Tr. 192.

On decreeing a judicial separation on the ground of the husband's cruelty, the Judge Ordinary, considering that under the circumstances of the case, the children ought not to be delivered up to the father—that he had no power to vary an order when once made, though it might afterwards be desirable to do so, and that there were no funds applicable to the maintenance and education of the children, declined to make any order under section 35. of 20 & 21 Vict. c. 85, as to their custody, maintenance

and education, but directed that they should remain with their mother for three months, in order that an application might be made to the Court of Chancery. *Ibid.*

Semble—that where the Court is asked, under section 35. of 20 & 21 Vict. c. 85, to make a provision as to the custody, &c. of the children in its final decree for a judicial separation, &c. that question must be gone into at the hearing of the suit, and cannot be made the subject of a separate hearing. *Ibid.*

In dealing with the custody of children under section 35. of 20 & 21 Vict. c. 85, the Court has a discretionary power exceeding that possessed by Courts of common law and equity, and should in exercising it make such orders as are just and proper with reference to the circumstances affecting the suit, taking into consideration the interests of both the children and parents. *Marsh v. Marsh*, 28 Law J. Rep. (N.S.) Prob. & M. 13; 1 Sw. & Tr. 312.

On decreeing a judicial separation on the ground of the husband's cruelty, the Judge Ordinary considering that the children of the marriage, who were four in number, and all under seven years of age, would be benefited by being left in the custody of the mother, that it would not be just to compel the unoffending mother to resort to any place where the father might choose to place them, and that any trouble he might be put to about going to see them would arise from his own misconduct, made it part of the decree that the children should remain under the control of the mother until the age of fourteen (when by law they could exercise their own choice in the matter), provided she kept at school, at her own expense, such of them as should be of fit age, the father to have the same access to them as should be allowed to the parents of other children at the same schools, and that as long as any child should be kept by the mother at her own house, the father should have access to it there once a week at any reasonable hour. *Ibid.*

The Court is not in a position to deal with a petition for custody of children brought under the 22 & 23 Vict. c. 61. s. 4, until both parties are before the Court. *Stacey v. Stacey*, 29 Law J. Rep. (N.S.) Prob. M. & A. 63.

The Rules and Orders already published do not apply to 22 & 23 Vict. c. 61. *Ibid.*

On pronouncing a decree of dissolution of marriage, the Court will make an order that a child in the custody of the respondent be given up to the petitioner, even when the child is of an age that entitles the petitioner to the custody by common-law right. *Boyd v. Boyd*, 29 Law J. Rep. (N.S.) Prob. M. & A. 79; 1 Sw. & Tr. 562.

In dealing with the custody of children the Court will consider the interests of the parents and of the children. *Suggate v. Suggate*, 29 Law J. Rep. (N.S.) Prob. M. & A. 167; 1 Sw. & Tr. 492.

A wife having obtained a decree of judicial separation, on the ground of cruelty, the Court being satisfied that the children of the marriage would not be brought up as carefully and morally by their father as by their mother, as an act of justice to her, and for the advantage of the children, ordered that she should have the custody of them until they should attain fourteen, with provision for their father having access to them. *Ibid.*

Upon an application by a husband for the custody of a child *pendente lite*, the wife asked for time to answer the affidavit upon which the application was founded. The Court granted time, upon an undertaking being given by the wife that the child should not be removed out of the jurisdiction of the Court until further order. *Carter v. Carter*, 29 Law J. Rep. (N.S.) Prob. M. & A. 167.

A deserted his wife and went to Australia in March, 1854; in 1858 the wife filed a petition for judicial separation by reason of desertion; the husband was personally served, but gave no appearance. The Court pronounced for the judicial separation, but refused to make any order for the custody of children. It seemed unnecessary, as they were now in the mother's custody, and the father in Australia. *Seymour v. Seymour*, 1 Sw. & Tr. 332.

Semble—when permanent custody is intended to be asked for, it should be inserted in the prayer of the petition. *Ibid.*

(b) Guardianship for Nurture.

Guardianship for nurture continues until a child attains the age of fourteen. Until that age the child cannot exercise his own choice as to quitting or remaining with his father. The Court, in its decree for a judicial separation, on the ground of the adultery of the husband, on proof that the husband continued to live in adultery and that the child of the marriage, a boy aged thirteen, resided with him, there being no imputation on the wife, ordered that she should have the custody of the child until the age of fourteen, provision being made for the husband having access to it. *Hyde v. Hyde*, 29 Law J. Rep. (N.S.) Prob. M. & A. 150.

(c) Violence and Cruelty.

When the petition in a matrimonial suit prays the Court in its final decree to make provision as to the custody, &c. of the children under section 35. of the Divorce Act, the Court, at the hearing, will confine the inquiry to the conduct of the husband and wife, and will not extend it to matters affecting solely the interests of the children, and if during the hearing enough should not transpire to enable the Court to give directions as to the custody, &c. of the children, it will require further evidence to be given on that question before making its final decree. The petition in such a case should not contain statements of matters affecting solely the interests of the children, such as charges of general misconduct by the respondent towards them. *Suggate v. Suggate*, 28 Law J. Rep. (N.S.) Prob. & M. 46; 1 Sw. & Tr. 492.

Acts of cruelty to children committed in the presence of the mother may amount to cruelty to her. *Ibid.*

A petition by the wife praying for a judicial separation on the ground of cruelty, and also for the custody of the children of the marriage, contained a general allegation that the respondent had been guilty of cruelty to the children:—Held, that such allegation ought to be struck out, unless it could be amended by stating that the acts of cruelty were committed on the premises of another, and also that charges of blasphemy and immorality on the part of the respondent were inadmissible. *Ibid.*

When the violence complained of was such as to lead to a suspicion of insanity, the Court would not

entertain the question of sanity or insanity, but looked only to the acts done. The innocent party has a *prima facie* right to the custody of the children; when, however, under peculiar circumstances, there had been no acts of violence towards the children, the Court gave up one of them to the father, the party complained of. *Martin v. Martin*, 29 Law J. Rep. (N.S.) Prob. M. & A. 106.

(d) *State of the Applicant's Mind.*

The Court, in its decree for a judicial separation, on the ground of the husband's adultery, ordered that the wife should have the custody of the children under fourteen until they should attain that age, on proof that the husband continued the adulterous intercourse. The application of the wife for the custody of the children was opposed, on the ground that she was not of sound mind. The evidence of medical men adduced by the parties conflicting, and it appearing that they were not much conversant with affections of the brain, the Court directed a personal examination of the wife by an eminent physician, and upon his certificate gave her the custody of the children. *Duggan v. Duggan*, 29 Law J. Rep. (N.S.) Prob. M. & A. 169.

(e) *Interim Order for.*

In a suit for a judicial separation by reason of the husband's cruelty, the wife applied under section 35. of 20 & 21 Vict. c. 85, for an interim order restraining the husband from removing from her custody the children of the marriage. They were respectively nine, eight and five years old, the two elder being under the care of a governess at her house, the youngest with the wife. The husband made a cross-application for an order that the two elder children should be delivered to him. The application of the wife was grounded on the facts stated in her petition for a separation, which were not admitted by the husband. The Court, in order to avoid prejudging the merits of the suit, refused both applications, and directed that until further orders the two elder children should remain with their governess, and the youngest child with the wife, she undertaking not to remove it without notice to the husband, who was to have all reasonable access to the children. *Curtis v. Curtis*, 27 Law J. Rep. (N.S.) Prob. & M. 16; 1 Sw. & Tr. 75.

In making an interim order under section 35. of the Divorce Act as to the custody of the children, the Court will adhere to, or depart from the common rule according to its discretion. *Spratt v. Spratt*, 1 Sw. & Tr. 215.

In April, 1858, the wife left her husband's house, with the view of instituting a suit for dissolution of marriage, by reason of cruelty and adultery, taking with her their boy, between seven and eight years of age, whom she placed in a school kept by an intimate friend of her own. On an application for an interim order, to prevent the father removing him from such school,—Held, that the wife's intimate friend could not be considered an indifferent person between the parties. The Court ordered the child to be given up to the husband's mother, who, from the letters, appeared to be on good terms with the daughter-in-law, and attached to the boy. *Boynnton v. Boynnton*, 1 Sw. & Tr. 324.

(I) PLEADING.

(a) *Answer as to Part.*

A petition for dissolution of marriage on the ground of the wife's adultery charged various acts of adultery in 1856, 1857 and 1858. The respondent, in her answer, pleaded, first, a denial of the adultery; secondly, desertion on the 4th of September 1857; thirdly, condonation; fourthly, connivance. The affidavit of the petitioner, filed in pursuance of Rule 2, did not verify the statements in the petition as to the adultery. The respondent's affidavit, filed in pursuance of Rule 15, did not verify the third and fourth pleas, it being supposed that by doing so the adultery would be admitted. On motion to disallow the last three pleas and for leave for the petitioner to file an affidavit verifying the adultery charged "to the best of his belief,"—Held, by the Judge Ordinary, first, that the second plea was bad, as, though it was pleaded to the adultery charged in the petition, it was only an answer as to part; secondly, that the third and fourth pleas should be verified by affidavit, as the respondent, by doing so, would not admit the adultery, each plea being to be construed by itself; thirdly, that the petitioner might in his affidavit state that the adultery was committed "to the best of his belief." *Tourle v. Tourle*, 27 Law J. Rep. (N.S.) Prob. & M. 52; 1 Sw. & Tr. 165.

(b) *Allegation of Cruelty.*

A petition for judicial separation, on the ground of cruelty, alleged, that "on the 26th day of July 1848, and other days between that day and the 24th day of July 1848, the respondent was guilty of cruelty to the petitioner":—Held, that this was not sufficient, but that such acts should be specified as, if proved, would constitute cruelty. *Suggate v. Suggate*, 28 Law J. Rep. (N.S.) Prob. & M. 7; 1 Sw. & Tr. 489.

The precise date of the commission of such acts need not be alleged. *Ibid.*

(c) *Uncertainty and Irrelevancy.*

The answer of the wife, in a suit for dissolution of marriage, by reason of adultery, stated, in the 2nd paragraph, that the wife, prior to the marriage, had been living with A, another man; that the petitioner had frequently visited her, and had induced her to leave A, and cohabit with him, and had lived with her at a house of ill fame. The 7th, 8th and 9th paragraphs charged the husband with adultery, between March the 1st and May the 5th, 1858. The 10th stated that the husband, having left her, was induced by the wife, on the 5th of May 1858, to return to her. The 11th stated that the husband, on divers occasions prior and subsequent to the 5th of May 1858, struck and assaulted her, and specified a particular occasion, in July 1858:—Held, by the Judge Ordinary, that the 2nd paragraph should be struck out, as opening too wide a field of inquiry, and being irrelevant; that the conduct therein charged was not "wilful misconduct," within the meaning of section 31. of the Divorce Act, which must be taken to be misconduct after the marriage; that the 7th, 8th and 9th paragraphs were material, as, though the adultery therein charged might have been condoned by the wife living again with her

husband, as alleged in the 10th paragraph, the Court might still, in exercise of the discretion vested in it by section 81, refuse to decree a dissolution of the marriage; and that the 11th paragraph should be amended by stating the date of the last act of cruelty, the objection to that paragraph being, that the petitioner, though cohabitation continued till September 1858, could not, unless so amended, tell whether or not to plead condonation. *Allen v. Allen*, 28 Law J. Rep. (N.S.) Prob. & M. 81.

(d) *Material Facts, but not Evidence, should be pleaded.*

A respondent cannot prove anything which he has not pleaded. *Plumer v. Plumer*, 29 Law J. Rep. (N.S.) Prob. M. & A. 63.

Semble—he will generally have the opportunity of pleading material facts afforded to him at any stage of the proceedings on such terms as shall seem equitable to the Court, having regard to all the circumstances of the particular case. *Ibid.*

A petition for dissolution of marriage by reason of the husband's adultery and desertion, directed to be amended by a distinct averment of the fact of desertion; some statement of circumstances in such a petition may be necessary, but evidence should not be pleaded. *Pyne v. Pyne*, 1 Sw. & Tr. 80.

(e) *Change of Suit in Answer.*

A charge of cruelty, with a prayer for judicial separation, cannot be made in answer to a petition for sentence of nullity of marriage. *Humphrey v. Williams*, 29 Law J. Rep. (N.S.) Prob. M. & A. 62.

(K) EVIDENCE.

(a) *Certified Copies of Public Documents.*

In proof of a marriage in Chili, a document was tendered purporting to be an extract from a register of marriages, and signed by the curate-rector of the church where it was solemnized. His signature was verified by a public notary, whose signature was verified by other notaries, and their signatures were verified by the Foreign Minister of the Chilian Republic, and a certificate under the hand and seal of the British Consul at Chili was added. On the evidence of a witness that a register was kept by the curate-rector of every church in Chili of marriages solemnized in it, and that certificates of marriages such as that tendered were in the Chilian courts received in evidence, that he knew the name of the curate-rector, and was also well acquainted with several of the persons whose signatures were appended to the certificate as witnesses, the document was admitted as evidence of the marriage. *Abbott v. Abbott*, 29 Law J. Rep. (N.S.) Prob. M. & A. 57.

Where there had been a decree of one of the extinct Courts, and depositions taken in the cause in which such decree was made, the Court held, that those depositions could not be used in evidence in a cause before this Court, except so far as they were embodied in the decree, and therefore part of the proceedings of a Court, and documents of a public nature of which this Court would receive in evidence a certified copy. *Linzee v. Linzee*, 29 Law J. Rep. (N.S.) Prob. M. & A. 128.

The authenticated copy of the register of marriages kept in India, made and transmitted to the

East India Company in London, under the authority of the company, is a duplicate original, and as such is admissible evidence to prove a marriage celebrated in India. *Ratcliff v. Ratcliff*, 29 Law J. Rep. (N.S.) Prob. M. & A. 171; 1 Sw. & Tr. 469.

(b) *Entries in Private Diary.*

In a suit for dissolution of marriage on the ground of the wife's adultery, the Court held, first, that entries in a private diary kept by the wife, detailing acts of adultery committed by her with A, the co-respondent, were evidence against her, as an admission or confession, though not as against A. Secondly, that the co-respondent, so long as he remains a party to the record, is not a competent witness. Thirdly, that when the respondent and co-respondent appear by different counsel, the case of the respondent should generally take priority of that of the co-respondent; but that by arrangement of counsel the case for the co-respondent might be taken first. *Robinson v. Robinson*, 27 Law J. Rep. (N.S.) Prob. & M. 91; 1 Sw. & Tr. 362.

Quære—whether under 20 & 21 Vict. c. 85, where there is no evidence against the co-respondent, the Court has power to dismiss him from the suit before its termination, for the purpose of rendering him a competent witness for the respondent. *Ibid.*

(c) *Notice to produce.*

In support of an allegation of desertion, a petitioner gave evidence that she had written letters to the respondent, asking him to provide a home for her. The husband did not appear, and no notice to produce the letters had been served upon him. The Court, without pronouncing a final opinion upon the point, declined to act upon this evidence, but dissolved the marriage upon other evidence, intimating that although a notice to produce might not be necessary, when the respondent was not easily accessible, it ought to be served when the service could be effected without difficulty. *Case v. Case*, 29 Law J. Rep. (N.S.) Prob. M. & A. 127.

(d) *Other Matters.*

The affidavit of the petitioner required by section 41. will not be taken as evidence at the hearing, but the parties must produce sufficient evidence to prove the petition independently of such affidavit. The Court is bound by the rules of evidence as observed at common law, section 48. *Deane v. Deane*, 1 Sw. & Tr. 90.

Semble—the fact of an appearance having been given to the citation, no further steps in the suit having been taken by the defendant, will not be considered at the hearing as any proof of identity. *Ibid.*

(L) PRACTICE.

(a) *Mode of Hearing or Trying the Cause.*

(1) *Application as to.*

Before the petitioner applies to the Court to direct the mode of hearing, an affidavit should be filed that search has been made for an appearance by the respondent, although service of a citation and copy of a petition upon him may have been dispensed with. *Cooke v. Cooke*, 28 Law J. Rep. (N.S.) Prob. & M. 56.

2) *By Oral Evidence before the Court.*

Generally the mode in which the petitioner for a dissolution of marriage will be directed to prove his petition when no answer has been filed, and twenty-one days have elapsed, as required by rule 14, is by oral evidence before the Court without a jury. There may be cases in which it would not be desirable that the evidence should be taken orally in court. *Norris v. Norris*, 27 Law J. Rep. (n.s.) Prob. & M. 51.

Where the petitioner for a dissolution of marriage, on the ground of the wife's adultery, had obtained a divorce *à mens et thoro*, and also a verdict in an action against the co-respondent for crim. con., but for nominal damages only, the Judge Ordinary refused to allow the petition to be heard on affidavits, but required oral evidence. *Potts v. Potts*, 27 Law J. Rep. (n.s.) Prob. & M. 59; 1 Sw. & Tr. 181.

A had obtained a sentence of divorce *à mens et thoro* from his wife, in the Consistory Court of London; he now brought a petition for dissolution of marriage. On the consent of the respondent and co-respondent, the Judge directed the petition to be heard before the full Court on oral evidence without a jury. *Robinson v. Robinson*, 1 Sw. & Tr. 179.

(3) *On Affidavits.*

A presented a petition for dissolution of marriage by reason of the adultery of his wife. The co-respondent put in an answer, but the wife did not appear. Before 20 & 21 Vict. c. 85. A had recovered damages in a defended action for crim. con. against the co-respondent. The Judge Ordinary, on the application of the petitioner, the co-respondent not objecting, directed that the cause should be heard upon affidavit; but that, in addition to affidavits of the facts, an examined copy of the record in the action should be brought into the Registry. *Armitage v. Armitage*, 27 Law J. Rep. (n.s.) Prob. & M. 50.

The petitioner for dissolution of marriage, on the ground of the wife's adultery, having recovered substantial damages in a defended action against the co-respondent for crim. con., which, with the costs of the action, had been paid, and having also obtained a sentence of divorce *à mens et thoro*,—the Judge Ordinary, on the application of the petitioner, the other parties to the suit consenting, directed that the cause should be heard on affidavits. *Ling v. Ling*, 27 Law J. Rep. (n.s.) Prob. & M. 58; 1 Sw. & Tr. 180, 187.

The husband having been convicted of bigamy in 1852, before the Judge Ordinary, and the witnesses being resident at Oldham and Huddersfield, leave was granted to the wife to prove her petition for dissolution of marriage on the ground of bigamy with adultery, by affidavit. *March v. March*, 28 Law J. Rep. (n.s.) Prob. & M. 30.

In a suit for dissolution of marriage, no appearance having been entered, the Court made an order that the petitioner at the hearing should be at liberty to prove by affidavits the marriage, which had taken place in Scotland, where all the persons who could prove it resided. *M'Kechie v. M'Kechie*, 28 Law J. Rep. (n.s.) Prob. & M. 31; 1 Sw. & Tr. 550.

(4) *By a Jury.*

The Court has power to order issues of fact to be tried before a jury, though none of the parties to the

suit apply for one, and will generally do so in cases to be tried before the full Court where there is likely to be much dispute as to the facts. Where, however, in a suit for dissolution of marriage, the main question was one for the exercise of the discretion of the full Court, the Judge Ordinary, neither of the parties applying for a jury, directed that the case should be heard without one. *Ratcliffe v. Ratcliffe*, 27 Law J. Rep. (n.s.) Prob. & M. 60; 1 Sw. & Tr. 217.

In a suit for restitution of conjugal rights, the record stated that "the petitioner did in his petition allege that the respondent did, without lawful cause, withdraw herself from cohabitation, &c., and that the respondent did, in her answer, deny that she withdrew herself from cohabitation without lawful cause, and the respondent did further say she frequently suffered from the insulting, degrading, and cruel conduct of the petitioner, &c." The Judge Ordinary ruled that on this record the onus of shewing that she had lawful cause for withdrawing from cohabitation lay on the respondent, and that her counsel, therefore, was entitled to begin. *Cherry v. Cherry*, 28 Law J. Rep. (n.s.) Prob. & M. 86; 1 Sw. & Tr. 319.

Where the questions of fact raised by the pleadings have been stated in the form of a record, the issues to be tried by the jury must be taken to be those stated in the record, although they may not be identical with those raised in the pleadings. *Ibid.*

Assuming that the Court has the power to send the main issue in a petition for dissolution to be tried before a Judge of Assize, who could pronounce no sentence in the suit, it is a power to be exercised very sparingly, and only under peculiar circumstances. *Evans v. Evans*, 1 Sw. & Tr. 216.

The power given to the Court by section 36. of 20 & 21 Vict. c. 85, to direct questions of fact arising in proceedings under the act to be tried before a jury, does not extend to issues raised between the parties on matters which, under the proviso to the 31st section, give the Court a discretion as to dissolving a marriage, though the petitioner's case may have been proved. When, therefore, the case is directed to be tried before a jury, such issues should not be included in the record prepared under rule 22. *Kretschmar v. Kretschmar*, 28 Law J. Rep. (n.s.) Prob. & M. 128.

(5) *In Camera.*

The Judge Ordinary has no power, even with the consent of the parties, to exclude the public from court during the hearing of a cause. *Barnett v. Barnett*, 29 Law J. Rep. (n.s.) Prob. & M. 28.

The Court has no power to exclude the public during the hearing of a cause. *H—, falsely called C—, v. C—*, 29 Law J. Rep. (n.s.) Prob. & M. 29.

(6) *On Appeal from Decree of the Judge Ordinary.*

On appeal from the decree of the Judge Ordinary, in a suit for judicial separation, the cause will not be re-heard, but the facts will be assumed to be those appearing on the Judge's notes. *Curtis v. Curtis*, 28 Law J. Rep. (n.s.) Prob. & M. 8.

(b) *At the Trial.*

[See *Studdy v. Studdy*, ante (C) (b) (4)].

Where the respondent conducts his own case, the

most convenient course is, that he should at once call his witnesses without making an opening speech, then give his evidence, and reserve any comments on the case for his summing-up. *Curtis v. Curtis*, 27 Law J. Rep. (N.S.) Prob. & M. 73; 1 Sw. & Tr. 192.

Where, in answer to a petition for dissolution of marriage on the ground of the wife's adultery, the respondent does not traverse the alleged adultery, but pleads fresh matter, on which issues are taken by the petitioner, upon the trial of these issues the respondent must begin. When these issues have been disposed of by the jury, witnesses called to prove the petition cannot be cross-examined by the respondent. *Bacon v. Bacon*, 29 Law J. Rep. (N.S.) Prob. M. & A. 61.

(c) *Withdrawing and dismissing Petition.*

When the respondent has appeared, the Court will not allow the petitioner to withdraw the petition, unless the respondent consent or has had notice of the motion. *Lutwyche v. Lutwyche*, 28 Law J. Rep. (N.S.) Prob. & M. 56.

Semble—that the Court will not dismiss the petition on the prayer of the petitioner after evidence has been given in the cause entitling the respondent to a matrimonial remedy. *Bannister v. Bannister*, 29 Law J. Rep. (N.S.) Prob. M. & A. 53.

The Court granted an application by a wife that a petition for a judicial separation filed by her might be dismissed, and that she might substitute for it a petition of dissolution of marriage upon the terms of her paying the costs. *Lewis v. Lewis*, 29 Law J. Rep. (N.S.) Prob. M. & A. 123.

(d) *Amendment of Petition.*

The petition by a wife for dissolution of marriage, on the ground of adultery and desertion, may be amended by adding a charge of cruelty, if the Court is satisfied that the fresh charge is brought forward *bona fide*, and not for the purpose of vexation. *Rowley v. Rowley*, 29 Law J. Rep. (N.S.) Prob. & M. 15; 1 Sw. & Tr. 487.

Where a citation has issued for dissolution of marriage, on the ground of adultery and desertion, and the petition is afterwards amended by adding a charge of cruelty, if the respondent has appeared to the original citation, a fresh citation is not requisite. *Ibid.*

Where the petitioner after an adjournment of the case part heard, in order to procure further evidence asks leave to amend his petition by adding a new charge, it is an objection to granting his application that the charge in question had come to his knowledge before the petition in its original form was drawn. *Bannister v. Bannister*, 29 Law J. Rep. (N.S.) Prob. M. & A. 53.

(e) *Service of Citation.*

[See post (k), *Cook v. Cook*.]

An application on behalf of a wife, who had presented a petition for dissolution of marriage, that a substitutional service of the citation on the father of her husband should be allowed, on the ground that she did not know her husband's address, but that his father was in communication with him, was rejected by the Judge Ordinary, as it appeared probable that the husband was in New York, and the impossibility of serving him personally was not made out. *Ro-*

botham v. Robotham, 27 Law J. Rep. (N.S.) Prob. M. & A. 33; 1 Sw. & Tr. 73.

Quære—whether the Judge Ordinary has power to dispense with personal service of the citation in a proceeding for dissolution of marriage. *Ibid.*

An application was made on behalf of a wife, who had presented a petition for dissolution of marriage, to dispense with personal service of the citation, and allow substitutional service on the brother of the husband. The affidavits, in support of the application, shewed that the husband was living abroad under an assumed name, and that the wife could not ascertain where he was, but that her husband's brother was in communication with him, and had undertaken to forward the citation to him. The Judge Ordinary rejected the application, on the ground that personal service might be effected through the husband's brother. *Chandler v. Chandler*, 27 Law J. Rep. (N.S.) Prob. & M. 35.

The Judge Ordinary allowed a husband to proceed with his suit for dissolution of marriage without serving the citation and petition on the alleged adulterer, who was then at the Cape of Good Hope, he having allowed judgment to go by default in an action for crim. con. at the suit of the husband. *Tomkin v. Tomkin*, 27 Law J. Rep. (N.S.) Prob. & M. 54; 1 Sw. & Tr. 182.

To entitle the petitioner, in a suit for dissolution of marriage, to proceed without personal service of a citation, it is not sufficient to shew that the respondent is abroad, and that the petitioner does not know where he is; some attempt should be made to discover and serve him. *Sudlow v. Sudlow*, 28 Law J. Rep. (N.S.) Prob. & M. 4.

In a suit for dissolution of marriage on the ground of the wife's adultery, the affidavits, in support of a motion to dispense with personal service of citations and copies of the petition, stated that the wife had deserted her husband in Liverpool in August 1857; that there was reason to believe that she afterwards lived in this country with Q., the co-respondent, as his wife; that in October 1857 two persons passing under the name of Mr. and Mrs. Q. sailed from London for Australia, and afterwards landed in Melbourne; that there was reason to believe that the said Mrs. and Mr. Q. were the respondent and co-respondent; that inquiries had been made in Melbourne of the agent of the ship in which those persons went to Australia, and of other shipping agents there, also of the inspector of police at Sydney, but that no trace of them or of their movements could be discovered. The Judge Ordinary, upon the above affidavits, dispensed altogether with service on the respondent and co-respondent. *Semble*—that if there had been any certain information as to their movements in Australia, further inquiries would probably have led to their discovery, and would have, therefore, been necessary. *Cook v. Cook*, 28 Law J. Rep. (N.S.) Prob. & M. 5.

A wife filed a petition for dissolution of marriage, but was unable to effect personal service of the citation, &c., in consequence of the respondent having gone abroad, but whither she knew not. A knowing where the respondent was, though refusing to give his address, forwarded to him, by post, an office copy and a plain copy of the petition, and two copies of the citation. The respondent returned, by post, to A the plain copy of the petition and one of the

copies of the citation, on which were indorsed memoranda signed by him, acknowledging the receipt of the office copy of the petition, and also a copy of the citation. The respondent not having entered an appearance, the Judge Ordinary allowed the petitioner to proceed without further service. *Chandler v. Chandler*, 28 Law J. Rep. (N.S.) Prob. & M. 6.

In a suit by the wife for judicial separation, application having been made for an order that service of the citation and copy of the petition upon the father of the husband should be deemed good service, upon affidavits which stated that the wife did not know where the husband was, and that his father, though it was believed he knew his address, would not disclose it, and that the wife had last heard from her husband in 1854, when he wrote to her; the Judge Ordinary refused to make the order without an affidavit that inquiries had been made for the husband at the place from which the letter was addressed, but subsequently granted it on an affidavit that such inquiries had been made there, and that he had left and gone to another place which he had also left, and that the person in whose employ he had been at the latter place did not know whether he had gone. *Lacey v. Lacey*, 28 Law J. Rep. (N.S.) Prob. & M. 24.

(f) *As to the Co-respondent.*

(1) *Appearance at Hearing not having answered.*

In a suit for dissolution of marriage, where the co-respondent has appeared, but has put in no answer, he cannot, at the hearing of the petition, be allowed to take any part in the proceedings. He cannot dispute the allegations of the petition either by cross-examining the witnesses in support of it, or by addressing the Court, nor can he be heard even on the question of costs. *Norris v. Norris*, 27 Law J. Rep. (N.S.) Prob. & M. 72; 1 Sw. & Tr. 174.

(2) *Damages against.*

In a suit for dissolution of marriage, the nature and effect of the marriage settlements may be taken into consideration by the jury in assessing damages against the co-respondent. *Bell v. Bell*, 29 Law J. Rep. (N.S.) Prob. M. & A. 159; 1 Sw. & Tr. 565.

Under 22 & 23 Vict. c. 61. s. 5, in a suit for dissolution of marriage, the Court has not power to deal with marriage settlements, when there is no issue of the marriage. *Ibid.*

(3) *Special Grounds for not making.*

The recovery of damages in an action of crim. con. by a husband does not constitute a special ground within the meaning of section 28. of the 20 & 21 Vict. c. 85, on which he will be excused from making the alleged adulterer a co-respondent to a petition for the dissolution of his marriage. *Ex parte* —, 27 Law J. Rep. (N.S.) Prob. & M. 4.

A having, in an action of crim. con., recovered damages against B, applied for leave to present a petition for the dissolution of his marriage without making B a co-respondent to such petition:—Held, that the circumstance of A having recovered damages against B did not constitute such special ground, within the meaning of 20 & 21 Vict. c. 85. s. 28, as to justify the Court to grant the application. *Ex parte Armitage*, 1 Sw. & Tr. 71.

Where the wife was living in a brothel as a prostitute, the Court excused the husband from making

a co-respondent to his petition for dissolution of marriage. *Quære*—whether a wife has any right to oppose the application of the husband to be excused from making a co-respondent. *Hooke v. Hooke*, 27 Law J. Rep. (N.S.) Prob. & M. 61; 1 Sw. & Tr. 183.

In a suit for dissolution of marriage, by reason of the wife's adultery, where the alleged adulterer is dead or unknown, the petitioner should apply at once to the Court for an order to be excused from making a co-respondent. *Quære*—whether the Court has power to make such an order after the citation has been served on the respondent. *Tollemache v. Tollemache*, 28 Law J. Rep. (N.S.) Prob. & M. 2.

A petition for dissolution of marriage alleged that the wife had committed adultery with A, who was made a co-respondent, and in the fifth paragraph charged her with having committed adultery with a person unknown. On motion that the petitioner might be excused from making such unknown person a co-respondent, or be allowed to strike out the fifth paragraph out of the petition, the Judge Ordinary held, that either might be done. *Quære*—whether, as there was one co-respondent, there was any necessity for the application. *Hunter v. Hunter*, 28 Law J. Rep. (N.S.) Prob. & M. 3.

Where a petition for dissolution of marriage alleged that "in the month of July 1857 the respondent, at Birkenhead, committed adultery with a man whose name is to the petitioner unknown," the Judge Ordinary refused to excuse the petitioner from making a co-respondent, on an affidavit simply stating that the petitioner was unable to learn the name of the alleged adulterer, but subsequently granted the application on an affidavit which stated that the petitioner had been informed by H that the respondent and a man had taken furnished apartments, and slept together in her house, and that she had not since seen the man, and did not know his name, though she had made efforts to discover it. *Evans v. Evans*, 28 Law J. Rep. (N.S.) Prob. & M. 20; 1 Sw. & Tr. 328.

(g) *Affidavits; Form of, and Entitling.*

The affidavit required to be filed in verification of a petition should not go into a detailed statement of the history of the parties. The Court may have no power to order an affidavit to be removed from the file of the Court, but on a question of taxation of costs, the costs of such an affidavit would not be allowed against the other party. *Forster v. Forster*, 1 Sw. & Tr. 167.

Where a petition for dissolution of marriage has been filed, but no citation has issued, affidavits should be entitled "In the matter of the petition of A," and not "A v. A," or should have no heading. *Gapp v. Gapp*, 28 Law J. Rep. (N.S.) Prob. & M. 48.

(h) *Particulars of Acts of Adultery.*

A petition for dissolution of marriage alleged a specific act of adultery, on the 25th of August, and then went on to allege other acts of adultery between that day and the 31st of October. The Judge Ordinary declined to order particulars of the dates of these latter acts of adultery. *Boddy v. Boddy*, 28 Law J. Rep. (N.S.) Prob. & M. 16.

A petition for dissolution of marriage alleged that the co-respondent had lived in the same house with

the petitioner and his wife for two years, and that the adultery was committed "on divers occasions during that period." The Court refused to order the petition to be amended by the insertion of further particulars of the acts of adultery, being of opinion that it gave sufficient information of the charge to enable the respondent to meet it. *Smith v. Smith*, 29 Law J. Rep. (N.S.) Prob. M. & A. 62.

(5) *Witness.*

[See *ante* (c), (h), (4), *Studdy v. Studdy*.]

(1) *Commission to examine.*

The solicitor in Australia employed to effect service having omitted to return the citations to this country, the Judge Ordinary refused to allow the petition to be set down for hearing until they should be returned, but, as the only proof of the adultery was the evidence of persons living in a brothel, to avoid the risk of their not being forthcoming in consequence of the hearing being delayed, allowed a commission to issue at once to take their evidence, under 20 & 21 Vict. c. 85. s. 47. *Cook v. Cook*, 28 Law J. Rep. (N.S.) Prob. & M. 37.

A witness, on behalf of the petitioner in a matrimonial suit, being about to leave this country was examined under a commission. On the next day he appeared before the Commissioner, and asked to be allowed to add to his evidence certain material facts which he alleged he had forgotten to state, having been flurried during the examination, by the frequent personal observations and interruptions of the respondent, who was then present. The statement as to the misconduct of the respondent was confirmed by the petitioner's solicitor, but not by the Commissioner, though he made an affidavit. The Judge Ordinary, under these circumstances, refused to allow the commission to be re-opened, that the witness might supply the alleged omission in his evidence. *Bewan v. McMahon*, 28 Law J. Rep. (N.S.) Prob. & M. 40.

(2) *Competency of Wife to prove Desertion.*

In a suit instituted by the wife for dissolution of marriage, on the ground of the husband's adultery and desertion, the wife is not a competent witness to prove the desertion. *Pyne v. Pyne*, 27 Law J. Rep. (N.S.) Prob. & M. 54; 1 Sw. & Tr. 178.

(k) *Other Matters.*

Where the respondent to a petition for dissolution of marriage appears, but does not put in an answer within twenty-one days from the service of the citation, an application to proceed to proof of the petition will not be granted unless notice of it has been given to the respondent. *Ward v. Ward*, 27 Law J. Rep. (N.S.) Prob. & M. 84.

The Court has no power in a suit for dissolution to order that the respondent should attend, and be confronted with the witnesses for the purpose of identification. *Hoote v. Hoote*, 28 Law J. Rep. (N.S.) Prob. & M. 29.

The citation must be returned to the Registry before a petition for dissolution can be set down for hearing, such return being necessary in order to preserve evidence that the proper steps have been taken. *Cook v. Cook*, 28 Law J. Rep. (N.S.) Prob. & M. 37.

The petitioner in a suit for dissolution of marriage

sent out citations for service on the respondent and co-respondent, who had gone to Australia. Efforts having been made to discover and serve them without success, personal service was dispensed with. *Ibid.*

Where issues raised in a suit for dissolution of marriage have been tried before a jury, the petitioner, on applying to the full Court for a decree, must prove any material facts in his petition not proved at the trial. If, however, it appears from the Judge's notes of the trial that such facts were proved, though not in issue, the Court will not require further evidence. *Evans v. Evans*, 28 Law J. Rep. (N.S.) Prob. & M. 136.

Where the papers required by the practice of the Court to be delivered to the Judges of the Full Court three days before the hearing of a cause have not been delivered, the Court will order the cause to be struck out of the list. *Evans v. Evans*, 29 Law J. Rep. (N.S.) Prob. M. & A. 53.

A respondent will be allowed to file an answer after the case has been adjourned, part heard, on shewing that she has been prevented from doing so previously by the contrivance of the petitioner. *Alexander v. Alexander*, 29 Law J. Rep. (N.S.) Prob. M. & A. 56.

Semle—that, under such circumstances, the respondent is not entitled to claim a different tribunal from that by which the cause was heard as an undefended cause. *Ibid.*

On a petition for dissolution of marriage, when a record is drawn up in order that the case may be tried before a jury, only the issues stated on the record are to be proved at the trial before jury by either party. *Tourle v. Tourle*, 1 Sw. & Tr. 176.

The co-respondent, if he has put in no answer to the petition, is no party to the issue to be tried by the jury. *Ibid.*

The co-respondent having put in no answer, is not entitled to be heard on the question of costs. The co-respondent condemned in the costs of the suit. *Ibid.*

So long as the suit remains on the Court book, the Court cannot consider as binding any agreement to compromise made by counsel of parties to a matrimonial suit, but is bound to hear such suit, if either party desires it, after such agreement made. *Quare*, whether this Court can sanction or consider as binding any agreement for a husband and wife to live apart. *Hayward v. Hayward*, 1 Sw. & Tr. 333.

(M) *Costs.*

(a) *Of the Wife.*

(1) *On Decree silent as to Costs.*

Where the Court decrees a dissolution of marriage at the suit of the wife, and no order is made as to costs, they follow the decree as a matter of course. *Kaye v. Kaye*, 27 Law J. Rep. (N.S.) Prob. & M. 54.

Where dissolution of marriage, on the ground of the wife's adultery, is decreed, if no order to the contrary is made, the husband pays the wife's costs. *Ling v. Ling*, 27 Law J. Rep. (N.S.) Prob. & M. 58; 1 Sw. & Tr. 180, 187.

Where the Court decrees a dissolution of marriage at the suit of the wife, costs follow the decree as a matter of course, if the Court, in pronouncing its

decree, gives no directions as to costs. *Dixon v. Dixon*, 28 Law J. Rep. (N.S.) Prob. & M. 96.

(2) *De Die in Diem*.

[See ante (F), (b), *Holt v. Holt*—also *Keats v. Keats*, post (3).]

In a suit for dissolution of marriage the wife is entitled to her costs *de die in diem*. *Weber v. Weber*, 28 Law J. Rep. (N.S.) Prob. & M. 11; 1 Sw. & Tr. 219.

(3) *Extent of Husband's Liability for*.

In the Ecclesiastical Court, the proctor of a wife defending a suit for divorce was always entitled to receive from the husband the reasonable costs of conducting her defence. In such a suit, transferred to the Divorce Court an additional allegation on behalf of the wife was brought in after the evidence had been published, setting up condonation during the progress of the suit, but was not supported by the evidence. According to the practice of the Ecclesiastical Court, additional allegations, at that stage of the suit, were only permitted if verified by affidavit. In this case it was verified by affidavit of the wife:—Held, that as the proctor of the wife is bound to bring before the Court any defence set up by her, and not plainly unfounded, he was entitled to receive the costs of this allegation from the husband. *Wells v. Wells*, 27 Law J. Rep. (N.S.) Prob. & M. 95; 1 Sw. & Tr. 308.

Though the wife may, during the progress of the suit, obtain an order for the taxation of her costs *de die in diem* against her husband, and also that security be given by the husband for the costs of the hearing, if no such order is made before the hearing, and she is unsuccessful in the suit, the husband has not to pay her costs. *Keats v. Keats*, 28 Law J. Rep. (N.S.) Prob. & M. 57; 1 Sw. & Tr. 334.

On decreeing a dissolution of marriage, on the ground of the wife's adultery, the Court ordered that the husband should secure to the wife an annuity of 150*l.* during their joint lives as long as she should live in chastity, on condition of her relinquishing a power vested in her by the marriage settlement, of appointing, by will, 2,000*l.* consols, and that the damages (1,000*l.*) assessed by a jury against the co-respondent should be paid to the husband, to be applied, first, in payment of the wife's costs, next in payment of the husband's costs, and the residue, if any, in satisfaction of the aforesaid annuity. *Ibid*.

The husband of a wife, who fails in a matrimonial suit, is not liable for the costs of the hearing beyond the sum which he has paid into the Registry to meet them, although they may exceed it on taxation. *Sopwith v. Sopwith*, 29 Law J. Rep. (N.S.) Prob. M. & A. 132.

(b) *Wife condemned in Costs*.

Pending a suit for divorce, the wife, in an improper manner, obtained possession of an infant child of the marriage, then living with the husband. On the husband again taking the child from her she endeavoured, by violence, to get it from him, but failing, applied to the Court for an order that it might be restored to her. The Court rejected the application, on account of the impropriety of her conduct, and condemned her in the costs of the

motion. *Allen v. Allen*, 29 Law J. Rep. (N.S.) Prob. M. & A. 166.

(c) *Against the Co-respondent, when and to what Extent granted*.

Where there was no evidence that the co-respondent, when he committed the adultery, knew that the respondent was married, the Court refused to order him to pay the costs. *Boddington v. Boddington*, 27 Law J. Rep. (N.S.) Prob. & M. 53.

Where costs against the co-respondent to a petition for dissolution of marriage on the ground of the wife's adultery are applied for, evidence should be given of the circumstances under which the adulterous connexion was formed. Where no such evidence is given, and it does not appear that the co-respondent, at the time the adulterous connexion was formed, knew that the respondent was a married woman, he will not be condemned in costs. *Teagle v. Teagle*, 27 Law J. Rep. (N.S.) Prob. & M. 55; 1 Sw. & Tr. 188.

The full Court, on decreeing a dissolution of marriage, refused to condemn the co-respondent in costs. *Ling v. Ling*, 27 Law J. Rep. (N.S.) Prob. & M. 58; 1 Sw. & Tr. 180, 187.

As a general rule, when dissolution of marriage is decreed on the ground of the wife's adultery, the co-respondent will be condemned in all the costs, as well those of the respondent as those of the petitioner. *Evans v. Evans*, 28 Law J. Rep. (N.S.) Prob. & M. 136.

The money paid into court by a husband petitioning for dissolution of marriage to meet his wife's costs of the hearing, is primarily liable to the payment of those costs when taxed, although the co-respondent may have been condemned in all the costs, including those of the wife, and the husband may be unable to obtain them from him. *Ibid*.

The Court will not condemn the co-respondent in costs where it is not proved that, at the time his connexion with the wife commenced, he knew she was a married woman. *Priest v. Priest*, 29 Law J. Rep. (N.S.) Prob. M. & A. 195.

Costs given against the co-respondent, who knew that the respondent was a married woman, though the husband's conduct towards his wife was remiss. *Badcock v. Badcock*, 1 Sw. & Tr. 189.

B received back his wife, after adultery by her committed, in May 1856. In June 1857, he left England for Australia, to ascertain his prospects in settling, leaving his wife in business in Devonport, close to her own mother. The wife, during his absence committed adultery with the co-respondent, and sold off the stock-in-trade. The Court dissolved the marriage, and condemned the co-respondent in the costs. *Wilton v. Wilton*, 1 Sw. & Tr. 568.

(d) *Taxation of Costs*.

An order having been made, during the progress of the suit for judicial separation by a wife, that the petitioner's costs should be taxed as against the respondent, the Registrar by his taxation disallowed, first, all charges incurred previously to the commencement of the suit; secondly, charges for attendances by the solicitor on the father of the petitioner, alleged to have been necessary in consequence of the illness of the petitioner:—Held, that this taxation was right, inasmuch as by the practice of the

Ecclesiastical Courts charges incurred before the commencement of the proceedings, and attendances of a proctor, unless on his client personally, were never allowed on taxation as between party and party. *Dickens v. Dickens*, 28 Law J. Rep. (N.S.) Prob. & M. 94.

The proper mode of reviewing a taxation of costs is by moving, as in the Common Law Courts, for a rule to shew cause why the taxation should not be reviewed, and not by act on petition. *Ibid.*

The general principles of taxing costs against a husband in matrimonial cases are the same as in other causes. The rule of the Ecclesiastical Courts not to allow more than two counsel on taxation is not applicable where the evidence is oral in open court. Where a London attorney conducts the suit, no expenses of a local attorney will be allowed on taxation against the husband. *Suggate v. Suggate*, 1 Sw. & Tr. 497.

(c) *Fieri Facias* to levy.

When damages and costs are not paid pursuant to an order of the Court, leave will be granted to issue a *feri facias* under section 52. of 20 & 21 Vict. c. 85. *Reed v. Reed*, 29 Law J. Rep. (N.S.) Prob. M. & A. 158.

DOCK TRUSTEES.

[Liability for not closing dock when dangerous, see NEGLIGENCE: *Gibbs v. the Trustees of the Liverpool Docks*.]

DOMICIL.

[See DIVORCE AND MATRIMONIAL CAUSES (A) a.)]

The expression of an intention not to renounce a domicile of origin cannot prevail against the intention and facts collected from the acts of the party, if those are otherwise sufficient to constitute a domicile abroad. Therefore, where a testator left England, and took up his residence at Hamburgh, and the facts shewed that he intended to live there permanently, and he did live and die there, it was held, that his domicile was there, notwithstanding that in a will made during a visit to England, the testator said that although he intended to return to Hamburgh, he did not mean by such declaration of intention to renounce his domicile of origin as an Englishman. *Re Steer*, 28 Law J. Rep. (N.S.) Exch. 22; 3 Hurl. & N. 594.

A wife cannot obtain a domicile of her own, independent of that of her husband. *Dolphin v. Robins* (H.L.), 29 Law J. Rep. (N.S.) Prob. M. & A. 11; 7 H.L. Cas. 390: affirming the judgment below, 27 Law J. Rep. (N.S.) Prob. & M. 24; 1 Sw. & Tr. 37.

A Scotch divorce is inoperative on an English marriage. *Ibid.*

A and B were married in England, and resided here for many years. Differences then arose between them; and, by agreement, they lived separate from each other. B had the power to dispose of certain property by deed or will. In February 1854 A went to Scotland, and committed adultery there.

He resided there till the middle of June in that year. While he was so residing there, B instituted a suit against him for a divorce, on the ground of adultery. Pending the suit she made a will in favour of C. A decree of divorce was pronounced. She married C, and went with him to France, where she lived till her death. In June 1856 she made a testamentary paper, revoking all former wills:—Held, that the divorce was inoperative; that she had no domicile, but that of her husband A; and that, consequently, the French will was void. *Ibid.*

A, a natural-born British subject, died domiciled in Russia, having acquired large property, both real and personal, in that country; he was also possessed of a considerable sum in the English funds. He left a will, made in Russia, whilst he was domiciled there, in the Russian language and form, appointing Russian subjects executors, which will was duly authenticated in the Russian Courts. It purported to dispose of "all his movable and immovable property." There were no words distinctly excluding any part of his property from its operation, nor was there any allusion to, nor any words distinctly describing, the money in the English funds:—Held, that the executors, being clothed with the authority of the competent Court of the testator's domicile, were entitled to probate as regards the money in the English funds. *Enobin v. Wylie*, 1 Sw. & Tr. 118.

Semle—where the Court of Probate has any doubt on a point of construction, it will so decide as will best enable the parties concerned to have recourse to the tribunals whose more special duty it is to put a construction on testamentary papers. *Ibid.*

The testator, who was an English-born subject and an officer in the royal navy on half-pay, in 1829 obtained leave of absence for the purpose of going to India, and went to Calcutta, where he established a lucrative business. In 1830 he married, and subsequently had three children, born in Calcutta. He continued to receive his half-pay and to obtain renewals of his leave of absence until 1839. In that year he made his will, and died at Calcutta without having at any time returned to England:—Held, that at the time of his death the testator's domicile was Indian, and therefore that no legacy duty was payable on his personal property. *Cockrell v. Cockrell*, 25 Law J. Rep. (N.S.) Chanc. 730.

The testator had an Irish domicile of origin. In 1790 he went to India, and entered into partnership in business there. In 1800 the partnership was dissolved. In 1802 he came to England, and took an assignment of a leasehold house in London, and purchased the furniture in the house. In 1811 he sold the house and furniture, and went to reside at Clifton. In 1812 he went to Madeira for his health, and in 1814 he there made his will. In 1815 he went to Lisbon by advice, and died there:—Held, that the domicile of the testator at the time of his death was English, and that the Crown was entitled to legacy duty on the bequests in his will. *Attorney General v. Fitzgerald*, 25 Law J. Rep. (N.S.) Chanc. 743; 3 Drew. 610.

The testator had a Scotch domicile of origin. In 1807 he sailed from England for the East Indies; the vessel was wrecked, and he was taken prisoner and confined at Verdun till 1814. In that year he was released; in 1815 he went to India, and set up in business there in 1835 he made his will, at

Calcutta, describing himself as of that place, and appointing two gentlemen resident at Calcutta his executors. In 1836 he sailed from India, in a vessel bound for an English port, and died *in itinere*:—Held, that the domicile of the testator, at the time of his death, was Indian, and, therefore, no legacy duty was payable upon his personal property. *Lyall v. Paton*, 25 Law J. Rep. (n.s.) Chanc. 746.

Held, also, as to costs, that where the Crown succeeds, it is entitled to costs out of the property, but where it fails, there should be no costs. *Ibid*.

An English gentleman, long before his death, took up his abode in a house he had purchased in a foreign city, set up his establishment there, centered his fortune, so far as it admitted of locality, there, lived there with such of his children as were not at school or out in the world, and destined that place for their future residence; from thence he went and habitually returned; he died in the country where he had purchased the house, having made a will in the language of that country, but not effectual for disposing of his property there, and a will in the English form, giving all his other property, which was personal:—Held (affirming a decision of one of the Vice Chancellors, but *Lord Justice Knight Bruce* dissenting), that the domicile was foreign. *Hoskins v. Mathews*, 25 Law J. Rep. (n.s.) Chanc. 689.

Where the residence of an Englishman in a foreign country is a matter of necessity upon account of health, change of domicile is not effected; but if the state of his health is such that a residence abroad is adopted as most beneficial and is the result of choice, a change of domicile will be effected. *Ibid*.

A B, a Scotchman by birth, and having property in Scotland, went to India, and remained there for many years. On his return he resided for five years on his property in Scotland, expending money upon such property, and considerably improving it. He then left Scotland, in consequence of certain unpleasant domestic events, and went to Paris, where he resided for five years, purchasing expensive furniture and keeping up an establishment there. During this time he still retained domestics at his house in Scotland, and constantly gave directions by letter as to the superintendence of his property, and particularly as to the management of his horses and other animals there. His furniture was left in Scotland, but ready packed up for immediate removal. He died in France:—Held, that his domicile was Scotch, and not French; the Court acting upon the principle that slighter evidence is required to warrant the conclusion that a man intends to abandon an acquired domicile and to resume his domicile of origin, than that he means to abandon his domicile of origin and to acquire a foreign domicile. *Lord v. Colvin*, 28 Law J. Rep. (n.s.) Chanc. 361; 4 Drew. 366.

G was born in Scotland, and went when quite a young man to India, where he entered into the service of the East India Company. After being there more than twenty years, he returned to Scotland. He took a house and married in Edinburgh. He afterwards became offended with the people there, and using very strong expressions as to his intention never to return there, he came to London. He brought his books and his property to London, and lived in London for some years, and engaged in various occupations. He then left London and

went to Paris, but left his books, some ornamental furniture, and other things in London, telling the persons with whom he left them to keep them until his return. He lived in Paris for some years, made his will there, made it in the English form, but described himself in it as "of Edinburgh"; and he died in Paris:—Held, that he had lost his domicile of origin, which was Scotch, and had acquired, and never lost, an English domicile. *Whicker v. Hume*, 28 Law J. Rep. (n.s.) Chanc. 396; 7 H.L. Cas. 124.

In his will he gave property to trustees, to appropriate the same as they in their "uncontrolled discretion should think proper for the benefit, advancement and propagation of education and learning in every part of the world":—Held, that the will was valid, and that there was a valid bequest of a charitable nature which was not void for uncertainty. *Ibid*.

The testator had lands in New South Wales, which were to form part of the property given to trustees for the purposes of the charity:—Held, that these lands would pass, and that the Mortmain Act was not applicable to New South Wales. *Ibid*.

Although permanent residence abroad without intent to return may not operate as a change of domicile, if believed to be necessary for health's sake, the circumstance that such residence was occasioned by mere preference of climate, or by the opinion that the air or the habits of the country may be better suited to the health than those of the country which has been quitted, will not be sufficient to prevent such permanent residence from so operating. *Hoskins v. Mathews*, 8 De Gex, M. & G. 13.

DONATIO MORTIS CAUSA.

Upon the death of a testator ten Austrian bonds were found, amongst other securities, in a box at his house, with the following indorsement: "The first five numbers of these Austrian bonds belong to and are H D's property," signed by the testator. H D was the testator's housekeeper, and the key of the box was given into her custody:—Held, that as there had been no actual transfer or delivery of the bonds to H D, they still remained part of the testator's assets. *Trimmer v. Danby*, 25 Law J. Rep. (n.s.) Chanc. 424.

A B, in 1852, signed a memorandum in which he particularized some Russian bonds and to whom he should give them. In October 1853 he made his will, not noticing the bonds. In November following he signed another memorandum to the same effect as the former, and at the same time delivered the bonds to C D, and under a declaration verbally that he was to pay A B the interest for life and hold the bonds for the persons named in the paper after his death:—Held (differing from a decision of one of the Vice Chancellors), that there was a valid delivery and disposition of the bonds in favour of the parties named in the memorandum. *Langley v. Thomas*, 26 Law J. Rep. (n.s.) Chanc. 609.

On the 20th of July 1840, M R K, then *in extremis*, executed the ordinary Bank power of attorney, and delivered the same to her sister E R K, whereby the latter was empowered to transfer into

her own name a sum of government stock then standing in the name of M R K. M R K died on the 21st of July 1840, and on the 23rd of the same month the transfer was made under the power:—Held, (the evidence shewing a clear intention on the part of M R K to give the legal and beneficial interest in the stock to her sister) that the gift was a valid and effectual one in favour of E R K as against the other next-of-kin of the donor. *Kiddill v. Farnell*, 26 Law J. Rep. (n.s.) Chanc. 818; 3 Sm. & G. 428.

A lady had a dressing-case and a box, both containing jewellery; the dressing-case was in her possession at the place where she died, the box was at her residence. On her death-bed she delivered the keys to her servant, with directions to deliver both to the plaintiffs in the event of her dying:—Held, that this did not amount to a *donatio mortis causa*. *Powell v. Hellicar*, 28 Law J. Rep. (n.s.) Chanc. 855; 26 Beav. 261.

A testatrix, by will, disposed of her personal estate. She afterwards put two promissory notes, which were payable to her or her order, into a box, which her niece used as her own, and gave her the key off her bunch, requesting her not to look into that division of the box in which she had placed the notes until after her decease. The testatrix did not indorse the notes; she lived nearly three months afterwards, but died of the complaint in which her illness originated:—Held, that it was a good *donatio mortis causa*. *In re Veal and Veal v. Veal*, 29 Law J. Rep. (n.s.) Chanc. 321; 27 Beav. 803.

Bills of exchange payable to order may be made the subject of a *donatio mortis causa*, though they were not indorsed to the donee. *Rankin v. Weguelin*, 29 Law J. Rep. (n.s.) Chanc. 323 n.; 27 Beav. 309.

DOWER.

[See PRODUCTION AND INSPECTION OF DOCUMENTS.]

- (A) ELECTION.
- (B) WHEN BARRED.
- (C) PROCEEDINGS FOR.
- (D) MORTGAGE BY HUSBAND.

(A) ELECTION.

A testator directed his trustees and executors to sell all his freehold and copyhold estates, and gave one half of the proceeds to his wife absolutely, and by a codicil he desired that his personal estate should be divided in the same proportions as his real estate:—Held, that the testator's widow (married before 1834) was not bound to elect between her dower and the benefits given by the will. *Bending v. Bending*, 26 Law J. Rep. (n.s.) Chanc. 469; 3 Kay & J. 257.

(B) WHEN BARRED.

A conveyance of real estate prior to the 3 & 4 Will. 4. c. 105. to A B, a married man, to uses to bar dower, with a declaration added, "to the intent that the present or any future wife of the said A B may not be entitled to dower," will not as against the heir-at-law, deprive a second wife married after

the passing of the act, of her dower. *Fry v. Noble*, 25 Law J. Rep. (n.s.) Chanc. 144; 7 De Gex, M. & G. 687; 24 Law J. Rep. (n.s.) Chanc. 591; 20 Beav. 598.

The equitable right to dower entitles a widow to costs, if it is disputed by the party to whom the estate has been sold by the heir-at-law. *Ibid*.

Where upon a purchase of freehold estate the conveyance deed contained a declaration, "that no widow of the purchaser should be dowable out of the hereditaments," it was held to be unnecessary, for the validity of the declaration, that the deed should be executed by the purchaser. *Fairley v. Tuck*, 27 Law J. Rep. (n.s.) Chanc. 28.

The widow of an intestate, whose estate was being administered in the Court of Chancery, being entitled to dower out of his estate, joined with her infant daughter, who was the intestate's heiress-at-law, in granting a lease of the unopened coal-mines; all the covenants and reservations being entered into between the infant and the lessee. The widow, who was appointed guardian of her daughter, received the rents and royalties from the coal-mines, and paid them into court on her daughter's account. Some time afterwards she claimed dower out of the coal-rents and royalties. The Court held, that the widow stood in the same position as a tenant for life of the property as to one-third, and although she had no power to open mines herself, she had power to prevent the remainderman from opening them; but that in this case the effect of the lease and the transactions between the parties was such as to prevent the widow from supporting her claim to dower. *Dicken v. Homer*, 29 Law J. Rep. (n.s.) Chanc. 778; 1 Dr. & Sm. 284.

(C) PROCEEDINGS FOR.

A husband was seised in fee subject to a trust term to secure life annuities, and to pay him half the surplus rents:—Held, that his widow was entitled to have her dower set out at once. *Sheaf v. Cave*, 24 Beav. 259.

(D) MORTGAGE BY HUSBAND.

Under the late Dower Act (3 & 4 Will. 4. c. 105.) a widow has no right as against the heir-at-law of her deceased husband, to be indemnified in respect of a mortgage created by the deceased. *Jones v. Jones*, 4 Kay & J. 361.

Therefore, where in a case of that description the mortgaged property had been sold by order of the Court in a suit for administration of an intestate's estate,—Held, as between his widow and his heir, that the right of the widow to dower was limited to one-third of the income of the clear surplus of the proceeds of the sale after deducting what was due upon the mortgage. *Ibid*.

DRAINAGE ACTS.

[See LAND, and LAND IMPROVEMENT ACTS.—The Maintenance of Navigations made in connexion with Drainage provided for, and further Provision in relation to Works of Drainage in Ireland made, by 19 & 20 Vict. c. 62.]

EASEMENTS.

[See COMMON—WATER AND WATERCOURSE.]

- (A) IMPLIED GRANT.
- (B) RIGHTS TO SUPPORT OF ADJOINING LAND OR TENEMENT.
- (C) ANCIENT LIGHTS.

(A) IMPLIED GRANT.

Where the owner of two or more adjoining houses sells one of them, the purchaser of such house is, without any express reservation or grant, entitled to the benefit of all drains from his house, and is, on the other hand, subject to all the drains necessary for the enjoyment of the adjoining house. Such necessity is to be considered with reference to the time of the conveyance, as matters then stood, without alteration, and without reference to whether any other outlet could be made for the drainage. *Pyer v. Carter*, 26 Law J. Rep. (n.s.) Exch. 258; 1 Hurl. & N. 916.

Although the occupiers of contiguous tenements, held under one title, may sometimes set up implied grants, from the original owner, of easements not expressly mentioned, this only applies to such easements as are apparent and continuous, that is to say, clearly indicated by the condition of the premises at the time of the division of title, and if the premises are then unfinished and the buildings are in a skeleton state, so that though there are openings left in the walls, it is uncertain for what purpose they are intended, whether as doors or windows, and if as doors, then in what direction and to what extent the ways thereto are designed to be used,—there will be no such implied grants, the easements not being apparent and continuous. And a plan attached to the grants, if it leave the matter equally uncertain, will not aid the implication. *Glave v. Harding*, 27 Law J. Rep. (n.s.) Exch. 286.

(B) RIGHT TO SUPPORT OF ADJOINING LAND OR TENEMENT.

In an action by a reversioner one count of the declaration alleged, that a messuage and land in fact received lateral support from, and were supported by the land adjoining, yet the defendant wrongfully and negligently dug and made excavations in the said land so adjoining, and without sufficiently shoring, propping or otherwise protecting the said messuage and land from the effects thereof, and thereby deprived the messuage and land of their said support, whereby the land and messuage sank. Another count stated that the plaintiff was, by reason of her said interest in the messuage and land, entitled to have the messuage supported laterally by certain land adjoining, yet the defendant wrongfully and negligently dug and made divers excavations in the land adjoining, and without sufficiently shoring, propping or otherwise protecting the said messuage and land, and thereby deprived the said messuage of the support to which the plaintiff was so entitled as aforesaid, whereby the messuage and land sank:—Held, on demurrer, that both counts disclosed a right of action, as well in respect of the injury to the house as to the land. *Bibby v. Carter*, 28 Law J. Rep. (n.s.) Exch. 182; 3 Hurl. & N. 153.

Three contiguous houses in a street visibly leaned out of the perpendicular for upwards of thirty years, the plaintiff's house leaning on B's house, and B's house leaning on the defendants' house. On the expiration of a lease to a tenant, the defendants took down their house, the effect of which, by removing the support, was to cause B's house to fall down, and B's house falling, the plaintiff's house fell:—Held, that the fall of the plaintiff's house did not give him a right of action against the defendants, for that the plaintiff had not either a natural or acquired right to have his house supported by the defendants', through the intermediate house. *Solomon v. the Vintners' Company*, 28 Law J. Rep. (n.s.) Exch. 370; 4 Hurl. & N. 585.

Seems—the owner of an ancient house is entitled to the lateral support of his neighbour's land, as well for the house as for the surface of the soil itself. *Hunt v. Peake*, 29 Law J. Rep. (n.s.) Chanc. 785; John. 705.

(C) ANCIENT LIGHTS.

Where the plaintiff, having acquired the right to the passage of light to his windows, blocks them up, and the defendant, while they are blocked up, purchases the servient tenement and commences building on it so as to obstruct the windows if open, whereupon the plaintiff re-opens them and brings an action for the obstruction, the plaintiff's right to recover depends upon two points; that he did not so close his lights as to lead the defendant to incur expense or loss on the reasonable belief that they had been permanently abandoned; nor so as to manifest an intention of permanently abandoning the right of using them. *Stokoe v. Singers*, 26 Law J. Rep. (n.s.) Q.B. 257; 8 E. & B. 31.

In an action for an injury to the reversion by obstructing ancient lights, it is sufficient for the declaration to shew an obstruction which may cause such injury, especially if it be alleged that by means thereof the plaintiff's reversionary estate was injured; and such declaration is not bad on demurrer because the obstruction is one which is capable of being shewn at the trial to be only temporary, and not injurious to the reversion. *The Metropolitan Association for Improving the Dwellings of the Industrious Classes v. Peck*, 27 Law J. Rep. (n.s.) C.P. 330; 5 Com. B. Rep. N.S. 504.

EDUCATION.

[The Appointment of a Vice-President of the Committee of Council on Education authorized by 19 & 20 Vict. c. 116.]

EJECTMENT.

[For Hereditaments forfeited by Breach of Covenant, see LEASE. And see LANDLORD AND TENANT—LIMITATIONS, STATUTE OF.]

- (A) WHEN MAINTAINABLE.
- (B) PRACTICE.

- (a) Writ.
- (b) Appearance of Persons not named.
- (c) Intervogatories.
- (d) Motion for Judgment and Execution.

- (e) *Trial and Entry of Verdict.*
 (f) *Staying Proceedings.*

(A) WHEN MAINTAINABLE.

[See LEGACY (N), *Tudor v. Guest.*]

A party may claim to recover in ejectment, both upon his own title and upon his prior possession, as sufficient title against a trespasser; and, failing on the former ground, he may then rely on the latter. Therefore, where parties, claiming under a lessee, and suing in ejectment a person who had got into possession, either under a sub-tenant of the plaintiffs or as a mere intruder, attempted to prove a surrender of a prior lease, it was held, that, even supposing they had failed to do so, they could still recover by reason of prior possession against a wrong-doer. *Davison v. Gent*, 26 Law J. Rep. (N.S.) Exch. 122; 1 Hurl. & N. 744.

The doctrine of *Thomas v. Cook*, that when a lessor grants a new lease to a third party, with consent of the former lessee, there is a surrender by act and operation of law, is not to be considered as over-ruled, and will be acted upon by the Court; and possession by a third party of a lease and of the demised premises, and his obtaining a renewal of the lease according to usage, under which the old lease was delivered up and cancelled, was held to be evidence of the assent of the original lessee. *Ibid.*

An action of ejectment for land taken possession of by the defendants, a railway company, for the purposes of the railway, under incomplete proceedings, pursuant to the Lands Clauses Consolidation Act, 1845, was referred to arbitration, the order of reference providing that the cause and all matters in difference between the parties should be referred, and that the arbitrator should decide what sum should be paid by the defendants to the plaintiff, as the price of, or compensation for the lands of the plaintiff which the defendants had taken for the purpose of their railway; the plaintiff agreeing to execute such a conveyance as the arbitrator might direct, and that the money paid into the Bank of England should be disposed of as the arbitrator should direct. The arbitrator directed that the verdict entered for the plaintiff should stand, and awarded a sum to be paid to the plaintiff, as the price of and compensation for the land of the plaintiff which the company had at the time of the making of the said order of reference taken for the purposes of their railway, and directed the amount to be paid to the plaintiff out of the money in the Bank of England, and the residue to be paid to the defendants; and he further awarded that there were no other matters in difference between the parties, and that the above payments were to be made and taken in full satisfaction and discharge of all matters in difference between them. It appeared that the money in the Bank included the purchase-money of other land of the plaintiff of which the defendants had lawful possession, and the plaintiff, treating the sum awarded as applicable to that, issued a writ of *hab. fa. possessionem*, and was put in possession, and now brought an action for mesne profits:—Held, that the action was not maintainable, the mesne profits being included in the reference and award. *Seemle*—that the plaintiff had no right to sue out the

writ of *habere facias possessionem*. *Smalley v. the Blackburn Rail. Co.*, 27 Law J. Rep. (N.S.) Exch. 65.

In ejectment by a judgment creditor on a writ of *elegit*, the writ, with the inquisition and the return thereupon, stating that the defendant, the judgment debtor, was possessed of the property, constitute sufficient evidence of the plaintiff's title to recover; and as between the *elegit* creditor and the judgment debtor, the return to the inquisition is conclusive, at all events down to the date of the return, so that the defendant cannot set up a title in a third party arising prior to that date. *Martin v. Smith*, 27 Law J. Rep. (N.S.) Exch. 317.

A, being lessee for a term of years of lands, the lessor devised them in fee to A's wife. A had issue by his wife:—Held, that A held the term and the fee in separate and distinct rights, and that the term was not merged, and that the fact that A had issue by his wife made no difference, for, the wife being still alive, the tenancy by the courtesy was only initiate, and not consummate. Therefore, the grantee under the will of the lessor of a rent-charge, with a power of entry on the lands, could not enter or maintain ejectment during the term. *Jones v. Davies*, 29 Law J. Rep. (N.S.) Exch. 374; 5 Hurl. & N. 766.

By the Hindoo law, no words of inheritance are necessary to pass the freehold of land to the heirs. A freehold interest cannot be created by parol or by an informal written instrument. Disputes arose between the Indian Government and an adjacent proprietor, M S, respecting a piece of alluvial land gained by accretion, of which M S was then in possession. The Indian Government required the land for public improvements. After some correspondence between the Government and M S, an agreement was entered into, by which M S undertook to relinquish all claim to the proprietary right, and to rent the land from the Government, upon condition of the latter allowing him to remain in possession until the projected public improvements rendered it necessary for him to vacate the land. Possession was given to Government, M S holding the land from the Government at a fixed rent, and undertaking to quit possession at a month's notice. Improvements in the neighbourhood having been made by the Government, and M S being dead, notice to quit was served on M S's representatives, who refused to quit, on the ground that the improvements were not such public improvements as were contemplated by the correspondence and agreement. In ejectment by the Government,—Held, first, that M S was, under the agreement, a mere tenant at will. Secondly, that ejectment was maintainable by the Government for recovery of the land, and that M S's representatives had no defence at law to the action. Judgment of the Supreme Court affirmed, without prejudice to such equitable rights as M S might have under the correspondence and agreement. *Sreenuttu Anundamohey Dossee v. Doe, on the demise of the East India Co.*, 13 Moore's P.C. 162.

(B) PRACTICE.

(a) Writ.

Tenants in common can recover in ejectment, under the Common Law Procedure Act, 1852, in a joint writ, the whole of the property to which they are entitled in common. *Ellis v. Ellis*, 27 Law J. Rep. (N.S.) Q.B. 316; E. B. & E. 81.

Where a writ in ejectment has not been addressed to but has been served on the tenant in possession, it is questionable whether the tenant can apply to set the writ aside as irregular. But if, instead of so applying, he applies for particulars or for other information, and allows ten days to elapse, he will be deemed to have waived the irregularity, supposing it to be such, and his application should then be not to set aside the writ, but to be allowed to appear and defend. *Thompson v. Slade*, 25 Law J. Rep. (N.S.) Exch. 306.

(b) *Appearance of Persons not named.*

In ejectment by the devisees of a person who had died seised, and had let in as tenants the defendants, who had (since action) paid rent and attorned to the plaintiffs, it was held, that certain persons who claimed to be entitled to an estate in remainder in fee, but who had never been acknowledged by the tenants, were not entitled to be let in to defend as landlords, they not being, by themselves or their tenants, in possession of the land in question. *Whitworth v. Humphrey*, 29 Law J. Rep. (N.S.) Exch. 113; 5 Hurl. & N. 185.

(c) *Interrogatories.*

The following interrogatories were allowed to be put by the defendant to the plaintiffs in ejectment: First, in what character or in what right do you, and each of you, claim to be entitled to the possession of the premises claimed by you in this action? Secondly, do you, or any of you, claim to be entitled to the same as heirs-at-law of Henry Flitcroft, deceased? Thirdly, if so, how do you allege that you, or any of you, are his heirs-at-law, and through what links do you trace such heirship? Fourthly, do you, or any of you, claim to be entitled, as grantees from or trustees for any person or persons claiming to be heirs-at-law of the said Henry Flitcroft? Fifthly, if so, who is, or are, the person or persons whose grantees or trustees you, or any of you, claim to be, and how do you allege that such person or persons is or are the heirs-at-law of the said Henry Flitcroft, and through what links do you trace such heirship? Sixthly, have you, or any of you, any right to or interest in the said premises, except as aforesaid, and if so, what is the nature of such right or interest? *Flitcroft v. Fletcher*, 25 Law J. Rep. (N.S.) Exch. 94; 11 Exch. Rep. 548.

Although, under section 51. of the Common Law Procedure Act, 1854, providing that in all causes, by order of a Court or a Judge, the plaintiff may, with the declaration, or the defendant with the plea, or either of them by leave of the Court or a Judge may at any other time, deliver to the opposite party interrogatories in writing upon any matter as to which discovery may be sought, the defendant in ejectment may be allowed to deliver interrogatories to the plaintiff as to the character or right or title under which he claims to be entitled to the premises claimed by him in the action—*Flitcroft v. Fletcher*; yet, the defendant in ejectment cannot be ordered to answer interrogatories of a similar character on the part of the plaintiff. And, therefore, where the plaintiff claimed as heir-at-law, he was not allowed to interrogate the defendant whether he claimed as heir; and if so, how; as grantee or in any other right or interest; and if so, of what nature such

right or interest might be. *Horton v. Bott*, 26 Law J. Rep. (N.S.) Exch. 267; 2 Hurl. & N. 249.

(d) *Motion for Judgment and Execution.*

A motion for leave to sign judgment and issue execution under the 210th section of the Common Law Procedure Act, 1852, may be made to the Court, and is absolute in the first instance. *Yousens v. Keen*, 2 Com. B. Rep. N.S. 884.

(e) *Trial and Entry of Verdict.*

In an action of ejectment, entered at the Assizes, the defendant not appearing when the cause was called on for trial, the plaintiff's counsel at once took a verdict; immediately after which the defendant's counsel came into court, strictly in time (by the clocks of the Assize town), and ready to try; which the plaintiff's attorney refused to consent to: the Court let the defendant in to try without terms. *Curtis v. Marsh*, 28 Law J. Rep. (N.S.) Exch. 36; 3 Hurl. & N. 866.

Where the defendant in ejectment defends for the whole of the land mentioned in the writ, and the plaintiff makes out a right to the possession of part only, he is not entitled to enter a general verdict; but the defendant is entitled to have the verdict entered in the form pointed out in section 180. of the Common Law Procedure Act 1852, and Schedule (A.), No. 17. *Alecock v. Wiskaw*, 29 Law J. Rep. (N.S.) Q.B. 143.

(f) *Staying Proceedings.*

A Judge at chambers has jurisdiction, under the Common Law Procedure Act, 1852, s. 219, to order a stay of proceedings, on payment of principal, interest, and costs. *Lawrence v. Hogben*, 26 Law J. Rep. (N.S.) Exch. 55.

The Courts will, in some cases, stay the proceedings of a second action of ejectment until the costs of a former action are paid, although the plaintiff claims by title paramount to the plaintiff in the former action. Thus, where the plaintiff was the father of the former claimant, and it appeared that he was cognizant of the former action, and remained out of the way to allow evidence to be given of his supposed death, and that both father and son claimed title from a common ancestor, through the same pedigree, the Court stayed the proceedings until payment of the costs of the action by the son. *Morgan v. Nicholl*, 27 Law J. Rep. (N.S.) Exch. 335; 3 Hurl. & N. 215.

ELEGIT.

[See SHERIFF, Poundage.]

Upon an inquiry on a writ of *elegit*, proof of possession or receipt of the rent of the land by the party, is *prima facie* evidence of title. *Barnes v. Harding*, *Official Assignee of the Royal British Bank*, 1 Com. B. Rep. N.S. 568.

EMBEZZLEMENT.

[See LARCENY.]

(A) EMBEZZLEMENT OR LARCENY.

(B) WHO IS A SERVANT WITHIN THE STATUTE.

- (C) RECEIPT OF MONEY ON ACCOUNT OF THE MASTER.
 (D) NON-ACCOUNTING.
 (E) OWNERSHIP OF PROPERTY.

(A) EMBEZZLEMENT OR LARCENY.

The prisoner was indicted, under the statute 3 Will. 4. c. 4. s. 1, for that he, being employed in the public service and entrusted by virtue of such employment with the receipt and custody of money, the property of the Queen, did, by virtue of such employment, receive 5,000*l.* on account of the public service of the Queen, and the said money fraudulently and feloniously applied to his own use. The count concluded charging that the said prisoner the said money in manner and form aforesaid did steal, take and carry away, against the statute, &c. The prisoner was an officer of Inland Revenue. It was his duty to receive certain taxes. By his accounts it appeared that the balance in his hands was much larger than he was entitled to retain. The Surveyor General shewed him an extract from his accounts, stating a balance against him of 5,214*l.* The prisoner said he knew it was about that sum, but he was not prepared to pay it over. The surveyor then reminded him that there was a balance of Excise duties alone of 800*l.* standing against him from the previous Monday, which was a receipt day at T. The prisoner then took out 281*l.* and said that was all the money he had in the world. On being asked what he had done with the rest, he said he had spent it in an unfortunate speculation:—Held, that there was evidence that he had fraudulently applied to his own use a part of the sum of 800*l.* he had received at T, and was therefore liable to be convicted under the statute. *The Queen v. Moah*, 25 Law J. Rep. (n.s.) M.C. 66; Deara. C.C. 626.

Quære—whether he could not upon the evidence stated have been convicted of fraudulently applying other parts of the 5,000*l.* than the 800*l.* Ibid.

Held, also, per *Pollock, C.B.*, that the prisoner might have been indicted simply for stealing the money, and that under such an indictment the special facts necessary to bring him within the penal provisions of the statute might have been given in evidence. Ibid.

A foreman employed to sell goods sold some to a customer, who bought them *bond fide* as bought from the master, and paid the foreman for them. The foreman did not enter the sale in his books or account for the price to his master, as in duty bound, but concealed the whole transaction and employed the money for his own use:—Held, that the foreman was not guilty of stealing the goods, as the sale was binding as between the buyer and the master, but that his offence was embezzling the price. *The Queen v. Betts*, 28 Law J. Rep. (n.s.) M.C. 69; Bell's C.C. 90.

(B) WHO IS A SERVANT WITHIN THE STATUTE.

The Great Western Railway Company and three other railway companies whose lines meet at C have a common station there, under the management of a station committee, composed of some directors of each company. This committee appoints, pays and dismisses all servants employed at the station,

and among others the delivery clerks who are employed to deliver parcels, arriving at C by any of the railways, throughout C and its neighbourhood, and to receive the sums charged for their carriage, and to pay them over at night to the chief clerk in the parcel office there. The particulars respecting each parcel are entered in the delivery clerk's book before he delivers them. The chief clerk pays over the whole money received from the delivery clerks to the cashier of the station committee, who keeps a separate account for each company and daily pays over to each its proportion of the receipts. The prisoner, a delivery clerk at C, on a particular day, received among other parcels one which came by the Great Western line, for which 5*s.* was charged in his book. He delivered the parcel and received the sum, but he altered the 5*s.* into 3*s.*, and after that, at night, duly accounted for the sums as they then stood in his book, keeping back the 2*s.* difference:—Held, that in an indictment for embezzlement, the prisoner might be described as the servant of the four companies or as the servant of the committee. *The Queen v. Bayley*, 26 Law J. Rep. (n.s.) M.C. 4; Deara. & B. 121.

The prisoner kept a refreshment house, and was employed by the prosecutors to get orders for their goods, to collect the money and pay it over. He was paid by commission. He was to go about among the farmers to get orders, but no definite time was to be spent in so doing. He was styled by them their agent for the particular district. The prosecutors had a store at B, under the control of the prisoner, who supplied customers from the stores pursuant to the orders he obtained. In order to obtain the security of a guarantee society for the prisoner's conduct, and in compliance with their regulations, it was arranged that the prosecutors should pay the prisoner a salary of 1*l.* a year. The prisoner having got into arrear was treated by the prosecutors as a debtor for the amount. The prisoner fraudulently appropriated money which he received from customers, and gave a false account:—Held, that a conviction for embezzlement could not be sustained, as the above facts did not establish that the prisoner was the servant of the prosecutors. *The Queen v. Walker*, 27 Law J. Rep. (n.s.) M.C. 207; Deara. & B. 600.

(C) RECEIPT OF MONEY ON ACCOUNT OF THE MASTER.

An agent to a railway company for delivering their parcels employed his own cart and his own servant, the prisoner, to carry them out. The agent was responsible to the company for all monies collected by his servants. It was the duty of the prisoner to receive the parcels from a clerk to the company, to deliver them, to collect the monies due, for the carriage, to the company according to a book furnished him by the clerk in question, and to account to the same clerk for the sums received. The prisoner collected some monies due to the company for the carriage of parcels and gave receipts in the name of the company. He did not account either to the clerk or his master, or to any one else, for these sums, but appropriated them to his own use:—Held, that the prisoner might be convicted on a charge of embezzlement as the servant of the agent, for though he received the money "in the

name" of the company, he received it "on account" of his master. *The Queen v. Thorpe*, 27 Law J. Rep. (N.S.) M.C. 264; Dears. & B. 562.

(D) NON-ACCOUNTING.

It was the duty of the prisoner to receive remittances from customers for his employers, to enter the amounts received in a cash-book, to furnish an extract from the cash-book to the cashier, also to enter the amount to his masters' credit in a bankers' book, and to pay the amount with others from time to time into the bank. He was further to enter each amount in his masters' ledger to the credit of the customer who paid it. The prisoner, having received a sum of money from a customer, did not enter it in the cash-book, or in the extract furnished to the cashier, or in the bankers' book, or pay the amount into the bank for his masters; but he entered it to the credit of the customer in the ledger:—Held, that entering the amount in the ledger did not exempt the prisoner from liability to the charge of having embezzled the money. *The Queen v. Lister*, 26 Law J. Rep. (N.S.) M.C. 26; Dears. & B. 118.

(E) OWNERSHIP OF PROPERTY.

The prisoner, who was the clerk to a savings bank, was convicted on an indictment charging him with embezzlement, the property being laid in A B. In order to prove that A B was a trustee of the bank he was called as a witness, and stated that since the commission of the offence he had been acting as a trustee; but that before that date he had attended only one meeting, having on that occasion been requested to do so lest there should be a deficiency of trustees; but he was also a manager of the bank, and it did not appear that any act was done by him at that meeting which he might not have done as a manager:—Held, that this was insufficient evidence of acting to support the inference of the legal appointment of A B as a trustee, and that the conviction was wrong. *Regina v. Essex*, Dears. & B. 369.

EQUITABLE PLEADINGS.

[See PLEADING, AT LAW.]

ERROR.

[QUASHING AND SETTING ASIDE, *Alleyne v. Regina*, 5 E. & B. 399; 6 Law J. Dig. 279—PRACTICE AND PROCEDURE, *Regina v. Seale*, 5 E. & B. 1; 6 Law J. Dig. 279.—And see JURY—PRACTICE, AT LAW.]

The Court refused to allow execution to issue, notwithstanding proceedings in error, under the 150th section of the Common Law Procedure Act, 1852, it being stated that the writ of error was brought *bond fide*, under the advice of counsel, and not for the purpose of delay, and it not appearing that the grounds of error were so frivolous as not to admit of argument. *Hall v. Conder*, 26 Law J. Rep. (N.S.) C.P. 261; 2 Com. B. Rep. N.S. 49.

Where, upon an indictment in a colonial court proceeding by course of common law, the prisoner has been convicted of a criminal offence, and is in execution of the sentence, the Court of Queen's Bench

will not grant a writ of error to bring up the record of the conviction, unless the Attorney General has issued his fiat for a writ of error. Nor will the Court, without such fiat, direct a *certiorari* to issue for the purpose of bringing up the record, and bringing a writ of error upon it. *Ex parte Lees*, E. B. & E. 828.

A writ of *habeas corpus* is not grantable in general where the party is in execution on a criminal charge, after judgment, on an indictment according to the course of the common law. *Ibid*.

ESTOPPEL.

[See SHERIFF.]

- (A) BY PROCEEDINGS IN REM.
- (B) BY ACCOUNT.
- (C) BY CONDUCT.
- (D) FROM DENYING TITLE OF LANDLORD AND REVERSIONER.

(A) BY PROCEEDINGS IN REM.

To a replication, taking issue on a plea of a public right of way to a declaration for trespass, *q. c. f.*, the defendant rejoined, by way of estoppel, that J P and others, being seized in fee of the *locus in quo*, were indicted and convicted for a nuisance in obstructing the way in question, and on proof of the abatement were fined, and that the plaintiff afterwards took possession of the land as trustee for J P and others, and was privy in estate to them, and that the defendant was one of the prosecutors of the said indictment:—Held, on demurrer, that the rejoinder was bad, the indictment not operating by way of estoppel on the plaintiff. *Petrie v. Nuttal*, 26 Law J. Rep. (N.S.) Exch. 200; 11 Exch. Rep. 569.

In an action for compensation in damages, *semble*, it is no answer, even by way of equitable defence, that a Court of equity has given judgment against the plaintiff on a bill filed by him against a defendant and a third party, for relief upon the same matters; even although it is alleged in the plea that the bill was for the same grievances and causes of suit, and although it appears that the transactions arose out of a partnership; so that possibly the Court of equity might have had jurisdiction; for *non constat* that the Court of equity did not dismiss the bill on the very ground that the plaintiff's remedy was at law. And a defendant will not be allowed to plead such a plea, at all events, along with several others and a demurrer, a Judge at chambers having already refused the leave. *Collins v. Cave*, 27 Law J. Rep. (N.S.) Exch. 146.

The title of the underwriters to the cargo of an abandoned vessel does not date from the acceptance of the abandonment, but has relation back to the time of the loss. *Cammell v. Sewell*, 27 Law J. Rep. (N.S.) Exch. 447; 8 Hurl. & N. 617.

A foreign vessel sailing with a cargo of timber, consigned from a foreign port to Hull, went ashore on the coast of Norway. The captain, without waiting for instructions from the consignee, and without any absolute necessity, made sale by auction of the timber, in the manner prescribed by the law of Norway, and the purchaser consigned the timber to

the defendants for sale on his behalf. The agents of the plaintiffs' underwriters, who had received notice of abandonment before, but had accepted it after the sale, in the mean time instituted a suit in the superior Diocesan Court of Drontheim, against the captain and the purchaser, to set aside the sale, and to compel the purchaser to deliver up the cargo to the underwriters. That Court confirmed the sale. In an action of trover, subsequently brought, by the plaintiffs, against the London consignee of the purchaser for the recovery of the cargo,—Held, first, that the title of the plaintiffs had relation back to the alleged loss, and that, therefore, they were entitled to maintain trover for the conversion occurring before the acceptance of the abandonment; but, secondly, that the judgment of the Norwegian Court was conclusive, and operated as an estoppel on the plaintiffs' claim; thirdly, that as a judgment *res*, it did not require to be specially pleaded, but was conclusive evidence upon the plea, that the goods were not the plaintiffs'. *Ibid*.

Quere—if the case had rested upon the sale alone, whether its effect as giving a valid title to the purchaser should be considered with reference to the law of Norway or to the law of England. *Ibid*.

(B) BY ACCOUNT.

The fact of a tradesman delivering an invoice or account in which goods are described as bought from him, does not operate as an estoppel, so as to prevent his shewing that he was not in truth the seller. Therefore, where in an action for not delivering the agreed quantity of ale purchased by the plaintiffs, and for improperly packing it, the proof on the part of the plaintiffs consisted of an invoice of the ale, made out by the defendant, and delivered to the plaintiffs with a printed heading, "Bought of J E" (the defendant), and payment of the amount charged was shewn to have been subsequently made to the defendant,—Held, that the defendant was not estopped from proving that the ale was bought by the plaintiffs from a third person, and included in an invoice of the defendant at the plaintiffs' request, for the purpose of their paying the amount with greater facility. *Holding v. Elliott*, 24 Law J. Rep. (N.S.) Exch. 184; 6 Hurl. & N. 117.

An agent appropriating, in his accounts with his principal, sums received to the payment of specific items, is estopped from disputing the payment of those items. Where, therefore, the agents of a foreign ship furnished coals to the ship on several voyages, and the accounts for the several voyages were balanced and settled, they were estopped from appropriating the receipts to a previous agency account for the ship, and suing the ship for the coals as necessities supplied and unpaid for. *The West Friesland*, 1 Swab. Ad. Ca. 456.

Where a ship is arrested for a specific demand, the amount cannot be referred to the Registrar, unless it appears that something, in any event, is due. *Ibid*.

(C) BY CONDUCT.

The plaintiff in order to protect his personal effects from his creditors, delivered the actual possession of them to the defendant; and in order that the latter might appear to be the true owner, he made a priced invoice of the articles, and gave a receipt to the defendant for the amount as on a sale.—Held, that the

plaintiff, as between himself and the defendant, was not estopped from shewing the real character of the transaction so as to entitle him to recover back the goods from the defendant. *Bowes v. Foster*, 27 Law J. Rep. (N.S.) Exch. 262; 2 Hurl. & N. 719.

A person may by his acts, in causing another to believe that he is the purchaser of goods, be precluded from disputing that he is not, in fact, the purchaser, although his acts were not intended to induce that belief. *Cornish v. Abington*, 28 Law J. Rep. (N.S.) Exch. 262; 4 Hurl. & N. 549.

A agreed with the defendant, a publisher, for the sale, on commission, of a map. A, who was the foreman of the plaintiff, a lithographic printer, without the defendant's consent or knowledge, entered, in the defendant's name, an order in the plaintiff's books for the paper and printing of the map. Some of the printed maps were sent direct from the plaintiff's premises to the defendant, and the delivery-notes made out in his name, the plaintiff, in his books, charging the work and materials to the defendant. A afterwards, representing to the defendant that he was called upon to pay the plaintiff's bill for paper and printing, induced the defendant to accept a bill of exchange, drawn in blank, for the amount due from him to A on sales of the map. A handed this bill to the plaintiff as if it were received from the defendant, on account of the plaintiff's bill for printing, and the plaintiff so treated it, and put his name as drawer, and the bill was paid by him at maturity. Further printing was done by the plaintiff under the same circumstances, and an invoice having been sent by the plaintiff to the defendant, in his name, A, in explanation, told the latter that the plaintiff had, by mistake, made out the account to the defendant, and with this explanation the defendant remained satisfied. The plaintiff having brought an action against the defendant for the printing,—Held, that it was properly left to the jury to say whether the conduct of the defendant was such as to induce the plaintiff to believe the defendant was buying the goods on his own account, and that, the jury having answered the question in the affirmative, the defendant was liable either on the footing of a contract or that he was estopped from saying there was no contract with the plaintiff, although the defendant thought that he was only selling on commission for A, and never intended to make himself responsible. *Ibid*.

(D) FROM DENYING TITLE OF LANDLORD AND REVERSIONER.

The rule by which a tenant is estopped from denying the title of the landlord who let him into possession is applicable in an action of trespass as well as in ejectment: qualifying the dictum of *Pollock, C.B.*, in *Watson v. Lane*. *Delaney v. Fox*, 26 Law J. Rep. (N.S.) C.P. 248; 2 Com. B. Rep. N.S. 768.

Payment by a tenant of rent to a person other than the person who let him into possession under a threat of expulsion, does not amount to a constructive eviction so as to affect the estoppel. *Semble*—that there cannot be a constructive eviction for that purpose. *Ibid*.

A declaration stated that, by deed, W demised a messuage, &c. to the defendant for twenty-one years, at a yearly rent, payable to W, his heirs and

assigns; and that the defendant covenanted with W, his heirs and assigns, to pay the rent and repair the premises, and alleged the entry and possession of the defendant, the reversion then belonging to W and his heirs; and that W devised the reversion to the plaintiff for life at W's death, whereby the plaintiff became and was seised in her demesne as of freehold for life of and in the reversion, and alleged breaches of the covenants. Plea—that the reversion did not belong to W and his heirs, as alleged. Replication—that the defendant ought not to be admitted to plead the said plea, because the lease was by indenture, executed by the defendant, under which he entered and was possessed of the term, and that he, at the time of the breaches, occupied the premises under the indenture, and by no other title; and that it did not appear by the indenture that W was not seised in fee, or that he had any estate or interest other than a fee simple, or any particular estate or interest whatsoever, nor did the indenture contain anything to shew that the reversion of and in the premises did not belong to W. On demurrer to this replication,—Held, that the plea was good, and that the replication was bad, as it did not shew any estoppel. *Weld v. Baxter* (Ex. Ch.), 26 Law J. Rep. (N.S.) Exch. 112; 1 Hurl. & N. 568: affirming the judgment below, 25 Law J. Rep. (N.S.) Exch. 214; 11 Exch. Rep. 816.

If a mortgagor of lands who retains only an equity of redemption leases by deed, and afterwards assigns his interest in the land, by words large enough to convey a legal estate, the assignee may, as assignee of the reversion, sue the tenant for waste in breach of the covenant in the lease; for the tenant is estopped from denying that his lessor had a legal reversion capable of being assigned. *Cuthbertson v. Irving* (Ex. Ch.), 29 Law J. Rep. (N.S.) Exch. 485: affirming the judgment below, 28 Law J. Rep. (N.S.) Exch. 307; 4 Hurl. & N. 742.

EVIDENCE.

[See DEVISE (B) (f).]

[The taking of evidence in Her Majesty's Dominions in relation to Civil and Commercial Matters pending before Foreign Tribunals provided for by 19 & 20 Vict. c. 113.—The taking of Evidence in Suits and Proceedings pending before Tribunals in Her Majesty's Dominions in Places out of the Jurisdiction of such Tribunals provided for by 22 Vict. c. 20.]

(A) GENERAL POINTS.

- (a) *Objection to Admissibility of Documents.*
- (b) *Inference against Party objecting to Admission of Documents.*
- (c) *Admissibility of unsupported Testimony of Accomplices.*
- (d) *Impeaching Credit of Witness.*
- (e) *Refreshing Witness's Memory by Entries in Books.*
- (f) *Examination of Wife as to Legitimacy.*
- (g) *Proof of Person's Name.*
- (h) *Admissibility of Evidence to prove an Agreement an Escrow.*
- (i) *Recitals in Acts of Parliament.*

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- (k) *Sufficiency of Stamp.*
- (l) *Other Points.*

(B) RECORDS AND JUDICIAL DOCUMENTS.

(C) PUBLIC DOCUMENTS.

(D) PRIVATE WRITINGS.

- (a) *Entries of Deceased Persons.*
- (b) *Maps.*
- (c) *Letters.*

(E) SECONDARY EVIDENCE.

- (a) *Of lost Document.*
- (b) *After Notice to produce.*

(F) PAROL EVIDENCE.

- (a) *Of Admission of Documents and their Contents.*
- (b) *To explain and apply Records and Contracts in Writing.*
- (c) *To contradict the Terms of Instruments in Writing.*

(G) DECLARATIONS OF DECEASED PERSONS.

(H) DYING DECLARATIONS.

(I) PRESUMPTIVE EVIDENCE.

(K) ADMISSIONS.

- (a) *Under legal Compulsion.*
- (b) *By Implication.*
- (c) *By Party or Privy.*
- (d) *By Conduct or Acts.*

(L) CONFESSIONS.

(M) DEPOSITIONS.

- (a) *Before a Master in Chancery.*
- (b) *Witness Abroad or too Ill to travel.*

(N) PRIOR CONVICTIONS.

(O) PRACTICE, IN EQUITY.

(A) GENERAL POINTS.

(a) *Objection to Admissibility of Documents.*

The objection to the admissibility of a document in evidence for want of a stamp ought to be taken at the earliest possible moment. Where, therefore, the plaintiffs, who were suing as executors, had put in evidence probate of the will of their testator, and the same had been read without objection, it was held, that the defendant could not afterwards, by giving extrinsic evidence of the value of the estate, object to the admissibility of the probate for want of a sufficient stamp. *Robinson v. Vernon*, 29 Law J. Rep. (N.S.) C.P. 310.

(b) *Inference against Party objecting to Admission of Documents.*

Where, in an action of ejectment by heir against devisee, the testator's competency was disputed, and the defendant, after proving that the testator had given a reasonable account of the real property left to him by his father, offered, in confirmation of his account, to put in the father's will, which was in court, but on an objection to its admissibility on the part of the plaintiff, it was withdrawn, and the Judge adverted to the fact in his summing up, and told the jury they might infer from the plaintiff's objecting to the will being put in, that it was conformable to the statement made by the testator:—Held, that there was no misdirection. *Sutton v. Devonport*, 27 Law J. Rep. (N.S.) C.P. 54.

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(c) *Admissibility of unsupported Testimony of Accomplices.*

It is not a rule of law, but of practice only, that a jury should not convict on the unsupported testimony of an accomplice. Therefore, if a jury chooses to act on such evidence only, the conviction cannot be quashed as had in law. The better practice is for the Judge to advise the jury to acquit, unless the testimony of the accomplice be corroborated, not only as to the circumstances of the offence, but also as to the participation of the accused in the transaction; and when several parties are charged, that it is not sufficient that the accomplice should be confirmed as to one or more of the prisoners to justify a conviction of those prisoners with respect to whom there is no confirmation. *The Queen v. Stubbs*, 25 Law J. Rep. (N.S.) M.C. 16; Dears. C.C. 555.

(d) *Impeaching Credit of Witness.*

A witness is not "adverse" within the meaning of the Common Law Procedure Act, 1854, s. 22, merely because his testimony is unfavourable to the party calling him. To be "adverse," within the meaning of that section, so as to entitle the party calling him to prove that he has made at another time a statement inconsistent with his present testimony, such witness must, in the opinion of the Judge, be "hostile." *Greenhough v. Eccles*, 28 Law J. Rep. (N.S.) C.P. 160; 5 Com. B. Rep. N.S. 786.

(e) *Refreshing Witness's Memory by Entries in Books.*

When a book is put into the hands of a witness to refresh his recollection, and questions are asked upon it in cross-examination, the book is not thereby made evidence for the party producing it, though it may be so for the opposite party. *Payne v. Ibbotson*, 27 Law J. Rep. (N.S.) Exch. 341.

If a Judge mis-states the evidence in summing up a case, the party complaining should correct the mis-statement at the time, as a mistake in matter of fact is no ground for a new trial on the ground of misdirection.

(f) *Cross-examination of Wife as to Legitimacy.*

On a question of legitimacy, it appeared that the child had been born three months after the marriage. It was suggested that the wife had not seen the husband until immediately before the marriage; and that at the period of conception he was married to another person. In the cross-examination of the mother, it was proposed to ask her,—"How long she had known her husband before her marriage?" This question was objected to, but the Court allowed her to be asked,—"When did you first become acquainted with your husband?" and she having answered twelve months before her marriage, the Court would not permit this subject to be further pursued. *Anon. v. Anon.*, 22 Beav. 481; 23 Beav. 273.

(g) *Proof of Person's Name.*

On a trial for felony the only evidence of the prosecutor's Christian name was a statement by a witness that he had seen the prosecutor sign his name to the charge against the prisoners, and to his deposition before the Magistrates; that he knew from that the prosecutor's name was Thomas B, but that, except

from having seen him make this signature, he had no knowledge of his Christian name:—Held, that this was admissible and sufficient evidence of the Christian name of the prosecutor. *The Queen v. Toole*, 26 Law J. Rep. (N.S.) M.C. 79; Dears. & B. 194.

(h) *Admissibility of Evidence to prove an Agreement an Ecceus.*

Evidence is admissible to shew that when a document, apparently an agreement, was signed by the parties, it was expressly stated that it was signed without any intention of making a present contract, but that it was to be conditional only upon the happening of an event which has not occurred. *Pym v. Campbell*, 25 Law J. Rep. (N.S.) Q.B. 277; 6 E. & B. 370.

(i) *Recitals in Acts of Parliament.*

Recital of the death of a prior tenant for life in a private act of parliament:—Held, upon an application by a subsequent tenant for life for payment of the income, to be insufficient evidence of the death. *Cowell v. Chambers*, 21 Beav. 619.

(k) *Sufficiency of Stamp.*

Under section 31. of the 17 & 18 Vict. c. 125, the question whether or not a document offered in evidence requires to be, or is sufficiently stamped, is to be decided by the Judge at Nisi Prius, and cannot properly be reserved for the opinion of the Court. *Tattersall v. Fearnley*, 17 Com. B. Rep. 368.

(l) *Other Points.*

The effect of section 18. of the Common Law Procedure Act, 1854, is, that when counsel for the defendant have not announced, at the close of plaintiff's case, that they intend to adduce evidence, they cannot afterwards be allowed to do so. *Darby v. Ouseley*, 25 Law J. Rep. (N.S.) Exch. 227; 1 Hurl. & N. 1.

The general principle, with respect to the licence to be allowed to counsel in addressing juries, and reading or referring to, as part of their speeches, matters of history or of speculative opinion, is, that whatever matter of fact a jury is asked to act upon must be proved. And although general reference may be permitted as to matters of history, such as the Council of Trent, or bulls of excommunication levelled against Roman Catholic sovereigns by Popes in former ages, it will not be allowable to read or refer to the specific terms of particular canons, bulls, or other documents, without proof. And canons, decrees, or other documents, which in foreign countries have the force of law, must be proved as part of the foreign law of such countries, and as matters of fact. *Ibid.*

Upon the same principle, although it is allowable to read, as matters of speculative opinion, the writings or speeches of statesmen and authors, in order to shew the meaning or force of a certain expression or a certain kind of writing, it is not allowable, either upon such a principle to read matters of foreign law, nor to read works of authority among a certain religious community in order to fix parties with particular opinions, without proof of such works as matters of fact; any more than it would be permissible to read works on farming or medical science, in order to induce the jury to form a certain opinion. *Ibid.*

The prisoner was indicted in one count for obtaining a sum of money from a savings bank, by falsely pretending that a certain document presented to the bank by Eliza T, the wife of Daniel T, had been filled up by the authority of Daniel T. In another count the prisoner was charged with conspiring with Eliza T to cheat the savings bank:—Held, that as Eliza T was not indicted, although alleged to be one of the conspiring parties, the evidence of Daniel T, the husband, was admissible on the first count, to prove that the document had been filled up without his authority. *The Queen v. Halliday*, 29 Law J. Rep. (N.S.) M.C. 148; 1 Bell. C.C. 257.

The finding the prisoner guilty on the first count, is perfectly consistent with finding him not guilty on the second. *Ibid.*

(B) RECORDS AND JUDICIAL DOCUMENTS.

The finding of a jury on a coroner's inquest held to throw the burden of proof in a civil case on the party alleging the contrary. *Prince of Wales, &c. Assoc. Co. v. Palmer*, 25 Beav. 605.

An extract from a parish register, signed by the curate of the parish, is admissible in evidence under the 14th section of the 14 & 15 Vict. c. 99. *Re Porter's Trust*, 25 Law J. Rep. (N.S.) Chanc. 688.

(C) PUBLIC DOCUMENTS.

[Admissibility of Parish Books, see CHURCHWARDENS AND OVERSEERS (B): *Cooper v. Law*.]

(D) PRIVATE WRITINGS.

(a) Entries of Deceased Persons.

Ewart v. Williams, 7 Law J. Dig. 286; 7 De Gex. M. & G. 68.]

Entries in a deceased solicitor's books in his handwriting relating to a deed prepared by him, and executed by a deceased client,—Held, good evidence. *Rawlings v. Rickards*, 28 Beav. 370.

(b) Maps.

In order to prove that there was a public right of way over and along certain closes which were part of a manor, the defendant put in evidence a map which had been used by a deceased steward of the manor at the manor courts for the purpose of defining the copyholds. In it there appeared a space marked out by two lines crossing the closes in question and called Mellow Lane. There were occupation-ways as well as public highways marked upon the map, but there was nothing to distinguish one from the other, nor was there anything to shew that the space marked out as above mentioned was a public highway at all:—Held, that the map was inadmissible. *Pipe v. Fulcher*, 28 Law J. Rep. (N.S.) Q.B. 12; 1 E. & E. 111.

(c) Letters.

In an action by a builder for work done in repairs to a house, the plaintiff's case being, that the work was done by him as builder, and one C as carpenter, separately, on the credit of the defendant, the tenant; and the defendant's case being, that it was done for the landlord; and a letter asking for payment, purporting to be from the plaintiff and C to the defendant, but written with the plaintiff's knowledge by a person signing on their behalf, having

been put in, on the part of the plaintiff,—Held, that a letter in answer, from the defendant to C, stating that the plaintiff had been expressly informed he was to be paid by the landlord, and which had been seen by the plaintiff shortly after, was properly received in evidence for the defendant. *Carne v. Steere*, 29 Law J. Rep. (N.S.) Exch. 281; 5 Hurl. & N. 628.

(E) SECONDARY EVIDENCE.

(a) Of Lost Document.

Where a written document (such as a power of attorney) has been lost, and secondary evidence is given of it, it is for the Judge, and not for the jury, to construe its meaning from the parol evidence. *Berwick v. Horsfall*, 27 Law J. Rep. (N.S.) C.P. 198; 4 Com. B. Rep. N.S. 450.

(b) After Notice to produce.

In an action against a sheriff after the expiration of his year of office, a notice served on his attorney to produce a warrant returned to the deputy sheriff in London during the sheriff's year of office, is sufficient to let in secondary evidence. *Suter v. Burrell*, 27 Law J. Rep. (N.S.) Exch. 193; 2 Hurl. & N. 867.

(F) PAROL EVIDENCE.

(a) Of Admission of Written Documents and their Contents.

The doctrine of *Slatterie v. Pooley* as to parol evidence of admissions as to the contents of a written document, and of *Howard v. Smith*, as to parol evidence of the fact of the existence or execution of a written document, does not apply to, or allow of proof by such evidence of the insertion of a name in any particular book; nor does section 24. of the Common Law Procedure Act, 1854, at all apply to authorize such a question, that section merely referring to the rule of evidence which had previously existed as to cross-examination of a witness with regard to previous statements (and which is affirmed by section 23.), and extending it to such statements when in writing. Therefore, in an action for libel, in imputing to the plaintiff that by reason of his belonging to a certain association he was a rebel, the plea justifying the libel,—Held, that the defendant could not ask him, on cross-examination, (he not having been asked anything on the point in the examination in chief), whether his name was inscribed in a book containing the names of members. *Darby v. Ouseley*, 25 Law J. Rep. (N.S.) Exch. 227; 1 Hurl. & N. 1.

(b) To explain and apply Records and Contracts in Writing.

[Meaning of "bales" by custom of trade, see WARRANTY; *Garrison v. Perrin*.]

A *Nisi Prius* record having been put in evidence, and there appearing to be two counts on distinct causes of action, and the verdict entered generally for the plaintiff, with 65*l.* damages, parol evidence is admissible to shew that the substantial damages were recovered on one count only. *Preston v. Peeke*, 27 Law J. Rep. (N.S.) Q.B. 422; E. B. & E. 336.

Where a written instrument contains no date parol evidence is admissible to shew from what time it was intended to operate. *Davis v. Jones*, 25 Law J. Rep. (N.S.) C.P. 91; 17 Com. B. Rep. 625.

By a contract entered into between the plaintiffs and the defendant, the latter purchased of the former "50 tons best palm oil, expected to arrive in Bristol from Africa per the *Chalco*," &c., "at 40*l.* 10*s.* per ton, usual tare and draft. Wet, dirty and inferior oil, if any, at a fair allowance," &c. Upon the arrival of the *Chalco* the plaintiffs offered to deliver to the defendant 50 tons of palm oil, but only one-fifth of the whole answered the description of "best palm oil":—Held, in an action for not accepting the oil, that evidence was admissible to shew that according to mercantile usage the plaintiffs had satisfied the contract. *Lucas v. Bristol*, 27 Law J. Rep. (N.S.) Q.B. 364; 3 E. B. & B. 907.

The defendant, by a contract in writing, purchased of the plaintiffs, who were farmers, a quantity of wool, which was described simply as "your wool." Some time previously a conversation had taken place in which the plaintiffs stated that they had a quantity of wool, consisting partly of their own clip, and partly of wool which they had contracted to buy of other farmers, and that altogether it amounted to "2,300 stones, 100 stones more or less." The quantity delivered was 2,700 stones, and the defendant refused to receive it. In an action for not accepting the wool, it was held, by Lord Campbell, C.J. and Erie, J., that the conversation was admissible in evidence for the purpose of explaining what the parties meant by the term "your wool"; but that the quantity expressed by the plaintiffs formed no part of the contract, which was complete on the face of the writing; by *Wightman, J.*, that the conversation was admissible in evidence, and that the quantity of wool therein described became part of the contract, so that the defendant was not bound to receive the larger quantity which was delivered. *Macdonald v. Longbottom*, 28 Law J. Rep. (N.S.) Q.B. 293.

The plaintiff called on the defendant's agent, and told him he had a quantity of wool, part his own clip, part what he had contracted to buy of other farmers, and that the whole quantity amounted to 2,300 stones, 100 stones more or less. The plaintiff afterwards wrote to the same agent, saying that he had succeeded in getting the promise of another clip, which would stand about 550 stones, and that it would go along with his other wool. In the following month the defendant's agent wrote to the plaintiff, saying, the defendant desires me to offer you for "your wool" 1*6s.* a stone." The plaintiff wrote back, "I agree to your offer for the wool, of 1*6s.* a stone." The plaintiff afterwards tendered 2,700 stones of wool, which the defendant refused to accept:—Held, that the written offer and acceptance formed a good contract in writing to purchase certain wool of the plaintiff described as "your wool"; that evidence of the previous conversation and letters was admissible to explain the expression "your wool" in the contract, and to point out that the subject-matter to which the contract applied was the wool which the plaintiff had under his control at the time of the contract, and was not limited to the quantity first mentioned, 2,300 stones, 100 stones more or less; consequently, that the plaintiff was entitled to recover. *Macdonald v. Longbottom* (Ex. Ch.), 29 Law J. Rep. (N.S.) Q.B. 256.

(c) *To contradict the Terms of Instruments in Writing.*

Although evidence is not admissible to shew, contrary to the terms of the deed, that by the contract the consideration was not to be paid in money, as stated in the deed, but in goods, such evidence is admissible to shew that, in point of fact, the consideration was so paid, and that goods were accepted in payment. *Smith v. Battams*, 26 Law J. Rep. (N.S.) Exch. 232.

A, in January 1853, gave to B his I O U for 65*l.* After A's death, B having claimed the amount, his receipt for the amount was produced. B swore positively that the amount had never been paid. The Court held, that it could not act on his unsupported testimony against the written evidence. *In re Farrow's Estate*, 22 Beav. 400.

(G) DECLARATIONS OF DECEASED PERSONS.

A declaration by a deceased tenant of a farm unaccompanied any act, that he was not entitled to common of pasture in respect of the farm, is not admissible evidence against the reversioner. *Papendick v. Bridgewater*, 24 Law J. Rep. (N.S.) Q.B. 289; 5 E. & B. 166.

(H) DYING DECLARATIONS.

The deceased, a few days previous to his death from injuries inflicted on him by the prisoners, made a statement in writing respecting them, concluding with the words, "I have made this statement believing I shall not recover." At the time he made it, it was impossible for him to have recovered. It was also proved that a few hours before he made his statement he had said to a witness, "I have seen the surgeon to-day, and he has given me some little hope that I am better, but I do not myself think that I shall ultimately recover." Before, however, the witness left the room the deceased said that he should not recover:—Held, that the statement was made under a belief of impending death, and consequently that it was admissible in evidence. *The Queen v. Reamy*, 26 Law J. Rep. (N.S.) M.C. 43; *Dears. & B.* 151.

A dying declaration is receivable in evidence against a prisoner on a charge of felony only when the death of the person making it is the subject of the charge, and the circumstances of the death are the subject of the dying declaration. Therefore, where a prisoner was charged with the felony of using instruments to procure the miscarriage of a woman, who afterwards died, her dying declaration was held inadmissible on his trial. *The Queen v. Hind*, 29 Law J. Rep. (N.S.) M.C. 147; *Bell's C.C.* 253.

(I) PRESUMPTIVE EVIDENCE.

It is sufficient *prima facie* proof of a prescription for a general easement, as a right of way for all purposes, to shew the actual exercise of the right for more than twenty years for all the purposes to which the use or enjoyment of the premises at different times required its exercise; although, for some of those purposes, it appears that it was first used in fact within that period. And hence where a right of way was pleaded for cattle and carts, and it appeared that the right had been used for cattle for more than twenty years, and had for the first time been used for carts within that period, on the

first occasion which had arisen requiring its use in that manner,—Held, that the evidence was enough to go to the jury, as raising a presumption that the right had existed to the general extent to which it was claimed, although it had not been exercised for a period so long as in itself to create a prescription. *Dare v. Heathcote*, 25 Law J. Rep. (n.s.) Exch. 245.

An award, made in 1830, under an Inclosure Act, which empowered the Commissioners to stop up highways, subject, nevertheless, to the order and concurrence of two Justices, directed a certain public highway for carriages to be stopped up. Ever since the award (i.e. for twenty-eight years) the road had been stopped up by a gate, and had never been used by the public with carriages or horses. There had been, however, some user by foot passengers. No proof was given that the requisite order of Justices had ever been made:—Held, that from the non-user of the road for so long a period, the jury might presume that there was such an order. *Williams v. Eytton* (Ex. Ch.), 28 Law J. Rep. (n.s.) Exch. 146; 4 Hurl. & N. 357; affirming the judgment below, 27 Law J. Rep. (n.s.) Exch. 170; 2 Hurl. & N. 171.

The presumption which prevails in the case of a public highway, that the soil *usque ad medium filum viae* belongs to the owner of the adjacent land, prevails also in the case of a private way; provided there be no other evidence of ownership to rebut such presumption. *Holmes v. Bellingham*, 29 Law J. Rep. (n.s.) C.P. 132; 7 Com. B. Rep. N.S. 329.

A, a Jew, and B, a Christian woman, cohabited as man and wife for twenty-eight years, and until B's death. They had several children, who were brought up as Christians. They cohabited partly in England and partly in foreign parts. There was no evidence of any marriage having been solemnized, but there was general reputation that the parties were married, and proof of the registry of the baptism in England of several of the children as of A and B his wife, and that on a judicial proceeding the parties gave evidence on oath as "A and B his wife." The relatives of A never recognized the fact of a marriage, and some of them swore that they did not know even of the reputation of marriage. A, in his will, referred to such of the children as were living as "my legatees." One of the Vice Chancellors decided that the children were entitled as legitimate children of A and B to a fund belonging to A's next-of-kin; and that the onus of proof lay upon those who sought to disturb the general reputation and presumption of marriage under the foregoing circumstances: and, on appeal, the decision was affirmed. *Goodman v. Goodman*, 28 Law J. Rep. (n.s.) Chanc. 745.

(K) ADMISSIONS.

(a) Under Legal Compulsion.

The enforced answers of a bankrupt, under examination of a Bankruptcy Commissioner, to questions relating to matters specified in section 117. of the Bankrupt Law Consolidation Act, 1849, may be given in evidence by the prosecution on any criminal proceeding against the bankrupt—*dissentiente Coleridge, J.* *The Queen v. Scott*, 25 Law J. Rep. (n.s.) M.C. 128; 1 Dears. & B. 47; s. p. *R. v. Crooks*, 1 Dears. & B. 68.

After verdict, to support an indictment, and to shew that the provisions of a statute have been complied with, dates laid under a *videlicet* will be taken to be true. *Ibid.*

(b) By Implication.

Although, where there is no evidence in itself to affect a defendant, the mere fact that he is not called as a witness is not sufficient to sustain a verdict against him; yet if there is some evidence against him (as an implied admission on his part), then the circumstance that he is not called to explain it may be enough to turn the scale and sustain the verdict. *M'Kewen v. Cotching*, 27 Law J. Rep. (n.s.) Exch. 41.

In an action for the conversion of a bill of exchange, it being proved that the defendant had said, in answer to a demand for it, that he could not give it up because it had been burnt, and the defendant not being called as a witness,—Held, that the case was rightly left to the jury, and that their verdict for the plaintiff was justified by the evidence. *Ibid.*

(c) By Party or Privy.

The plaintiff sued the defendant for a consequential injury to her reversionary interest in a several fishery in an arm of the sea, alleging her right to the soil between high and low water mark, into which she charged the defendant with cutting, and stating that such soil and fishery were in the possession of F as her tenant. The defendant was tenant of a neighbouring property under G. In support of the plaintiff's title, evidence was offered of the proceedings in a former action, brought by F, while tenant to the plaintiff, against G, complaining of a similar injury to the same fishery. The declaration in the former action alleged that the present plaintiff was owner of the soil between high and low water mark, and charged G with cutting the said soil, and thereby injuring F's fishery. Not guilty being pleaded, the cause was referred to arbitration, and an award made in favour of F:—Held, that these proceedings were not admissible either as evidence of reputation of the plaintiff's ownership of the fishery, or as proof or an admission by G of the plaintiff's title to the soil or fishery. *Wenman v. Mackenzie*, 25 Law J. Rep. (n.s.) Q.B. 44; 5 E. & B. 447.

(d) By Conduct or Acts.

Upon a question whether a piece of waste land lying between a highway and the plaintiff's inclosed land belonged to the plaintiff, or to the lord of the manor,—Held, that grants by the lord of other slips of waste land on either side of the same road, abutting on inclosed lands of the lord himself and of other persons, were admissible for the purpose of shewing that the *locus in quo* was part of the waste of the manor, without shewing continuity. *Dendy v. Simpson*, 18 Com. B. Rep. 831.

(L) CONFESSIONS.

The statute 11 & 12 Vict. c. 42. s. 18, which requires that on a criminal charge after the examination of the witnesses has been completed and their depositions read over, the Justice shall give the prescribed caution to the prisoner before he takes his statement in answer to the charge, does not render inadmissible in evidence on the trial a statement

voluntarily made by the prisoner before a magistrate when brought up on an application for a remand. *The Queen v. Stripp*, 25 Law J. Rep. (N.S.) M.C. 109; Dears. C.C. 648.

(M) DEPOSITIONS.

(a) Before a Master in Chancery.

In 1806 it was referred to the Master in Chancery to report who was the proper person to be committee of G, a lunatic, and to certify who was her next-of-kin and heir-at-law, to whom it was directed that notice was to be given. S, maternal grandmother of G, the lunatic, made a deposition before the Master, in which she stated the connexions of the family. In 1854 G. died. In an ejectment in which the question was who was heir-at-law *ex parte paterni* of G, the deposition of S, at that time deceased, was tendered in evidence as a declaration of a deceased relative on a matter of pedigree. No evidence was given either way as to whether, in 1806, there was any real dispute as to who was the heir of G. The evidence was objected to as being *post litem motam*, but received. On a rule for a new trial,—Held, that the evidence was properly received; the inquiry as to who was heir-at-law before the Master not being in itself a controversy or *in pende* within the rule, and it being no objection that the declaration was upon oath. *Gee v. Ward*, 7 E. & B. 509.

(b) Witness Abroad or too Ill to travel.

A deposition taken before a magistrate on a charge of felony against the prisoner, cannot be read in evidence against him on his trial, merely because the witness is absent, and resident in a foreign country. *The Queen v. Austin*, 25 Law J. Rep. (N.S.) M.C. 48; Dears. C.C. 612.

If a witness has had an attack of paralysis and is unable to hear or speak or give evidence, and his physician does not permit him to go about, his deposition may be read under the statute 11 & 12 Vict. c. 42. s. 17, though it would not endanger his life to travel or to be brought into court. *The Queen v. Cockburn*, 26 Law J. Rep. (N.S.) M.C. 136; Dears. & B. 203.

(N) PRIOR CONVICTIONS.

On an indictment for a nuisance in carrying on an offensive trade, a conviction of the defendant before Justices for an offence against the statute 16 & 17 Vict. c. 128. s. 1, committed at the same place and in the course of the same trade, but anterior to the period comprised in the indictment, was received in evidence:—Held, by the whole Court (*Lord Campbell, C.J., Coleridge, J. and Wightman, J.*) that it was improperly received, the offence of which defendant was convicted not necessarily being a nuisance. And, by *Lord Campbell, C.J. and Coleridge, J.*, even if it had been a conviction for an offence precisely similar to that charged against the defendant, except that it was anterior in time, it would not have been admissible; *Wightman, J.* not concurring. *Regina v. Fairie*, 8 E. & B. 486.

(O) PRACTICE, IN EQUITY.

The 38th section of the Chancery Procedure Amendment Act does not apply to the cross-examination of a witness who has made an affidavit after decree; and such witness, therefore, if required to be

cross-examined before the examiner, must be served with a subpoena. *Stebbing v. Ailee*, 26 Law J. Rep. (N.S.) Chanc. 265.

No special order of the Court is necessary for transferring the cross-examination of a witness from the Judge in chambers to the examiner. *Ibid.*

The time for closing the evidence in the cause being fixed for the 17th of April, the plaintiffs, on the 16th of April, filed affidavits containing paragraphs impeaching the characters of two of the defendants' witnesses:—Held, on motion made on the 28th of May, and afterwards affirmed upon appeal, that the defendants were entitled to further time to file affidavits in answer to the paragraphs against the character of their witnesses. *Scott v. the Corporation of Liverpool*, 26 Law J. Rep. (N.S.) Chanc. 651; 1 De Gex & J. 369.

One of the partners in a firm died intestate, and in a suit for winding up the partnership affairs, a sum of money was paid into court. The intestate was also possessed of two other sums of stock, which were transferred to the Commissioners for the Reduction of the National Debt, since no next-of-kin of the intestate could be found. A claimant came forward as next-of-kin, and presented a petition in the partnership suit, claiming the money standing to the separate account of the intestate. In that suit nine affidavits were filed. The same claimant presented a petition praying for a transfer of the sums paid to the Commissioners, when nineteen affidavits were filed. On this petition the Attorney General appeared, as representing the Crown and the Commissioners. Letters of administration were then granted to the Solicitor for the Treasury, as nominee of the Crown, and a suit was instituted against him by the representatives of the first claimant, to prove his relationship to the intestate. Another claimant also came forward in this suit, by whom one affidavit was filed. The persons who made the affidavits were all dead:—Held, that evidence produced on a former occasion could only be made use of in subsequent proceedings between the same parties and upon the same issue. Upon this principle, the nine affidavits in the partnership suit and the one affidavit in the present suit by a different claimant, were rejected, but the nineteen affidavits on the petition were admitted. *Lawrence v. Maule*, 28 Law J. Rep. (N.S.) Chanc. 681; 4 Drew. 472.

The Attorney General, having been served, under the 56 Geo. 3. c. 60, must be presumed to have represented the Crown and the National Debt Commissioners and the beneficial interests of the Crown. *Ibid.*

Upon a notice of motion for a decree a plaintiff may cross-examine a defendant on his answer, but other defendants may object to such cross-examination being read as evidence against them. *Rhaden v. Wesley*, 28 Law J. Rep. (N.S.) Chanc. 797; 26 Beav. 432.

After notice of motion for a decree witnesses in chief cannot be examined. *Ibid.*

The plaintiff obtained an order for a subpoena to hear judgment, and set down the cause for hearing after the time for closing the evidence in chief had expired, but before the time allowed for cross-examining affidavit witnesses. The defendant moved to set aside the order for a subpoena, and to strike the cause out of the Registrar's list, on the ground of

irregularity:—Held, that the plaintiff's proceedings were regular, and that the cause might be set down for hearing before the period for closing the cross-examination of witnesses. *Dowson v. Solomon*, 28 Law J. Rep. (N.S.) Chanc. 884; 4 Drew. 642.

The evidence taken by any parties to a cause may be used by any of the other parties. *Sturgis v. Morse*, 20 Beav. 562.

EXCHANGE.

[*Minet v. Leman*, 7 Law J. Dig. 294; 7 De Gaz. M. & G. 340.]

EXCHEQUER, COURT OF.

[The Office of Queen's Remembrancer regulated, and the Practice and Procedure on the Revenue Side of the Court of Exchequer amended, by 22 & 23 Vict. c. 21.]

EXCISE.

[See REVENUE.]

EXECUTION.

[See ARREST—SHERIFF.]

- (A) ISSUED ON DAY OF DEFENDANT'S DEATH.
- (B) DIRECTION TO WITHDRAW, IF NOT ACTED UPON.
- (C) RETURN OF THE WRIT.
- (D) COSTS OF ABORTIVE WRIT.

- (A) ISSUED ON DAY OF DEFENDANT'S DEATH.

Judgment having been signed and execution issued on the day on which the defendant had died,—Held, that the judgment and execution were regular. *Wright v. Mills*, 28 Law J. Rep. (N.S.) Exch. 223; 4 Hurl. & N. 488.

- (B) DIRECTION TO WITHDRAW, IF NOT ACTED UPON.

Under a *f. fa.*, at the suit of P, lodged with the sheriff of Hants, the goods of the execution debtor were seized. Before the return of the writ, P issued a *ca. sa.*, under which the debtor was arrested in Middlesex. The attorney of P, by letter, directed the sheriff of Hants to withdraw the *f. fa.* There was at that time another writ of *f. fa.*, at the suit of W, lodged with the sheriff, and no directions were, in fact, given to the bailiff in possession to withdraw, and he continued in possession, holding both warrants. An order was subsequently made by a Judge at chambers that, upon payment of the debt to P on a day mentioned, no *ca. sa.* should be issued against the debtor; but that in the mean time P should be at liberty to proceed on the *f. fa.* already issued:—Held, that the writ never was, in fact, withdrawn; and consequently that P was entitled to the proceeds of the sale of the goods in the sheriff's hands as against W, who claimed them under a bill of sale

executed by the judgment debtor before the direction to withdraw the *f. fa.* *Withers v. Parker*, 28 Law J. Rep. (N.S.) Exch. 292; 4 Hurl. & N. 524.

(C) RETURN OF THE WRIT.

Where a *f. fa.* has been issued, and the goods of a co-defendant seized, but the execution withdrawn before sale, the writ must be returned before a *ca. sa.* can be issued against the other defendant.—*Millar v. Parnell* supported. *Andrews v. Saunderson*, 26 Law J. Rep. (N.S.) Exch. 208; 1 Hurl. & N. 725.

After a writ of *f. fa.* has been executed, the defendant is entitled to rule the sheriff to return the writ without shewing special grounds for so doing. *Richardson v. Trundle*, 29 Law J. Rep. (N.S.) C.P. 310; 8 Com. B. Rep. N.S. 474. *Ibid.*

(D) COSTS OF ABORTIVE WRIT.

The plaintiff, having recovered judgment, issued a writ of *f. fa.* to levy on the goods of the defendant, to which the sheriff returned *nulla bona*. The plaintiff thereupon issued a writ of *ca. sa.* indorsed to satisfy the same debt, together with the costs of the abortive writ of *f. fa.*, under which latter writ the defendant was taken in execution:—Held, that the plaintiff was not entitled to recover the costs of the abortive writ of *f. fa.* under section 123. of 16 & 17 Vict. c. 76, which enacts, that "in every case of execution the party entitled to execution may levy the poundage, fees, and expenses of the execution over and above the sum recovered." *The Marquis of Salisbury v. Ray*, 29 Law J. Rep. (N.S.) C.P. 225; 8 Com. B. Rep. N.S. 193.

EXECUTOR AND ADMINISTRATOR.

[See ADMINISTRATION—ADMINISTRATION OF ESTATE IN CHANCERY.]

[The Law of Property and to relieve Trustees further amended by 22 & 23 Vict. c. 35.]

(A) RIGHTS AND DUTIES.

- (a) *Undisposed-of Estate.*
- (b) *Debts due to Deceased.*
- (c) *Carrying on Trade.*
- (d) *Selling and pledging Estate.*
- (e) *Right of Retainer.*
- (f) *Administrator durante Absentia.*
- (g) *As to Costs.*

(B) LIABILITIES.

- (a) *For Testator's Breach of Covenant.*
- (b) *For Sums improperly dealt with.*
- (c) *As to Value of Testator's Property.*
- (d) *For Interest.*
- (e) *For Legacy Duty.*
- (f) *To Costs.*
- (g) *Judgment against Company in which Testator is a Shareholder.*

(C) ASSETS.

- (a) *Admission of.*
- (b) *Administration of.*

(D) FEME COVERT EXECUTRIX.

(E) ACTIONS AND SUITS.

(A) RIGHTS AND DUTIES.

(a) *Undisposed-of Estate.*

A testator, who died in 1855, by his will gave all his property and the residue of his estate to three persons, upon trust, to pay various legacies; he also gave legacies of unequal amounts to each of his trustees, whom he also appointed executors. The trustees were also empowered to appoint new trustees in the place of those unable to act. The testator afterwards gave an additional legacy to one of his executors. He was illegitimate, and died without having ever been married:—Held, that the undisposed-of residue did not belong to the executors, but lapsed to the Crown, and that it was unaffected by the 11 Geo. 4. & 1 Will. 4. c. 40. *Read v. Stedman*, 28 Law J. Rep. (N.S.) Chanc. 481; 28 Beav. 495.

A testator who was illegitimate, and left no child, bequeathed all his personal estate to trustees, upon certain charitable trusts, which failed under the Statute of Mortmain. He also devised certain real estates to his wife, charged with a mortgage, and charged with payment of debts. He also appointed his trustees executors. The widow survived the testator:—Held, that the executors were not entitled to the personal estate for their own benefit, but that they took it as trustees for the benefit of the widow and the Crown in equal moieties; and that the devise of the real estate was not entitled to have the mortgage debt discharged out of the personalty, but that the personalty was liable to the payment of the general debts. *Dacre v. Patrickson*, 29 Law J. Rep. (N.S.) Chanc. 846; 1 Dr. & Sm. 182.

(b) *Debts due to Deceased.*

A testator died in 1842, having appointed T R and others his executors. T R, who owed the testator 300*l.* on promissory note, did not prove the will until 1855:—Held, that he could not then set up the Statute of Limitations in respect of the debt; that the act of proving had relation to the testator's death, and that he must be considered as having the 300*l.* in his hands as assets and be charged therewith with interest from 1855. *Ingle v. Richards* (No. 2), 28 Beav. 366.

(c) *Carrying on Trade.*

A testator who was seised and possessed of real and leasehold estate and of personal property (part of the leasehold being a colliery) specifically devised part of his real estate to his son, and then devised and bequeathed all the residue of the real and the whole of the personal estate to trustees, upon trust at some convenient time, with the approbation of his son, to sell and convert the same, and raise and invest and apply 1,000*l.* upon certain trusts, and to pay two life annuities, and then to pay his, the testator's, daughter an annuity of 200*l.* a year for her life over and above half the income of the real and personal estate given to the trustees. The testator directed that the daughter's annuity should not exceed 600*l.* a year, and that the profits of the mine should not be deemed income until 10*l.* per cent. was set apart for expenses: and he gave all his property, subject to the legacy and annuities, to his son, and empowered his trustees to let his son into

possession of all the property upon his securing the legacy and annuities. He appointed his two trustees and his son executors. At the death of the testator his debts exceeded the amount of the pure personalty exclusive of the colliery. The son alone proved the will, the trustees having disclaimed the trusts and renounced probate. The son entered into possession of the whole property. The colliery was worked out, and yielded a profit of altogether 27,000*l.* The daughter filed a bill against her brother and other parties for the administration of the testator's estate:—Held, affirming in all respects the order of the Lords Justices, that the son, having acted as sole executor and trustee, could not be allowed to make a profit of the trust; that the clear income of the colliery formed part of the capital of the testator's personal estate; and that although the colliery ought to have been sold twelve months after the testator's death, yet not having been so, the son was not entitled to have its value ascertained at that time and to be only charged with that sum and interest, but that the 27,000*l.* must be treated as part of the general personal estate, the son being allowed his reasonable expenditure on the colliery. *Wightwick v. Lord*, 26 Law J. Rep. (N.S.) Chanc. 825; 6 H.L. Cas. 217; affirming 28 Law J. Rep. (N.S.) Chanc. 235; 4 De Gex, M. & G. 803; 1 Drew. 576.

Executors carried on their testator's trade in that character, and in the ordinary course of the business accepted a bill of exchange, describing themselves in it simply as executors of their testator:—Held, that neither the above circumstances nor the form of the acceptance, relieved the estate of one of the executors, who died in the lifetime of the other, from the ordinary equitable liability upon the bill. *Liverpool Borough Bank v. Walker*, 4 De Gex & J. 24.

(d) *Selling and Pledging Estate.*

A testatrix had lent money upon the security of a ship, the T C. Her executor shifted the security to the ship, the E, and having borrowed money in his character of executor from a bank, of a branch of which he was manager, he lent it to the owner of the ship E to pay for repairs to it, and took a mortgage of the same. Subsequently, the executor assigned this mortgage and the mortgage debts to the bank as a security for the money lent to him. The ship E was sold for less than the money the testatrix had herself lent upon it. Upon a question in a suit between the parties entitled under the will of the mortgagee and the bank, —Held, affirming a decision of the Master of the Rolls, that the executor had no right to pledge the assets; but as the executor was the agent of the bank, the bank had notice of his inability to do so, and could stand in no better position than he did, and that the parties claiming under the will were entitled, in preference to the bank, to the produce of the sale of the ship E. *Collinson v. Lister*, 25 Law J. Rep. (N.S.) Chanc. 38; 7 De Gex, M. & G. 634; 24 Law J. Rep. (N.S.) Chanc. 762; 20 Beav. 356.

Where parties appeal, and all join in one petition, they cannot appear by separate counsel to argue their cases separately, but all the counsel must appear for all the appellants. *Ibid.*

A testator directed his debts to be paid out of his real and personal estates; he then devised his freehold

lands to trustees for 500 years, and, subject to that he gave all his real and personal estates to his five sons, their heirs, executors, &c., upon condition that they should proportionately contribute to the payment of his debts, legacies, &c., on failure of which the trustees of the term were to raise out of the rents or by mortgage or sale of the shares of the defaulting son as much money as the son ought to have paid. The testator appointed his five sons executors, and two of them, after the death of their three brothers, sold a portion of the estates:—Held, that the executors had an implied power of sale under the direction to pay debts, and that a contract entered into by them after the death of their three brothers, and thirty-one years after the decease of the testator, was valid, and a decree was made for specific performance. *Wrigley v. Sykes*, 25 Law J. Rep. (n.s.) Chanc. 458; 21 Beav. 387.

A testator possessed of divers securities of foreign states gave all his real and personal estate to trustees for his life for life, and after her decease for his sons and their children. He gave his trustees a discretion to postpone the conversion of his residuary estate, which he had directed to be sold, and he directed that his stocks in the foreign funds should not be sold out during the widowhood of his wife without her consent, his object being that she might enjoy the larger income derivable from such foreign funds:—Held, that all the foreign investments should be retained. *Ellis v. Eden*, 26 Law J. Rep. (n.s.) Chanc. 533; 23 Beav. 543.

Held, also, that the certificates for Boston Water scrip and bonds of the Pennsylvania Railroad Company were not within the meaning of the will, and that they must be sold. *Ibid.*

An implied power of sale in the executor of a mortgagor, arising from a direction in the will to pay debts, will not enable the Court to direct the sale of the mortgaged estate if it cannot make a decree for foreclosure. *Bolton v. Stannard*, 27 Law J. Rep. (n.s.) Chanc. 845.

Such a decree can only be made in a creditors' suit. *Ibid.*

An executrix directed to pay debts cannot be considered to represent third parties within the meaning of the 15 & 16 Vict. c. 86. *Ibid.*

A purchaser will obtain a good title under a power of sale implied in a charge of debts made by a testator twenty-seven years since, though the executors selling derived their title from the executors of the original testator, and though the parties beneficially entitled, subject to the charge, had been let into possession. *Sabin v. Heape*, 29 Law J. Rep. (n.s.) Chanc. 79; 27 Beav. 553.

An executor and devisee in trust, having paid off all the debts of his testatrix, borrowed 1,000*l.* from H upon deposit of the title-deeds of the estate, alleging that the money was required to pay debts, but 150*l.* part of the 1,000*l.*, was taken out in wine. This debt was paid off, and, subsequently, seventeen years after the death of the testatrix, a further sum of 1,000*l.* was borrowed in the same manner from H by the executor, who agreed to purchase 200*l.* worth of wine. The executor also agreed to execute a legal mortgage when called upon to do so. H, the mortgagee, assigned his security, and a legal mortgage was then executed. Upon bill filed against the representative of that mortgagee, it was held, that the nature

of the original transaction was sufficient proof that the money was not borrowed by the executor for payment of debts, and the assignee from H, the original mortgagee, could not stand in a better position than H himself. The mortgage was, therefore, declared void. *Burt v. Trueman*, 29 Law J. Rep. (n.s.) Chanc. 902.

(e) Right of Retainer.

Administrator of deceased executor of the testator in the cause held entitled, as against specialty creditors of such testator, to retain assets of his intestate, who had died indebted to the estate of the testator, towards payment of a judgment debt recovered by himself against his intestate in his lifetime. *Horne v. Shepherd*; *Horne v. Dendy*, 26 Law J. Rep. (n.s.) Chanc. 817.

After a decree for taking accounts in an administration suit, one of several executors may insist upon his right of retainer in respect of a debt due more than six years before the testator's death, notwithstanding the Statute of Limitations. *Sharman v. Rudd*, 27 Law J. Rep. (n.s.) Chanc. 844.

If an administrator of two persons has in hand a balance of the estate of one who is indebted to the estate of the other, he may refuse to retain the debt in favour of the one to the prejudice of the creditors of the other; but the Court will interfere to protect the estate of the deceased creditor, and retain the balance in the hands of the administrator, though the money would have been applicable to the payment of general creditors of the debtor's estate. *Fox v. Garrett*; *Miles v. Fox*, 29 Law J. Rep. (n.s.) Chanc. 423; 28 Beav. 16.

An executor is entitled to retain his debt, although barred by the Statute of Limitations during the lifetime of the testator. Therefore, where an executor, under a mistake of facts, had made yearly payments to his testatrix for twenty-five years previous to her death, he was held entitled to retain the amount out of her residuary estate.—Contrary *dictum* of *Bayley, J.* in *McCulloch v. Davies* (9 Dowl. & Ry. 48), disapproved. *Hill v. Walker*, 4 Kay & J. 166.

(f) Administrator durante Absentia.

By the will of a testator, his property was directed to be sold by his executors after the death of his widow. Upon the death of the widow, who was also the survivor of the executors, letters of administration *cum testamento annexo durante absentia* were granted to W, as the lawful attorney of the only son and next-of-kin both of the testator and widow, he then residing in Canada West; and letters of administration *durante absentia* to the estate of the widow were also granted to W. W put up the property, consisting of leasehold estates, to sale by auction, subject to certain conditions, whereby the sale was stated to be "by order of the executors":—Held (reversing the decision of one of the Vice Chancellors), that specific performance of a contract for the purchase of the leasehold estates could not be enforced by W. *Webb v. Kirby*, 26 Law J. Rep. (n.s.) Chanc. 145; 7 De Gex, M. & G. 376; 25 Law J. Rep. (n.s.) Chanc. 872; 3 Sm. & G. 333.

(g) As to Costs.

If a solicitor is appointed an executor, liberty to charge for professional services will not authorize him

to charge for services which appertain to the ordinary duties of an executor. *Harbin v. Darby*, 29 Law J. Rep. (N.S.) Chanc. 622; 28 Beav. 325.

An order to tax the costs of an executor, in a suit, including any costs, charges and expenses properly incurred by him in the execution of the trusts of the will, does not include the costs of his defence to other suits instituted against him as executor. *Payne v. Little*, 27 Beav. 83.

(B) LIABILITIES.

(a) For Testator's Breach of Covenant.

A testator who was, at his death, lessee of a house under a lease, in which he had covenanted to keep the house insured, appointed A, his son, his executor. The testator had effected a policy of insurance. The policy expired on the 25th of March. The testator died on the 27th of March. The house was burnt down on the 26th of May. A proved the will on the 17th of June. Evidence was given that, between the death of the testator and the 26th of May, A had received money of some of the customers of the testator who had been a tradesman:—Held, that A was not liable in respect of the breach of the covenant. *Fry v. Fry*, 28 Law J. Rep. (N.S.) Chanc. 593.

A testator, by his will, gave several legacies, among which were two legacies of 2,000*l.* each, upon which a duty of 10*l.* per cent. was paid, and the sums set apart until the legatees attained twenty-five. The residuary estate was given to one of the executors, who was allowed to receive and apply it for his own use, as the debts and legacies of the testator were considered to be satisfied. After this, upon the expiration of a lease which had been granted to the testator, an action was brought against the executors for breach of covenants contained therein. One of the executors then instituted two suits, the one to administer the estate of the testator, and the other to get the two appropriated legacies into court. Orders were made in each of these suits in accordance with the prayer, but the residuary legatee, when pressed to pay the residuary estate into court, took the benefit of the Insolvent Act. Upon a petition by the creditor to obtain payment of his debt,—Held, that he was entitled to enforce the orders made in the suits, and that the two appropriated sums were liable to make good the debt claimed in the action, together with all costs incurred, though one of the legacies had been sold and assigned by the legatee to a stranger. *Noble v. Brett*, 27 Law J. Rep. (N.S.) Chanc. 516; 24 Beav. 499.

(b) For Sums improperly dealt with.

If an executor enables his co-executor to obtain a sum of money belonging to their testator's estate, which the co-executor misapplies, such executor will not be responsible for the loss, if his co-executor could have obtained the money by his own independent act. *Candler v. Tillett*; *Candler v. Wade*; *Candler v. Wheelton*; and *Wade v. Candler*, 25 Law J. Rep. (N.S.) Chanc. 505; 22 Beav. 257.

But an executor will be responsible for any loss which may arise by leaving the securities of their testator in the hands of his co-executor, who was also the mortgagor, even though such co-executor was the legal and confidential adviser of the testator, in whose custody he always left his title-deeds and securities. *Ibid.*

A decree in an administration suit directed a contract for the sale of a particular house to be completed, but contained no directions as to the investment or otherwise of the purchase-money. The administratrix, with the knowledge of the solicitors of the testator, and of other persons interested under his will, paid the purchase-money for the house, and other monies, into a private bank. The bank failed, and the monies were lost:—Held, that the administratrix was not liable for the monies so lost. *Wilks v. Groom*, 25 Law J. Rep. (N.S.) Chanc. 724; 8 Drew. 584.

A testator gave annuities to the plaintiffs and appointed three executors, one of whom (A B) was the residuary legatee. No fund was set apart to answer the annuities, but A B was permitted by his co-executors to receive the assets, which he wasted, though he paid the annuities for eighteen years, at the end of which he became insolvent:—Held, that the co-executors were liable to the plaintiffs for A B's receipts. *Egbert v. Butler*, 21 Beav. 560.

A testator, who died in 1835, directed his executors and trustees (A and B) to convert his real and personal estate, and after paying his debts, &c. to invest the proceeds on mortgage of freeholds, &c., or on government securities. A and B deposited the proceeds in a bank at interest in their joint names. A died in 1842, and B drew out the balance, and applied it to his own use. No sufficient reason being shown for retaining the money in the bank, it was held, that the estate of A was liable to make good the loss. *Gibbins v. Taylor*, 22 Beav. 344.

A testator died in 1829; part of his assets consisted of a promissory note for 100*l.* of five persons. All interest on it was paid down to 1837, but by whom did not appear. In 1837 the executor took the note of one of the five for the 100*l.*, and interest was paid until 1842. Subsequently, nothing was done, and the debt became barred by the statute,—Held, that the taking the second note was equivalent to payment of the first, and the executor was charged with the 100*l.* *Sparkes v. Restall*, 22 Beav. 587.

Where an executor has improperly employed the assets of his testator in trade, he will be made to account for and pay over those profits, although the persons in partnership with whom he had made those profits are not before the Court as parties to the suit, or in any other character than as witnesses to prove the amount of profits received by the executor. *Macdonald v. Richardson*, 1 Giff. 81.

Whether *Simpson v. Chapman* (4 De Gex, M. & G. 154) is reconcilable with previous authorities—*quære*. *Ibid.*

Executors and trustees, surviving partners of the testator, directed by his will to invest an infant's legacy on government or real securities, took a security for it in the form of a mortgage on the freehold and leasehold property and fixtures belonging to the partnership in which they were the testator's surviving partners:—Held, that they were bound to account for the profits made by so employing the legacy and interest in the trade,—and the will directing the interest to be accumulated from the testator's death; but by the partnership articles, the principal not being payable, but only interest at 5*l.* per cent. for five years after the testator's death,—Held, that the amount of interest on the legacy should be computed with annual rests up to the date of the

security, which was dated, and taken on the day when the amount of the testator's share was payable. Held, that the entry by the executors in the partnership books of the amount of the legacy to the credit of the legatee was a sufficient admission of assets. *Townend v. Townend*, 1 Giff. 201.

(c) *As to Value of Testator's Property.*

Where executors have neglected to realize assets which are outstanding upon an improper investment, there is no fixed period at which the loss is to be calculated. It depends on the particular nature of the property and the evidence affecting it. *Hughes v. Empson*, 22 Beav. 181.

Losses occurred by the non-sale of Crystal Palace shares, which were at a premium at the testator's death, but subsequently fell to a discount. The executors were charged by the certificate with the value at the end of two months, but the Court varied the certificate to twelve months. *Ibid.*

(d) *For Interest.*

An executor who had unnecessarily retained in his hands uninvested a balance of 655*l.* for a year and a half, charged with interest thereon. *Stafford v. Fiddon*, 23 Beav. 386.

Executor charged, on further consideration, with interest on balances retained in his hands for various periods varying from 670 to 229 days. *Johnson v. Prendergast*, 28 Beav. 480.

(e) *For Legacy Duty.*

The executor of a will, in every instance, made the half-yearly payments due to the tenant for life of the residuary estate through the solicitor employed by him in the administration of the trusts of the will. The solicitor having neglected to retain the legacy duty out of several such payments, applied to the tenant for life for a return of the amount of such duty. Having accordingly received the amount from the tenant for life, the solicitor, instead of paying the same to the Crown, retained it for his own purposes, and soon afterwards absconded. The executor subsequently paid the said duty to the Crown:—Held, that he was not entitled to retain out of the life interest of the tenant for life what he had so paid. *Horn v. Coleman*, 26 Law J. Rep. (N.S.) Chanc. 213.

A testator directed his estates to be sold, and gave the dividends of one portion of the proceeds to his wife for life, and after her death he gave the capital to A B. The second portion he gave to A B subject to various annuities. By an arrangement between the widow and A B, the first portion was paid over by the executors to A B during the widow's life, and no sum was retained to answer the legacy duty, which would become payable on the widow's death. A B sold the second portion to the plaintiff, and the surviving executors of the surviving executor of the testator joined in the assignment for the purpose of admitting A B's title to the property, and stating that they knew of no incumbrance upon it. Upon the death of the annuitant, the purchaser filed a bill against the executors for a transfer of the fund; and the Court held, that the defendants were not entitled to retain the legacy duty payable upon the first portion of the property. *Bignold v. Giles*, 28 Law J. Rep. (N.S.) Chanc. 238.

(f) *To Costs.*

The Court will not exempt an administrator plaintiff from costs, under the 3 & 4 Will. 4. c. 42. s. 81, if the verdict be against him, unless the defendant has been guilty of falsehood or misconduct. The mere concealing his defence is not misconduct. But it is sufficient misconduct if, when the administrator applies to the defendant for information, the result of which might decide the case, the latter, by suppression, concealment or miscolouring, leads the plaintiff astray and induces him to continue the action. *Redmayne v. Moon*, 25 Law J. Rep. (N.S.) Q.B. 311.

(g) *Judgment against Company in which Testator a Shareholder.*

After the death of a shareholder in a joint-stock banking company his name was inserted in the last delivered memorial of shareholders. Judgment in an action of debt was a few months afterwards recovered against the company:—Held, that proceedings could not be taken to enforce the judgment against the effects of the deceased in the hands of his executors on failure of the effects of the company to satisfy the judgment, although section 21. of the statute 7 & 8 Vict. c. 113. says, that the persons whose names shall appear in the last delivered memorial, and their legal representatives, shall be liable to legal proceedings as existing shareholders of the company; for the term "persons" in that section applies only to individuals living at the time the memorial is filed. *Powis v. Butler*, 27 Law J. Rep. (N.S.) C.P. 249; 4 Com. B. Rep. N.S. 469.

(C) ASSETS.

(a) *Admission of.*

[*Hutton v. Rossiter*, 7 Law J. Dig. 300; 7 De Gex, M. & G. 9.]

Annuities given by a will were regularly paid by the executors for six years, and irregular payments on account were made by them for the next four years. *Semble*—that this of itself would be an admission of assets. *Payne v. Little*, 22 Beav. 69.

This Court does not bind executors by an admission of assets if new claims on the estate afterwards arise. *Ibid.*

(b) *Administration of.*

If an administrator pays simple contract debts, he will not be allowed them against a judgment creditor, though the judgment was unregistered when the payment was made, and though he had neither notice nor knowledge of its existence. *Fuller v. Redman*, 29 Law J. Rep. (N.S.) Chanc. 324; 26 Beav. 600, 614.

In the settlement of accounts by executors two or more may bind the others, though with notice of their dissent, provided there is neither fraud nor gross error. Such settlement will also bind their *cestuis que trust*. *Smith v. Everett*, 29 Law J. Rep. (N.S.) Chanc. 236; 27 Beav. 446.

Where, on taking an account, a balance was found due to the executor for monies advanced, the estate being insolvent,—Held, that the executor was entitled to be paid in full, in priority to the creditors. *Spackman v. Holdbrook*, 2 Giff. 198.

If, after a decree, an executor thinks fit to pay a creditor he does so at his own risk, and he is only entitled to stand in the place of his creditor against the estate. *Irbly v. Irbly*, 24 Beav. 525.

The testator had mortgaged his real estate to secure monies held on the trusts of his marriage settlement. A suit was instituted to administer his estate and to realize his mortgage. After the decree (in 1832) the executors advanced considerable sums out of the rents and personal estate on account of interest to the persons entitled to the mortgage. The estate proved deficient to pay all the creditors:—Held (in 1857), that the payments could not be justified; that the executors must pay the amount, and be charged with interest on the balances composed of the money so improperly paid by them. *Ibid*.

Trust monies were lent on mortgage to the tenant for life. On his death a suit was instituted mainly for the administration of his estate, and also the realization of the mortgage and involving the execution of the trusts of the settlement:—Held, that the costs ought to be paid as of an administration suit out of the assets; but that the costs, so far as they had been increased by its being a suit for the execution of the trusts of the settlement must be borne by the settlement fund. *Ibid*.

(D) FEME COVERT EXECUTRIX.

A feme covert executrix having obtained an order for the protection of her property, under the 21st section of the Divorce and Matrimonial Causes Act, is entitled to a transfer of stock standing in the name of her testator without the concurrence of her husband. *Baile v. the Governor and Company of the Bank of England*, 27 Law J. Rep. (N.S.) Chanc. 630; 4 Kay & J. 564.

A testatrix gave an annuity of \$501. to her adopted daughter, a married woman, for her separate use, without power of anticipation, and appointed her executrix of the will. The annuitant was unable to obtain probate, and took possession of and misappropriated the estate of the deceased, by applying 4,000*l.* to her own use:—Held, that the future payments of the annuity could not be rendered liable to make good the 4,000*l.*, but the restraint on anticipation was not applicable to a sum of 1,800*l.* due for arrears of the annuity which could be applied in satisfaction of the amount due from the annuitant. *Pemberton v. M'Gill*, 29 Law J. Rep. (N.S.) Chanc. 499; 1 De Gex & Sm. 266.

The husband of an executrix or administratrix is liable for all the assets received, or *devastavit* committed by himself or by his wife during the coverture, and his estate remains liable after his death. *Smith v. Smith*, 21 Beav. 385.

The husband of an executrix, who was liable for a breach of trust, made his wife and two others executrix and executors. "They possessed themselves of all his assets":—Held, that the husband's liability was not satisfied by the circumstance of his widow uniting in herself the two characters; and in a suit to charge the husband's assets an inquiry as to the amount of such assets received by her was refused; and it was held, that her legal personal representative was not a necessary party. *Ibid*.

To a declaration by the plaintiff as executor of S for money had and received, and for the conversion

of securities by the defendant, the defendant pleaded that S appointed the plaintiff and one G executor and executrix of her will, and that the defendants had paid the debt to G as executrix, and had delivered the securities to her, which was the conversion complained of. The plaintiff replied that G was a married woman, and was appointed executrix without the assent of her husband, who dissented from her administering, and never administered himself; that G applied for probate, but was refused, and that it was granted to the plaintiff alone; and that the defendant had paid the debt and delivered the securities to G as executrix voluntarily, knowing her to be a married woman, and that G had not duly administered the said debts and securities:—Held, on demurrer (*dissentientibus Cockburn, C.J. and Bramwell, B.*), that the payment and the delivery of the securities being made *bond fide* by the debtor to G as executrix, knowing her to be a married woman, but not knowing of any other disability, operated as a discharge to the debtor from an action by the co-executor. *Pemberton v. Chapman*, 27 Law J. Rep. (N.S.) Q.B. 429; E. B. & E. 1056: affirming the judgment below, 26 Law J. Rep. (N.S.) Q.B. 117; 7 E. & B. 210.

(E) ACTIONS AND SUITS.

Where an intestate had executed transfers of railway shares and stock to a fictitious person, the Court on a bill filed by his administrator declared that the intestate used the fictitious name as another designation of himself, and that the plaintiff, as his administrator, was entitled to transfer the shares and stock, and to receive the dividends thereof. *Arthur v. the Midland Rail. Co.*, 3 Kay & J. 204.

Payment to an administrator is a good discharge, though a will exist and be afterwards proved. *Prosser v. Wagner*, 26 Law J. Rep. (N.S.) C.P. 81; 1 Com. B. Rep. N.S. 289. *Ibid*.

In an action by an administrator, the Court refused to allow the defendant to plead that the supposed intestate had made a will and appointed executors. *Ibid*.

The Court also refused to stay proceedings in the action until a will made in India, by the supposed intestate, should be brought to England and proved by the executors. *Ibid*.

EXTENT.

In 1802, in pursuance of an order of the Court under the statute 25 Geo. 3. c. 35, the extended lands of a Crown debtor were sold for more than the amount of the Crown debt, and the debtor being a lunatic the amount of the purchase-money was, by order of the Court, paid into the hands of the Deputy Remembrancer, and was by him invested in the public funds in the name of the Accountant General. In 1841, by the statute 5 Vict. c. 5, the fund and accumulations were vested in the Queen's Remembrancer to attend the orders of the Court. On the petition of the heir of the debtor:—Held, that he was entitled to the surplus of the monies after payment of the Crown debt, interest and costs. *In re Delamotte*, 27 Law J. Rep. (N.S.) Exch. 110; *nom. King George III. v. Delamotte*, 2 Hurl. & N. 589.

FACTORY.

[The Laws relating to Labour in Factories amended, and the Fencing of Machinery provided for, by 19 & 20 Vict. c. 38.—The Employment of Women, Young Persons, and Children in Bleaching Works and Dyeing Works placed under the Regulations of the Factories Acts by 23 & 24 Vict. c. 78.]

LIABILITY FOR NOT FENCING MACHINERY.

Declaration for an injury to the plaintiff, alleged to have been caused by the neglect of the defendants to fence the shaft of certain machinery in motion for the manufacture of carpets, contrary to the provisions of the Factory Act, 7 Vict. c. 15. The defendants pleaded, admitting that the shaft was in motion and not properly fenced, that the part of the machinery, namely, a certain driving strap, by which the plaintiff was entangled, was not in motion at the time of the alleged injury, but, on the contrary, wholly at rest. That the plaintiff wilfully and wrongfully, against the will and contrary to the express command of the defendants, touched and caught hold of and thereby set in motion the said strap, the plaintiff then well knowing that it was dangerous, improper and contrary to the express command of the defendants for him to touch or meddle with the same, and thereby, and not by reason merely of the negligence of the defendants, the injury was occasioned:—Held, upon demurrer, that assuming the common law right to bring an action for an injury occasioned by the alleged unlawful act, it was subject to the principle that the plaintiff did not by his own negligence or misconduct contribute to the injury, and therefore that the plea was an answer to the present action. *Casswell v. Worth*, 25 Law J. Rep. (N.S.) Q.B. 121; 5 E. & B. 849.

To a declaration upon the 7 Vict. c. 15. for not fencing a shaft, being part of mill gearing in motion, in a factory, whereby the plaintiff was injured by it, the defendant pleaded that the shaft was not near to where any person was employed, but was at such a distance and height away from the nearest place of approach thereto, and was so situated, that no danger or liability to accident existed therefrom, so as to require it to be fenced:—Held, that the plea was no answer to the action. *Doel v. Sheppard*, 25 Law J. Rep. (N.S.) Q.B. 124; 5 E. & B. 856.

FALSE IMPRISONMENT.

- (A) AUTHORITY OF FOREIGN GOVERNMENT ON THE HIGH SEAS.
- (B) SUSPICION OF MISDEMEANOR.
- (C) CONFINEMENT IN LUNATIC ASYLUM.
- (D) SIGNING CHARGE-SHEET AT POLICE STATION.
- (E) DETENTION OF WRONG PERSON.
- (F) BREACH OF THE PEACE.
- (G) PLEADING.

(A) AUTHORITY OF FOREIGN GOVERNMENT ON THE HIGH SEAS.

The defendant, a master of an English vessel, entered into a contract with the Chilean Government, to carry from Valparaiso to Liverpool some political

prisoners, banished to England. They were brought on board his ship at Valparaiso, in Chili, in custody of the officers of the Chilean Government, and carried by the defendant to England, under his contract, against the consent of the prisoners, and landed by the defendant at Liverpool. They immediately preferred an indictment against him, for assault and false imprisonment:—Held, assuming the Chilean Government to have by its own laws the power of transporting its subjects to foreign countries, that the defendant could justify the imprisonment under the authority of the Chilean Government, as agent of that government, so long as the vessel remained within the local jurisdiction of Chili, but that the Chilean law had no force on board an English ship as soon as it passed out of the Chilean waters and reached the high seas; and, consequently, that the imprisonment, after they reached the high seas was unlawful, the defendant, previous to receiving the men on board, having contemplated the carrying them in custody, against their consent, beyond the Chilean jurisdiction. But that the master of a Chilean ship might probably have justified under the authority of his government for conveying the prosecutors as prisoners the whole way to England. *The Queen v. Lesley*, 29 Law J. Rep. (N.S.) M.C. 97; Bell's C.C. 220.

(B) SUSPICION OF MISDEMEANOR.

A constable at common law, is not justified in imprisoning a person in the belief that he has committed a misdemeanor. And a superintendent of a county constabulary finding a person in custody on a charge of violently assaulting a constable in the execution of his duty, continuing him in custody and taking him before a magistrate, it turning out that no such offence had been committed,—Held, liable for the imprisonment. *Griffin v. Colman*, 28 Law J. Rep. (N.S.) Exch. 134; 4 Hurl. & N. 265.

(C) CONFINEMENT IN LUNATIC ASYLUM.

To an action for assault and imprisoning the plaintiff in a lunatic asylum, the defendant pleaded, that the plaintiff had conducted himself as a person of unsound mind and incapable of taking care of himself, and as a person proper to be detained under due care and treatment; that two medical certificates to the effect that the plaintiff was of unsound mind and ought to be taken charge of, had been duly given as required by statute; and that the defendant had reasonable cause, and did *bona fide* believe the certificate to be true, and the plaintiff to be a person of unsound mind and dangerous to be at large; and so the defendant, being the uncle of the plaintiff and a proper person to act in that behalf, caused him to be confined:—Held, that the plea was bad, as the person ordering the confinement of an alleged lunatic is not protected by the 8 & 9 Vict. c. 100. s. 99, and at common law he would only be justified if the person was in fact a lunatic, which the plea did not allege. *Fletcher v. Fletcher*, 28 Law J. Rep. (N.S.) Q.B. 134; 1 E. & E. 420.

(D) SIGNING CHARGE-SHEET AT POLICE STATION.

The defendant, having lost some property, gave information to a police constable, who, upon hearing the facts from the defendant, took the plaintiff into custody, and removed her to the police station.

The defendant followed, and at the police constable's request signed the charge-sheet:—Held, that the act of signing the charge-sheet did not render the defendant liable to an action of trespass. *Grinham v. Willey*, 28 Law J. Rep. (N.S.) Exch. 242; 4 Hurl. & N. 496.

In an action for false imprisonment, the plaintiff having been arrested on suspicion of stealing an article, the property of an inmate in the house of the defendant, with whom the plaintiff lived as his servant,—Held, that the fact that the defendant signed the charge-sheet and appeared before the magistrate was strong though not conclusive evidence that he authorized the arrest. Held, also, that the plaintiff might be asked what the owner of the article stated, in the presence of the policeman, as to what the defendant had said to her, on her going to ask him what she should do as to giving the plaintiff into custody. *Harris v. Dignum*, 29 Law J. Rep. (N.S.) Exch. 23.

(E) DETENTION OF WRONG PERSON.

In an action for false imprisonment against a sheriff, the defendant pleaded that he arrested the plaintiff under a *co. sa.* against E D, and that the plaintiff represented herself to be E D. The plaintiff new assigned, that afterwards she gave notice that she was not E D, and after that the defendant detained her in custody. Rejoinder, that the subsequent imprisonment was a continuation of the first, and was the consequence of the plaintiff's false representation that she was E D:—Held, that the plaintiff was estopped from saying she was not E D, as to the original imprisonment; but that she might maintain her action on the new assignment for the detention after notice to the defendant. *Dunston v. Paterson*, 26 Law J. Rep. (N.S.) C.P. 267; 2 Com. B. Rep. N.S. 495.

(F) BREACH OF THE PEACE.

[*Derecourt v. Corbishley*, 5 E. & B. 188; 6 Law J. Dig. 305.]

(G) PLEADING.

A count, that the defendant caused the plaintiff to be arrested and imprisoned, without reasonable or probable cause, on a false and malicious charge of felony, is a count in trespass for an assault and false imprisonment, and not an informal count for a malicious prosecution; and therefore requires no evidence of malice, or want of reasonable and probable cause. *Brandt v. Craddock*, 27 Law J. Rep. (N.S.) Exch. 314.

FALSE PRETENCES.

[See CONSPIRACY—EVIDENCE (A) (k) *The Queen v. Halliday*—FORGERY—LARCENY.—The Law of False Pretences amended by 21 & 22 Vict. c. 47.]

- (A) FALSE PRETENCES, WITHIN THE STATUTE, IN GENERAL.
- (B) AS TO THE QUALITY AND QUANTITY OF GOODS.
- (C) OBTAINING VALUABLE SECURITIES BY.
- (D) OBTAINING ENLISTMENT MONEY BY.
- (E) OBTAINING ANIMALS NOT THE SUBJECT OF LARCENY BY.

- (F) WHEN THE OBTAINING BY IS TOO REMOTE.
- (G) BY MEANS OF INNOCENT AGENT.
- (H) INDUCING A PERSON TO ENTER INTO PARTNERSHIP BY.
- (I) PAYMENT OF MONEY WITH KNOWLEDGE THAT PRETENCE IS FALSE.
- (K) ATTEMPT BY FALSE PRETENCES TO STEAL.
- (L) INDICTMENT.
 - (a) Description of Property.
 - (b) Venue.

(A) FALSE PRETENCES, WITHIN THE STATUTE, IN GENERAL.

If a person passes a note of a country bank for 5*l.* payable on demand as a good note and as of the value of 5*l.*, knowing that the bank is insolvent and has stopped payment and cannot pay the note in full, he may be indicted for obtaining money by false pretences. But where the evidence shewed that the bank had paid a dividend, a direction to the jury that there was evidence the note was not of any value was held wrong, and the conviction was quashed. *The Queen v. Evans*, 29 Law J. Rep. (N.S.) M.C. 20; Bell's C.C. 187.

A false representation respecting an alleged matter of definite fact, knowingly made, whether in the course of a bargain or not, is a false pretence on which an indictment may be founded; but a false representation in the nature of exaggerated praise of an article offered for sale, or made on a subject which is a matter rather of opinion than of fact, is not. *The Queen v. Goss*, and *The Queen v. Ragg*, 29 Law J. Rep. (N.S.) M.C. 86; Bell's C.C. 208, 214.

If a man obtain money (the price of 15 cwt. of coal) by falsely representing that he has delivered 15 cwt. of coal when he knows he has delivered only 8 cwt., he is indictable; so also if he induces a purchaser to buy and pay for a cheese of a very inferior description, by the wilfully false statement that a taster of a different and superior cheese produced as a sample had formed part of and been taken out of the cheese sold. *Ibid.*

The prisoner by falsely representing to the prosecutor that he had built a house on certain land, and by depositing with the prosecutor the lease of the land as a security, and by entering into a written agreement to execute a mortgage on the land, induced the prosecutor to advance him money, by way of loan:—Held, that the prisoner might be convicted of obtaining the money by false pretences. *The Queen v. Burgon*, 25 Law J. Rep. (N.S.) M.C. 105; 1 Dears. & B. 11.

An indictment alleged that the prisoner falsely pretended to the prosecutrix (among other false pretences) that she kept a shop at A, and that the prosecutrix might go and live with her there until she got a situation, and that by means of the false pretences the prisoner obtained from the prosecutrix 10*s.* The making of the false pretences was proved, and the evidence shewed that the prisoner did not keep a shop at A, but failed to negative the other false pretences. The jury found specially that the prisoner was guilty of fraudulently obtaining the 10*s.*, and that the prosecutrix parted with it under the belief that the prisoner kept a shop at A, and that the prosecutrix should have it when she went home

with her:—Held, that the indictment was good, and that the conviction was supported by the evidence and the finding of the jury. *The Queen v. Fry*, 27 Law J. Rep. (N.S.) M.C. 68; Dears. & E. 449.

The prisoner, with intent to defraud, falsely pretended that an Irish one pound note was a five pound note, and asked for change. The prosecutrix believing his representation, without looking at the note, gave him change as for a five pound note:—Held, that the prisoner was guilty of obtaining the money by false pretences within the statute. *The Queen v. Jessop*, 27 Law J. Rep. (N.S.) M.C. 70; Dears. & B. 442.

The prisoner induced the prosecutrix to lend him some money, on the statement that he had bought certain skins of one A.B. and would sell them to the prosecutrix, if she would let him have a certain sum. The prisoner had not purchased any skins, and his statement was fraudulently made with a view to get the money:—Held, that although part of the inducement to the prosecutrix to part with her money was a mere promise for future conduct, the prisoner might properly be convicted under the statute on a charge of obtaining the money by false pretences. *The Queen v. West*, 27 Law J. Rep. (N.S.) M.C. 227; Dears. & B. 575.

An indictment charged, that the defendant knowingly falsely pretended that a horse was sound, and that he himself was a farmer at O, negating both pretences in the usual way. The defendant was convicted, but a case was reserved, in which, after stating that the various allegations in the indictment were proved, and that the defence was that this was a case of giving a false warranty, and therefore not indictable, the question was put, whether the conviction could be sustained? The Court having directed an amendment of the case, the facts proved at the trial were set out more specifically, but it was not stated as a fact that the defendant knew the horse to be unsound, though evidence was stated, from which that inference might be drawn; nor was it stated what direction the chairman had given to the jury:—Held, that, as the case was framed, the conviction must be quashed; as the Court, not knowing what direction had been given to the jury, could not answer the question put in the affirmative; and as it was consistent with the case that the jury might have been told that, even if the defendant did not know that the horse was unsound, he might be convicted upon the other false pretence alone. *The Queen v. Keighley*, Dears. & B. 145.

(B) AS TO THE QUALITY AND QUANTITY OF GOODS.

If a man asks a pawnbroker to advance money on a chain, which he pretends to be silver, but which he knows to be of other metal and of value inferior to silver, he is guilty of the misdemeanor of attempting to obtain money by false pretences. *The Queen v. Roebuck*, 26 Law J. Rep. (N.S.) M.C. 101; 1 Dears. & B. 24.

The prisoner having contracted to sell and deliver to the prosecutrix a load of coals at 7d. per cwt. delivered to her a load of coals which he knew weighed only 14 cwt., but which he stated to her contained 18 cwt., and he produced a ticket shewing such to be the weight, which he said he had himself made out when the coals were weighed. She thereupon paid him the price as for 18 cwt., which was

2s. 4d. more than was due:—Held, that the prisoner was indictable for obtaining the 2s. 4d. by false pretences. *The Queen v. Sherwood*, 26 Law J. Rep. (N.S.) M.C. 81; Dears. & B. 251.

The prisoner induced a pawnbroker to advance him money on some spoons, which he represented as silver-plated spoons which had as much silver on them as "Elkington's A," (a known class of plated spoon), and that the foundations were of the best material. The spoons were plated with silver, but were, to the prisoner's knowledge, of very inferior quality, and not worth the money advanced on them:—Held, by the Court (*dissentiente Willes, J.*, and *dubitante Bramwell, B.*), that obtaining the money by the false representation as to the quality of the spoons was not an indictable offence within the statute against false pretences, as the article the prisoner delivered to the pawnbroker was the same in specie as he had professed it to be, though of inferior quality to what he had stated. *The Queen v. Bryan*, 26 Law J. Rep. (N.S.) M.C. 84; Dears. & B. 265.

(C) OBTAINING VALUABLE SECURITIES BY.

Inducing a person by a false pretence to accept a bill of exchange is not an obtaining a valuable security by a false pretence within the meaning of the statute, 7 & 8 Geo. 4. c. 29. s. 53. *The Queen v. Danger*, 26 Law J. Rep. (N.S.) M.C. 185; Dears. C.C. 307.

(D) OBTAINING ENLISTMENT MONEY BY.

The prisoner, a volunteer in a militia regiment assembled for the purpose of being exercised, and therefore subject to the Mutiny Act, was taken to be attested before a deputy lieutenant. A form of questions supplied from the War Office for the attestation of militia volunteers, was used and answered by the prisoner. To the question, Have you ever served in the army? the prisoner answered, No. He was then sworn and received the bounty-money. It was afterwards discovered that he had previously served in and been discharged from another militia regiment. The schedule of questions provided by the Mutiny Act to be put to volunteers for the line by the Justices of the Peace on attestation differs considerably from that used in the case of the prisoner, but in the Schedule to the Mutiny Act also occurs the question, Have you ever served in the army? The Militia Act, 15 & 16 Vict. c. 50, provides that a militia recruit, when examined and approved according to the regulations of the Secretary-at-War, may be sworn before a deputy lieutenant or Justice:—Held, that the prisoner could not be convicted of the offence, under section 57. of the Mutiny Act, of making a false representation of a particular contained in the oaths and certificate, in the schedule to the act annexed, before the Justice at the time of his attestation, and of obtaining enlisting money or bounty for entering into Her Majesty's service. *The Queen v. Jessup*, 25 Law J. Rep. (N.S.) M.C. 54; *nom. The Queen v. Jussup*, Dears. C.C. 619.

(E) OBTAINING ANIMALS NOT THE SUBJECT OF LARCENY BY.

A person cannot be convicted of obtaining a dog by false pretences, since it is not an animal in respect of which larceny can be committed. *The*

Queen v. Robinson, 28 Law J. Rep. (n.s.) M.C. 58; Bell's C.C. 34.

(F) WHEN THE OBTAINING BY IS TOO REMOTE.

The prisoner, by falsely pretending and representing himself to be a naval officer, induced the prosecutrix to enter into a contract to lodge and board him at a guinea a week. Under this contract he was lodged and supplied by her with meat and drink for above a week:—Held, that the supply of the articles of food was too remotely the result of the false pretence to support a conviction for obtaining them by the false pretence. *The Queen v. Gardner*, 25 Law J. Rep. (n.s.) M.C. 100; 1 Dears. & B. 40.

(G) BY MEANS OF INNOCENT AGENT.

J B was one of many persons employed, whose wages were paid weekly at a pay-table. On one occasion, when J B's wages were due, the prisoner said to a little boy, I will give you a penny if you will go and get J B's money. The boy innocently went to the pay-table and said to the treasurer, I am come for J B's money, and J B's wages were given him. He took the money to the prisoner, who was waiting outside, and who gave the boy the promised penny:—Held, that the prisoner could not be convicted on the charge of obtaining the money from the treasurer, by falsely pretending to the treasurer that he, the prisoner, had authority from J B to receive his money, or of obtaining it, from the treasurer and the boy, by falsely pretending to the boy that he had such authority, or of obtaining from the boy by the like false pretence to the boy; but that he might have been convicted on a count charging him with obtaining it from the treasurer, by falsely pretending to the treasurer that the boy had the authority from J B to receive the amount. *The Queen v. Butcher*, 28 Law J. Rep. (n.s.) M.C. 14; Bell's C.C. 6.

(H) INDUCING A PERSON TO ENTER INTO PARTNERSHIP BY.

If a person is induced by false representations as to the nature and profits of a business to enter into and continue in partnership with another, and to give him money as part of the capital of the concern, (the whole scheme not being a mere sham) the latter cannot be indicted for having obtained the money by false pretences. *The Queen v. Watson*, 27 Law J. Rep. (n.s.) M.C. 18; Dears. & B. 348.

(I) PAYMENT OF MONEY WITH KNOWLEDGE THAT PRETENCE IS FALSE.

The prisoner, who was employed to work for the prosecutor, stated that he had done more work than was the fact, and requested payment for the work he professed to have done. The prosecutor, though he was aware of the true amount of work the prisoner had done, and that he was making a knowingly false overcharge, paid him what he asked:—Held, that the prisoner could not be indicted for obtaining the money by false pretences. *The Queen v. Mills*, 26 Law J. Rep. (n.s.) M.C. 79; Dears. & B. 205.

(K) ATTEMPT BY FALSE PRETENCES TO STEAL.

A count in an indictment alleging that the prisoners, by divers false and fraudulent pretences,

unlawfully, knowingly and designedly did attempt and endeavour feloniously to steal, take and carry away from J G a large sum of money, to wit, the sum of 20l. of the monies of the said J G, is good. *The Queen v. Bullock*, 25 Law J. Rep. (n.s.) M.C. 92; Dears. C.C. 653.

(L) INDIOTMENT.

(a) Description of Property.

An indictment, alleging that the prisoner, by means of false pretences, did "unlawfully obtain from A B a cheque for the sum of 8l. 14s. 6d. of the monies of the said W W" sufficiently shews that the cheque is the property of W W. *The Queen v. Godfrey*, 27 Law J. Rep. (n.s.) M.C. 161; Dears. & B. 426.

(b) Venue.

The prisoner wrote and posted in a county a letter, containing a false pretence, to the prosecutor, who received it in a borough. The prosecutor, in the borough, posted to the prisoner in the county, a letter containing the money obtained by the false pretence, and which the prisoner received in the county:—Held, that, under the statute 7 Geo. 4. c. 64. s. 12, which authorizes the trial in any jurisdiction where the offence is begun or completed, the prisoner might be tried for the offence of obtaining the money by false pretences at the Borough Quarter Sessions; part of the offence being the making the false pretence, and the false pretence being made to the prosecutor in the borough, where the letter containing the false pretence was delivered to him by the post-office authorities, whom the prisoner made his agents for that purpose. *The Queen v. Leech*, 25 Law J. Rep. (n.s.) M.C. 77; Dears. C.C. 642.

FALSE REPRESENTATION.

[See FRAUD AND MISREPRESENTATION.]

FELON.

- (A) FORFEITURE OF ESTATE.
- (B) PROPERTY ACQUIRED AFTER CONDITIONAL PARDON.
- (C) PROPERTY FOUND IN POSSESSION OF.
- (D) EFFECT OF CONVICTION ON CIVIL REMEDY.

(A) FORFEITURE OF ESTATE.

Certain land belonging to several persons was taken under a local act, and the purchase-money paid into court. A suit was instituted to determine the rights of the parties, and all the shares were paid out, except as to one of the owners, who was convicted of felony and transported for seven years. At the expiration of that period he claimed his share:—Held, that the money remained impressed with the character of real estate, having been paid into court under a section of the act corresponding with the 69th section of the Lands Clauses Act; and that, consequently, the share of the petitioner was not forfeited to the Crown as it would have been if the money were to be treated as personality. *In re Harrop's Estate*, 26 Law J. Rep. (n.s.) Chanc. 516; 3 Drew. 726.

A testator devised a real estate to his widow for life, and at her death to trustees to sell and pay part of the proceeds to B, who committed a felony, but had undergone his punishment before the widow's death:—Held, that his interest was not forfeited to the Crown. *In re Thompson's Trusts*, 22 Beav. 506.

The same testator directed his trustees to provide a fund out of his personalty and other real estates, to secure an annuity for his widow. The fund was provided:—Held, that B's interest being vested, became forfeited to the Crown, by his conviction for felony in the widow's life, though he had undergone his punishment previous to her death. *Ibid*.

(B) PROPERTY ACQUIRED AFTER CONDITIONAL PARDON.

The 26th section of the 5 Geo. 4. c. 84. protects felons who have received a remission of their sentences in the enjoyment of all property acquired by them since their conviction, and not merely such property as has been acquired by their own industry; therefore, where a convicted felon who had received a conditional free pardon became entitled as one of the next-of-kin of a testator to a share in personal property, he was held entitled to hold it against the Crown. *Gough v. Davies*, 25 Law J. Rep. (n.s.) Chanc. 677; 2 Kay & J. 623.

The Attorney General, pressing the claim of the Crown and failing, not entitled to his costs of appearance. *Ibid*.

In 1833 A B was convicted of felony and transported. At this time his wife was entitled to a fund contingently on her surviving her mother. In 1846 A B obtained a conditional pardon, available in all places, except the United Kingdom. The mother died in 1838 and the wife in 1852. On a petition by the Crown for payment, the Court without deciding the right merely ordered payment to the administrator of the wife. *Re Harrington's Trusts*, 29 Beav. 24.

(C) PROPERTY FOUND IN POSSESSION OF.

After the trial and conviction of a felon, the Judges who presided at the trial made an order, directing that property found in his possession when he was apprehended should be disposed of in a particular manner. This property was not part of that which had been stolen, nor was it connected therewith:—Held, that the order was bad, as the Judges had no jurisdiction to make it. *The Queen v. the Corporation of the City of London*, 27 Law J. Rep. (n.s.) M.C. 231; E. B. & E. 509.

A Judge has no power, either at common law or by statute, to direct the disposal of chattels in the possession of a convicted felon, not belonging to the prosecutor. *Regina v. Pierce*, Bell's C.C. 235.

(D) EFFECT OF CONVICTION ON CIVIL REMEDY.

Where a debt arises out of a felonious act of the debtor, the civil remedy is suspended only until public justice is satisfied. Therefore, where the plaintiff, who claimed to be a creditor for the amount paid by him on a forged cheque, had commenced a prosecution upon which a true bill was found and the prisoner was arraigned, but the prosecutor had abstained from bringing on the trial by the direction of the Judge, who thought the ends of justice satisfied by sentencing the prisoner for another forgery to

which he had pleaded guilty,—Held, that the plaintiff had done enough to satisfy the rule of law, and that his civil remedy revived. *Dudley and West Bromwich Banking Company v. Spittle*, 1 Jo. & H. 14.

FERRY.

The Isle of Dogs Ferry Society are the owners of an ancient ferry called Potter's Ferry, which was described in their title-deeds as between the Isle of Dogs and Greenwich. Down to the year 1850, the use of the ferry appeared to have been exercised between an ancient landing-place in the Isle of Dogs and Garden Stairs opposite, and occasionally one or two other landing-places at Greenwich. Since 1850 a dock and wharf and public road have been constructed by C, in the Isle of Dogs, about 800 yards lower down the river than the said ancient landing-place; before this there was no other convenient way to the river nor any other landing-place than the said ancient landing-place. The society leased their right of ferry to D, who employed M, a freeman of the Watermen and Lightermen's Company, to carry passengers in his skiff. In alleged exercise of the said right, M carried passengers for hire from C's dock and wharf to a point opposite at Greenwich, and not having a licence from the Master, Wardens and Assistants of the said Watermen's Company, as required by the 38th section of the 7 & 8 Geo. 4. c. lxxv, he was convicted in a penalty under the provisions of the said act:—Held, first, that section 99. of the said act is not limited by section 101, and extends to except boats plying in the exercise of a right of ferry from the operation of the act; but, secondly, that the right of ferry in question did not extend to the landing-place at C's dock and wharf, and, therefore that the 99th section did not apply, and M was properly convicted. *The Queen v. Matthews*, 25 Law J. Rep. (n.s.) M.C. 7; *nom. Matthews v. Peache*, 5 E. & B. 546.

To a declaration complaining of an evasion of the plaintiff's ferry over a certain river by the defendants carrying passengers near to the said ferry, the Court refused to allow the defendants to add a plea stating various matters, in effect that since the grant of the said ferry a new town and neighbourhood had sprung up on the side of the landing-place of the said ferry, and that it was necessary for the inhabitants of such new town and neighbourhood that there should be a pier, and means of passage across the said river from such new town and neighbourhood; that a pier had been constructed there, distant, to wit, three quarters of a mile from the said landing-place of the ferry; from which pier the defendants' boat ran across the said river for the conveyance of such inhabitants; and that such pier had been constructed and such boat used *bona fide* for the convenience of such inhabitants, and not with the intention of evading the plaintiff's right of ferry. *Newton v. Cubitt*, 28 Law J. Rep. (n.s.) C.P. 176; 5 Com. B. Rep. N.S. 627.

FINE AND RECOVERY.

(A) VALIDITY OF.

(B) ACKNOWLEDGMENT OF MARRIED WOMEN.

- (a) *Concurrence of Husband in Conveyance of Wife's Property.*
- (b) *Certificate of.*
- (c) *Affidavit verifying Certificate of.*

(A) VALIDITY OF.

A testator, who was entitled to the equity of redemption in certain freehold premises subject to a mortgage in fee, devised the premises to J P and another as trustees on trust, in the first place, out of the rents to pay off the mortgage, and he then gave 10l. a year out of the rents in the events which happened to E P, and the remainder of the rents to J P and T M P equally, and after the death of E P he devised certain parts of the premises to J P and the heirs of his body. T M P died in the lifetime of E P. J P then joined in suffering a recovery for the purpose of barring the estate tail, but neither E P nor the next-of-kin of T M P joined in making the tenant to the præcipe:—Held, that the concurrence of E P was not necessary, but that the concurrence of the next-of-kin of T M P was necessary, and that the recovery was for want of such concurrence invalid as to one moiety of the premises. *Penny v. Allen*, 7 De Gex, M. & G. 409.

The eldest son and heir-at-law of T M P was in possession of the rents of all the devised premises, and joined in respect of certain parts of them of which he was himself tenant in tail in making the tenant to the præcipe. The Court refused, in the absence of any other circumstances tending to prove it, to presume a surrender to him of T M P's estate *pour autre vie*, or to regard him as having a title to it by general occupancy. *Ibid*.

Held, that there could be no general occupancy whether the estate *pour autre vie* was regarded as legal or equitable, and that the persons beneficially entitled, and not the executor or administrator of T M P, was the proper person to concur in making the tenant to the præcipe. *Ibid*.

The title of the plaintiff against which in this case the recovery was set up accrued in 1837. The plaintiff brought an ejectment in 1852, but was forced to abandon it and proceed in equity: he filed his bill in 1855:—Held, that he was not barred of his title to relief by lapse of time, and in particular that the 23rd section of the act, 3 & 4 Will. 4. c. 27, did not apply to the case. *Ibid*.

The account of rents and profits of those portions of the property in which the plaintiff was declared entitled was directed from 1852, the time when the plaintiff first made an adverse claim by commencing the ejectment. *Ibid*.

(B) ACKNOWLEDGMENT OF MARRIED WOMEN.

- (a) *Concurrence of Husband in Conveyance of Wife's Property.*

The Court refused an order, under 3 & 4 Will. 4. c. 74. s. 91, to dispense with the husband's concurrence in a conveyance of the wife's property, where it appeared that the husband had been for three years beyond the seas, and did not intend returning for a considerable time, but still corresponded with his wife, and remitted small sums of money for her support. *Re Squires*, 25 Law J. Rep. (n.s.) C.P. 55; 17 Com. B. Rep. 176.

A husband, who by reason of infancy is incapable of executing a valid deed, is within the words of the 91st section of the Fines and Recoveries Act (3 & 4 Will. 4. c. 74), which enables this Court, in certain cases provided for by that section, to dispense with the concurrence of the husband in the disposal of any estate which the wife alone, or she and her husband in her right, may have in lands, &c. *In re Haigh*, 26 Law J. Rep. (n.s.) C.P. 209; 2 Com. B. Rep. N.S. 198.

By indenture on marriage freehold property was settled upon trust to permit the husband to receive the rents during coverture or until the wife should otherwise appoint, and after such appointment, upon trust for the separate use of the wife, and after her death for her appointee. The deed also contained a power of sale to be exercised by the trustees "at the request and direction of the husband and wife during their joint lives, such request and direction to be testified by some writing under the hands and seals of the husband and wife." In 1851 the wife duly appointed to her own separate use. In 1852 the husband went to Australia, and had not been heard of since December 1857, when he was at Geelong: and the wife deposed to her belief that he would never return to this country. The Court refused to dispense with the concurrence of the husband in the conveyance of the property (under 3 & 4 Will. 4. c. 74. s. 91.), it also appearing that no application had been made to him to concur. *Scoble*—that section 91. does not apply to this case at all. *Re Eden*, 28 Law J. Rep. (n.s.) C.P. 4; 5 Com. B. Rep. N.S. 232.

The Court granted an order to dispense with the concurrence of the husband in a conveyance by the wife of her separate property, under the 3 & 4 Will. 4. c. 74. s. 91, upon an affidavit shewing that he had absconded, and had not been heard of since the year 1837, although it also appeared that she had in the mean time married again. *In re Yarnall*, 17 Com. B. Rep. 189.

The Court refused to grant a rule to enable a married woman to execute a conveyance under the 3 & 4 Will. 4. c. 74. s. 91, without the concurrence of her husband, upon an affidavit merely stating that the parties were living apart by mutual consent: but required an affidavit shewing that an application had been made to the husband to execute the deed, and that he had refused to do so. *Ex parte Tremery*, 1 Com. B. Rep. N.S. 187.

Upon a motion to dispense with the husband's concurrence in a deed for the conveyance by the wife of her separate property, the affidavit must contain the addition or description of the husband. *In re Gardner*, 1 Com. B. Rep. N.S. 215.

Upon a motion for an order to enable a married woman to execute a conveyance without her husband's concurrence, under the 3 & 4 Will. 4. c. 74. s. 91, the Court declined to receive an affidavit in which she was described as "wife or widow of W A." *In re Anderson*, 2 Com. B. Rep. N.S. 118.

(b) *Certificate of.*

In a commission to take the acknowledgment of married women abroad, under the 3 & 4 Will. 4. c. 74. two of the Commissioners were described as John Howey, wholesale grocer, and Alexander Cummins, wholesale grocer, all of Debuque, in the state

of Iowa, in the United States of America. The certificate of acknowledgment was signed by Andrew Cummins and John Hoey. There was an affidavit by the attorney in England explaining how the mistake arose, and stating that the deponent believed that Andrew Cummins and John Hoey, who signed the certificate, were the persons to whom the commission was intended to be directed; but the Court refused to allow the certificate to be filed, without an affidavit shewing that there were no other persons at Debuque to whom the description in the commission could apply. *Re Booth, Cock and Foster*, 38 Law J. Rep. (N.S.) C.P. 138; 6 Com. B. Rep. N.S. 540, 541, 543, 544.

The notarial certificate may be on paper instead of parchment. *Ibid*.

Where there was sufficient on the face of the documents to satisfy the Court that the commission had been *bond fide* executed, the Court allowed the documents to be filed, although the notarial certificate did not verify the signature of the Justice before whom the affidavit of verification was sworn. *Ibid*.

The Court allowed a certificate of acknowledgment of a deed by a married woman, under the 3 & 4 Will. 4. c. 74, to be filed, although instead of certifying that the married woman was of full age, according to the form prescribed by section 84, the Commissioners certified only that she was "as they, the Commissioners, believe," of full age. *Ex parte Wallis*, 29 Law J. Rep. (N.S.) C.P. 29; 7 Com. B. Rep. N.S. 303.

A commission to take the acknowledgment of a deed by a married woman at Poonah, in the East Indies, was addressed to Commissioners one of whom was described as "Edward C. Jones," a collector and magistrate at that place. The acknowledgment was duly taken by Mr. Jones and one of the other Commissioners; but Jones signed the certificate and affidavit of verification "Edmund C. Jones." The Court allowed the documents to be received and filed, upon the production of affidavits shewing that Edmund C. Jones was the person to whom the commission was intended to go, that he had always been described in the register at the India House as "Edward C. Jones," and that there was no other collector of that name in the Company's service. *In re Price*, 17 Com. B. Rep. 708.

(c) *Affidavit verifying Certificate of.*

Where the affidavit, verifying the certificate of acknowledgment of a married woman, sworn at Adelaide in Australia, omitted the words "at Adelaide" in the jurat, the Court allowed the certificate to be filed, there being an affidavit that the papers came from Adelaide, and that all the parties resided there. *In re Sanderson*, 29 Law J. Rep. (N.S.) C.P. 264; 8 Com. B. Rep. N.S. 93.

The rule of Hil. term, 4 Will. 4. directs that the affidavit verifying the certificate of the taking of an acknowledgment of a married woman, under the 3 & 4 Will. 4. c. 74. ss. 83, 84, by Commissioners abroad, shall be in the form annexed; and that form mentions the place where the acknowledgment was taken:—Held, that as the rule is not a statutory one, the certificate of acknowledgment may be received, though the affidavit does not state the place where the acknowledgment was taken, if the Court can see from the documents that the statute has been substantially complied with, and that the object

of the rule has been attained: confirming *In re Shufflebottom*. *In re Partridge*, 25 Law J. Rep. (N.S.) C.P. 1; 17 Com. B. Rep. 18.

The affidavit verifying the certificate of acknowledgment of a deed by a married woman before special Commissioners under the 3 & 4 Will. 4. c. 74, ought to shew clearly that the persons who purported to have taken the acknowledgment were the Commissioners named in the commission. *In re Vaughan*, 1 Com. B. Rep. N.S. 314.

The Court allowed a special commission for taking the acknowledgment of a married woman in America, the certificate of the taking thereof, and the affidavit of verification, to be filed by the proper officer pursuant to the 3 & 4 Will. 4. c. 74. s. 85, notwithstanding that there was a slight defect in that part of the affidavit which negated the interest of the Commissioners, and that the jurat did not shew where the affidavit was sworn. *In re Chandler*, 1 Com. B. Rep. N.S. 323.

FIRE ARMS.

[See GUNMAKERS' COMPANY.]

FISH AND FISHERY.

[See *Wenman v. Mackenzie*, title EVIDENCE—PUBLIC WORKS.]

[A certain Toll levied upon Fishing Vessels passing the Nore repealed by 22 & 23 Vict. c. 29.—The Act, 8 & 9 Vict. c. 26, for preventing Fishing for Trout or other Freshwater Fish by Nets in the Rivers and Waters in Scotland, extended by 23 & 24 Vict. c. 45.—The Law relative to the Scottish Herring Fisheries amended by 23 & 24 Vict. c. 92.]

The 3rd section of 1 Eliz. c. 17. enacts, that no person shall take fish as therein mentioned, "but only with net or trammel whereof the mesh or mask shall be 2½ inches broad":—Held, that the meaning is, that, every space between the threads of the net should be 2½ inches from one thread to the opposite thread, and that the superficial area which bounded each mesh should be 2½ inches square at least. *Thomas v. Evans*, 27 Law J. Rep. (N.S.) M.C. 172; E. B. & E. 171.

FIXTURES.

[See LANDLORD AND TENANT—LARCENY—TROVER.]

FOREIGN CORPORATION.

[See PRACTICE; SERVICE.]

FOREIGN LAW.

[See SHIP AND SHIPPING.]

FOREST OF DEAN.

[See MINN.]

FORFEITURE.

[See LEASE.]

FORGERY AND UTTERING FORGED INSTRUMENTS.

[See BILLS OF EXCHANGE AND PROMISSORY NOTES: *Ingham v. Primrose*, ante, p. 91—CHEATING.]

- (A) AT COMMON LAW.
- (B) ORDER OR WARRANT FOR PAYMENT OF MONEY.
- (C) RECEIPTS.
- (D) REPORT OF CHARACTER OF A SEAMAN.

(A) AT COMMON LAW.

If a man forge a diploma of the College of Surgeons with intent to induce people generally or particular persons to believe that he is a member of that college, but have no intent of committing any particular fraud or doing any specific wrong to any individual, he is not guilty of the offence of forgery at common law. *The Queen v. Hodgson*, 25 Law J. Rep. (n.s.) M.C. 78; 1 Dears. & B. 3.

The prisoner, with a view of getting the situation of police constable, forged and uttered to the chief constable, who had the power of appointment to the situation, letters containing a false account of himself, and recommending himself as a person of upright character:—Held, that he was guilty of forgery at common law. *The Queen v. Moah*, 27 Law J. Rep. (n.s.) M.C. 204; Dears. & B. 550.

One B was in the habit of selling baking powders, wrapped in printed wrappers, entitled "B's Baking-powder," and having his printed signature at the end. The prisoner got printed a quantity of wrappers in imitation of those of B, only leaving out B's signature, and sold spurious powders wrapped up in these labels as B's powders:—Held, that the prisoner was not guilty of forging the wrappers or uttering forged wrappers, though he might be indictable for the fraud on a charge of obtaining money by false pretences. *The Queen v. Smith*, 27 Law J. Rep. (n.s.) M.C. 225; Dears. & B. 566.

(B) ORDER OR WARRANT FOR PAYMENT OF MONEY.

The dividend warrant or cheque of a railway company, signed by the secretary, addressed to their bankers, directed the latter to pay to A, a shareholder, or his order, a certain amount. There was a memorandum at the bottom of the document—"The shareholder's name must be indorsed at the back of the cheque." It was held, that a person who forged the shareholder's indorsement on the cheque was guilty of forging an order or warrant for the payment of money. *The Queen v. Auley*, 26 Law J. Rep. (n.s.) M.C. 190; Dears. & B. 294.

(C) RECEIPTS.

A person who utters a forged pawnbroker's duplicate may be indicted for uttering a forged accountable receipt for goods. *The Queen v. Fitchie*, 26 Law J. Rep. (n.s.) M.C. 90; Dears. & B. 175.

A station-master employed by a railway company

to pay the carrier who delivered and collected parcels told the carrier falsely that the company would not pay him for delivery. The carrier acquiesced. After this the carrier's account for collecting goods was made out and paid by the station-master, and the carrier wrote on it "received," and signed his name. The station-master then on the face of the account added an account purporting to be the carrier's account for delivery, and fixed a receipt stamp on the paper under the signature, and wrote on the face of the stamp the amount in figures of the sum of the account charged for collecting and delivery:—Held, that the prisoner was guilty of forging the receipt. *The Queen v. Griffith*, 27 Law J. Rep. (n.s.) M.C. 205; Dears. & B. 548.

(D) REPORT OF CHARACTER OF A SEAMAN.

Altering in a report as to the conduct and character of a seaman made before the shipping master, pursuant to the statute 17 & 18 Vict. c. 104. s. 176, the letter M, which denotes the character of middling ability into the letter G, which means good, with intent to deceive, is a forgery within that section. *The Queen v. Wilson*, 27 Law J. Rep. (n.s.) M.C. 230; Dears. & B. 558.

FRAUD AND MISREPRESENTATION.

[False packing and other frauds in the hay and straw trade prevented by 19 & 20 Vict. c. 114.—see PRACTICE; Pleading and Demurring together—TROVER.]

(A) ACTION FOR.

(B) RELIEF AGAINST, IN EQUITY.

(A) ACTION FOR.

An action may be maintained against a party who makes a false and fraudulent representation as to the character of another, and thereby obtains credit for him notwithstanding the representation be partly written and partly verbal, if the written representation be a material part of the inducement which moved the plaintiff to give the credit. *Wade v. Tatton (in error)*, 25 Law J. Rep. (n.s.) C.P. 240; 18 Com. B. Rep. 371; *nom. Tatton v. Wade*.

The declaration stated that the defendant falsely and fraudulently represented to the plaintiffs that he was authorized by T I to order, and did order, certain quantities of stone for the building of a church to be charged to T I and others, and did falsely and fraudulently write to the plaintiffs a letter, (set out); and that the plaintiffs, relying on the representation of the defendant, supplied the stone, whereas the defendant had no authority to order it, and T I refusing to pay for it, the plaintiffs brought an action against him for the price and failed in it, and were obliged to pay T I's costs and their own costs:—Held, first, that the declaration was sufficient, even if the letter set out did not itself shew a false representation of authority; and, secondly, that the plaintiffs were entitled to recover, by way of damages, not only the price of the stone supplied, but the costs which they had paid in the action against T I. *Randell v. Trimen*, 25 Law J. Rep. (n.s.) C.P. 307; 18 Com. B. Rep. 786.

An action for false representation (contained in the prospectus of a company, of which the defendant is a director) is maintainable, although such representation may be capable of a meaning in which it would not be literally false. In such a case it is for the jury to say whether the representation was made in the sense necessary to maintain the action. *Clarke v. Dickson*, 28 Law J. Rep. (N.S.) C.P. 225; 6 Com. B. Rep. N.S. 453.

In order to maintain such action it is not necessary that there should have been any direct personal representation made by the defendant to the plaintiff; it is sufficient if the defendant authorized the circulation of the prospectus to the public, knowing it to contain false statements. *Ibid*.

The fact that other inducements were held out by other parties in addition to such false representations, by which the plaintiff was also partially influenced, is in itself no defence. *Ibid*.

(B) RELIEF AGAINST, IN EQUITY.

Upon a bill to set aside the mortgage of a reversion obtained unduly from an expectant heir, after a decree that the deeds should stand as a security for the money advanced only, it was asked, in accordance with the prayer of the bill, that certain policies of assurance on the life of the mortgagor, and which formed part of the security, might be assigned, or that the produce for which they had been sold might be paid to the plaintiffs. The Court made the addition requested, but on taking the accounts which were directed as to the payment of the premiums by the defendant, it was found that the receipts upon the policies were far less than the payments for the premiums. Leave was then obtained to re-hear the cause:—Held, on the re-hearing, that the addition made to the decree ought to be omitted, and the decree was rectified, but without costs. *Pennell v. Millar*, 16 Law J. Rep. (N.S.) Chanc. 699; 23 Beav. 172.

J W and C B were partners as bankers. C B was the managing partner, J W not interfering in the active business of the concern. They negotiated with R R to become a partner, and shewed him a written statement of the affairs of the bank, which was wrong to the extent of 15,000*l.*; but J W. was ignorant of the falsehood. R R joined the partnership, which continued four years; but he never examined the books. On the discovery of the fraud R R brought an action against J W and C B; but before declaration J W died, and the action being continued against C B, R R obtained a verdict, with damages assessed by arbitration. C B became insolvent, whereupon R R filed a bill against the executors of J W to set aside the contract, and to render the estate of J W liable for the indemnity of R R against the claims of the creditors of the late firm. One of the Vice Chancellors having made a decree in accordance with the prayer, but without costs, in consequence of the unsupported charges of fraud contained in the bill, the executors of J W appealed:—Held, that the plaintiff was entitled to relief; and the appeal was dismissed, with costs, except that the plaintiff was allowed the deposit. *Rawlins v. Wickham*, 28 Law J. Rep. (N.S.) Chanc. 188; 3 De Gex & J. 304; 1 Giff. 355.

A representation made by a party, not knowing that it is false, is binding upon him; and if the other party enters into a contract on the faith of its truth,

the Court will set aside the same altogether, and not merely rectify it. Though the other party does not examine the books for four years during which the partnership continued, it not being his duty to do so, it will not bar him of relief on the score of negligence or acquiescence. *Ibid*.

The bringing of an action against the partners, and recovering a verdict against the survivor of them, does not prevent the deceived party from seeking relief in equity. *Ibid*.

A Court of equity will unravel complicated transactions entered into by an expectant heir, and take into consideration the fairness of charges made by him upon his estates. *Bromley v. Smith*; *Boustead v. Bromley*; and *Smith v. Bromley*, 29 Law J. Rep. (N.S.) Chanc. 18; 26 Beav. 644.

If an expectant heir of the mature age of thirty-nine years creates upon estates, to which he is entitled upon the decease of his father, charges which a Court of equity thinks unfair, it will set aside the whole of the securities, though the nature and extent of the transactions were fully understood by him. *Ibid*.

The plaintiff and defendant were directors in a railway company. The plaintiff was desirous of obtaining 1,000 "unallotted" shares in order to promote its success. The defendant clandestinely caused 1,000 of his own "allotted" shares to be transferred to the plaintiff. The transaction took place in July 1853, but was discovered in June 1854, and the bill was filed in November following. The Court held that the transaction was void, and set it aside and that there had been no laches. *Blake v. Mowatt*, 21 Beav. 603.

Four out of five persons who entered into a provisional contract to purchase a mine which they agreed to sell for their joint benefit to a company were deceived by the fifth, who, assuring them that the vendors would not take less than 85,714*l.*, obtained secretly from the latter an agreement that if the contract were perfected and money paid he should receive thereout a bonus of 20,000*l.* for his pains in effecting the sale. Two of the four, having absolute power from the rest to sell to the intended company, then formed themselves with others into a committee of management, and still ignorant of the surreptitious contract, issued a prospectus stating that a contract had been entered into for the purchase by the company of the entire property for 125,000*l.*, "including all preliminary expenses and a premium to the parties who incurred the risk and responsibility of the original purchase." The company having been established, the requisite capital paid up, and the provisional contract perfected:—Held, that the 20,000*l.* transaction was fraudulent and void not only as against the four original purchasers, but also against the company, notwithstanding the mine proved cheap at the price (125,000*l.*) at which they became shareholders. It was not enough that the company got the whole of their bargain. They had a right to the best bargain which the two members of the committee of management had they known the facts, would have been in a position, acting fairly and rightly, to give them. *Beck v. Kantorowicz*, 3 Kay & J. 230.

FRAUDS, STATUTE OF.

[See STAMP—Agreements: *Glover v. Hackett.*]

(A) CONTRACTS REQUIRED TO BE IN WRITING.

- (a) *Interest in Land.*
 - (b) *Leases.*
 - (c) *Sale of Goods.*
 - (d) *To answer for the Debt of another.*
 - (e) *Rescission of Contract.*
 - (f) *Performance within a Year.*
 - (g) *Part Performance.*
- (B) NOTE OR MEMORANDUM IN WRITING.
(C) ACCEPTANCE AND RECEIPT.

(A) CONTRACTS REQUIRED TO BE IN WRITING.

(a) *Interest in Land.*

Held, expressly on the authority of *Watson v. Spralley*, that a contract for shares in a mining company, worked on the cost-book principle, is not a contract for an interest in land under the 4th section of the Statute of Frauds. *Semble—per Jervis, C.J.*, that *Watson v. Spralley* was correctly decided. *Powell v. Jessop*, 25 Law J. Rep. (N.S.) C.B. 199; 18 Com. B. Rep. 336; see report Com. B.

It was agreed by parol between the plaintiff and the defendant that the plaintiff should take possession of a brickyard, of which the defendant was in occupation as tenant, and take the bricks and plant lying there at a valuation, and the defendant promised he would settle with the landlord for the rent due, and endeavour to induce him to accept the plaintiff as his tenant. The plaintiff took possession of the yard, bricks, and plant, and gave the defendant a warrant of attorney for the amount at which the bricks, &c. were valued. After he had been in possession some months a distress was put into the premises, and the plant, &c. seized and sold for rent due from the defendant to the landlord. The plaintiff thereupon brought an action against the defendant for a breach of his promise to pay the rent:—Held, that the agreement was a contract concerning an interest in land, within the 4th section of the Statute of Frauds, and, as it was not in writing, the plaintiff could not maintain his action. *Hodgson v. Johnson*, 28 Law J. Rep. (N.S.) Q.B. 88; E.B. & E. 685.

The defendant agreed by parol with the plaintiff, who kept a boarding-house, to pay for the board and lodging of himself and servant and accommodation for a horse 200*l.* a year from a given day, terminable by either party by a quarter's notice. The defendant having refused to enter on the occupation,—Held, that this was not a contract of an interest in or concerning land, within the 4th section of the Statute of Frauds (29 Car. 2. c. 3.); and that the plaintiff could therefore maintain an action for the breach of it. *Wright v. Staver*, 29 Law J. Rep. (N.S.) Q.B. 161.

The plaintiff and the defendant agreed, by word of mouth, that the plaintiff should pay 37*l.* for the interest of the defendant in premises occupied by him as a slaughter-house, and for the fixtures; the defendant to return 10*l.* if the plaintiff were refused a licence to use the premises as a slaughter-house. The premises and fixtures were transferred to the plaintiff; and the defendant received the 37*l.* Subsequently, this action was brought to reco-

ver 10*l.*, on an allegation that the licence to use the premises had been refused to the plaintiff. A nonsuit was directed, on the ground that the contract was for an interest in land, and was void under sect. 4. of the Statute of Frauds. On a rule to set aside the nonsuit,—Held, by *Wightman, J.* and *Erie, J.* (*Crompton, J.* not concurring), that, the contract being executed as far as regarded the land, and the promise sued on relating wholly to money, the plaintiff might recover, though the contract was not in writing. *Green v. Saddington*, 7 E. & B. 503.

(b) *Lease of Lands.*

A letter, by an owner of the premises, saying, "I agree to let to A the stables in G for the same rent, and subject to the same conditions that I hold them myself," though accepted in writing by A, is not a sufficient contract in writing to be binding under the Statute of Frauds, as it does not state the duration of the term for which the premises were let. *Fitzmaurice v. Bayley*, 27 Law J. Rep. (N.S.) Q.B. 143; *nom. Bayley v. Fitzmaurice*, 8 E. & B. 664: reversing the judgment below, 26 Law J. Rep. (N.S.) Q.B. 114; 6 E. & B. 368.

In the court below, the contention of A, the defendant, was that the letter offering the stables was not a sufficient contract within the Statute of Frauds, on the ground that it had been accepted by his agent without his authority, and that he had not ratified it:—Held, that the defendant was not precluded in the court of error from taking the objection that the letter did not state the length of the proposed lease, as that was not a new point, but merely a new argument to support the original objection below, which was that there was no valid contract within the Statute of Frauds. *Ibid.*

(c) *Sale of Goods.*

The effect of the 7th section of Lord Tenterden's Act, 9 Geo. 4. c. 14. is to substitute for the words "for the price of 10*l.*" in the 17th section of the Statute of Frauds the words "of the value of 10*l.*" And a contract for the sale of goods of the value of 10*l.* or upwards is within the 17th section of the Statute of Frauds, notwithstanding the contract includes other matters to which that section does not apply. *Harman v. Reeve*, 25 Law J. Rep. (N.S.) C.P. 257; 18 Com. B. Rep. 587.

The plaintiff, a printer, having agreed to print for the defendant a work, which was to contain a dedication to be thereafter sent to him, printed the work and also the dedication, but on the latter being returned to him revised, discovered for the first time that it contained libellous matter, whereupon he refused to continue the printing of it, and on the defendant refusing to accept or pay for the work without the dedication, brought an action against him for the price of the work without the dedication:—Held, first, that the contract was not within the 17th section of the Statute of Frauds, being one of work and labour, and not of goods sold. Secondly, that the dedication being libellous, the plaintiff was justified in refusing to publish it, and was entitled to recover the expense of printing the body of the work. *Clay v. Yates*, 25 Law J. Rep. (N.S.) Exch. 237; 1 Hurl. & N. 73.

Semble—per Pollock, C.B., that Lord Tenterden's Act applies only where the contract is for goods

thereafter to be made, and not to a mixed contract of work, labour and materials. *Ibid.*

Although a purchaser's written order upon or a signature to a prospectus or invoice or other document really expressing the terms agreed upon between the parties to a sale of goods may, under some circumstances, be sufficient to satisfy the Statute of Frauds, it is otherwise of a document which does not really express the terms agreed upon by reason of some parol stipulation inconsistent with it; nor is a memorandum sufficient which does not mention price, if an agreement has been come to on that point. And a letter merely declining to accept goods sent under a parol contract or a written contract insufficient within the statute, will not take the case out of the statute. *Goodman v. Griffiths*, 26 Law J. Rep. (N.S.) Exch. 145; 1 Hurl. & N. 574.

Thus, when the seller shewed the buyer a list of prices, and the buyer only agreed to purchase on condition of a deduction of 25l. per cent. from such prices for cash payment, and then wrote an order for certain of the articles, not specifying anything as to price, this was held not enough to satisfy the statute; and a subsequent letter from him, declining to take the goods, was deemed also insufficient to take the case out of the statute. *Ibid.*

The plaintiff H had employed T & M, London brokers, to sell some oil. S had employed the defendants, D, M & Co., also London brokers, to buy oil for him. The two brokers met, and without disclosing their principals, entered into the following notes: "Sold this day for T & M to our principal 10 tuns of linseed oil, &c. at 44l. per tun, &c., allowing 2½l. per cent. brokerage, D, M & Co., brokers, ½l. per cent. brokerage to D, M & Co." This was signed by the defendants, and sent by them to T & M. The other note was—"Sold to D, M & Co., for account of H, 10 tuns linseed oil, &c., at 44l. &c. T & M brokers, ½l. per cent. brokerage to D, M & Co., a half to us." This note was signed by T & M, and sent to the plaintiff. No copy of this was sent to the defendants. The plaintiff gave evidence that, according to the usage of the trade, whenever a broker purchases or sells oil without disclosing his principal, he is himself liable to be looked to as the purchaser or seller, and that it was in accordance with the usual practice in such cases not to send a copy of the second note to the defendants:—Held, by a majority of the Court, that, on the evidence of the notes and of the usage of trade, there was a contract by the defendants to buy the oil, on which the plaintiff could sue, sufficient to satisfy the requirements of section 17. of the Statute of Frauds—*dissentientibus Martin, B. and Willes, J. Humphrey v. Dale* (Ex. Ch.), 27 Law J. Rep. (N.S.) Q.B. 390; E. B. & E. 1004.

(d) *To Answer for the Debt of another.*

The defendant addressed the following letter to the plaintiff, relating to a proposed mortgage of certain leasehold property:—"I saw Mr. L this day, and I told him he had better call on you, as he seemed very anxious to have the mortgage completed, and I thought he offered very fair; but do as you please about it. I will take any responsibility myself respecting it, should there be any." After the letter had been received, the plaintiff had an interview with Mr. L, and on the faith of such letter, lent 400l.

to A B, on the said leasehold security:—Held, that the letter was not a sufficient guarantee within section 4. of the Statute of Frauds, as the whole promise could not be made out without reference to parol evidence. *Holmes v. Mitchell*, 28 Law J. Rep. (N.S.) C.P. 301; 7 Com. B. Rep. N.S. 361.

The defendant, in order to raise money, got the plaintiff, on his indemnity, to draw a bill, which, in default of the acceptor, the plaintiff had to pay, and the defendant was then sued upon his undertaking to indemnify the plaintiff:—Held, that this was an original liability, and did not require any promise in writing. *Batson v. King*, 28 Law J. Rep. (N.S.) Exch. 327; 4 Hurl. & N. 739.

The plaintiffs, through D & Co., who were brokers, sold 682 bags of linseed, at a certain price per quarter, to H, and H afterwards, through the same brokers, sold the linseed, at an increased price, to the defendant. The time for the defendant's payment of the purchase-money was to arrive before the time fixed for H's payment. The defendant being in want of the linseed to complete a contract he had made, sent one of his clerks to D & Co. for the delivery order, with instructions to follow up the matter and get the order. The clerk was taken by D & Co. to the plaintiffs, from whom he obtained the order only on his promising that the defendant would pay the plaintiffs for the seed, as the plaintiffs required to be paid before they parted with the order. On the following day the defendant sent a cheque to D & Co. for 900l., on account of the linseed, which had not been measured at that time, so that the precise quantity of it was not then known. Upon its being measured it was found that the plaintiffs were entitled under their contract with H to receive 971l. 15s. 6d. In an action by them against the defendant to recover the difference between this amount and 900l., the amount of the cheque,—Held, that the contract made by the defendant's clerk was not a contract to pay the debt of a third person within the 4th section of the Statute of Frauds, as the linseed, the giving up of which by the plaintiffs was the consideration for such promise, was the property of the defendant, subject to the plaintiffs' lien for the purchase-money. Held, further, (*Cockburn, C.J. dissentiente*), that there was no evidence to warrant a jury in finding a ratification by the defendant of the contract which the clerk had so made, it not being proved that the clerk had communicated to the defendant what had passed between him and the plaintiffs when he obtained the order. *Fitzgerald v. Dressler*. 29 Law J. Rep. (N.S.) C.P. 113; 7 Com. B. Rep. N.S. 374.

H, who was agent for the plaintiffs, being desirous of retiring, the defendant applied for the agency. H was indebted to the plaintiffs, and also claimed a commission for introducing customers. It was agreed that the plaintiffs should allow H 52l. on that account, and that the defendant on taking the agency should allow the plaintiffs to retain six months' salary, which amounted to 52l. In an action by the plaintiffs for money received by the defendant as such agent, to which the defendant pleaded a set-off for six months' salary,—Held, that this was not an undertaking to answer for the debt of another within the 4th section of the Statute of Frauds. *Walker v. Hill*, 5 Hurl. & N. 419.

A testator appointed his son and three other

persons his executors and trustees. The son disclaimed and renounced probate, and afterwards purchased a portion of the testator's property. The other legatees raised a claim for losses incurred by the trustees; and the son's solicitor wrote, on his behalf, to the claimants, agreeing to pay 3,000*l.* in satisfaction of the alleged losses:—Held, that this letter was not within the Statute of Frauds, as an agreement to answer the debt, default or miscarriage of another; and that it was not invalid for want of consideration. The claim was, therefore, allowed against the son's estate. *Orrell v. Coppock*, 26 Law J. Rep. (N.S.) Chanc. 269.

(e) *Rescission of Contract.*

A sold goods to an infant, and delivered them to B for the purpose of being worked up by him for the vendee. The vendee afterwards, and after a portion of the goods had been used in performance of the work, went with A to B's shop, and desired that the remainder might be returned to A. B thereupon said, "I will return them or pay for them" at a price then agreed upon:—Held, that it was competent to A thus to rescind the contract without writing; and that, supposing the agreement so to do was one which the infant himself might have repudiated, it was not competent to B to object that the rescission was void, as not being for the infant's benefit. *Douglas v. Watson*, 17 Com. B. Rep. 685.

(f) *Performance within a Year.*

The plaintiff having been in the defendants' employment as a traveller entered, in October 1854, into a fresh verbal agreement with them, whereby either party was to be at liberty to determine the agreement by giving the other three months' notice before the 1st of September 1855, otherwise the parties were to go on for another twelvemonth from that time:—Held, that this was a contract not to be performed within the year, and therefore was required to be in writing under the 4th section of the Statute of Frauds. *Dobson v. Collis*, 25 Law J. Rep. (N.S.) Exch. 267; 1 Hurl. & N. 81.

The defendant, in a letter signed by him, proposed to the plaintiff that she should assign a patent which she had obtained for making toys, to the defendant, in trust for an institution managed by him, such patent to be used by the institution, and the plaintiff to have 5*l.* per cent. on the profits, and the defendant to provide for the next payment in respect of the patent; and if the payments made should not equal a certain sum in the first and subsequent years, the plaintiff to have the right to reclaim the patent. This proposal was accepted by the plaintiff by word of mouth:—Held, first, that the contract did not require to be in writing under the 4th section of the Statute of Frauds, inasmuch as all that was to be done by the plaintiff, as the consideration of the defendant's promise, was capable of being done within a year, and it did not appear that any part of it was to be postponed until after a year: confirming *Donellan v. Read* and *Cherry v. Heming*. Secondly, that if a contract in writing signed by the party to be charged, were necessary, there was such a contract, the parol acceptance of the written proposal being sufficient under the statute: confirming *Warner v. Willington*. Thirdly, that the contract was only for the use of the plaintiff's right,

without regard to the question whether that right could be sustained on litigation, and did not involve a warranty that the invention was new, or was a manufacture under the Statute of James. Fourthly, that the plea of *non concessit* puts in issue only the granting of the letters patent. *Smith v. Neale*, 26 Law J. Rep. (N.S.) C.P. 143; 2 Com. B. Rep. N.S. 67.

(g) *Part Performance.*

J L agreed by parol with J W for a conveyance of a life interest in real estate, part of which, a cottage, was in his own occupation; the terms were, that J W should be repaid the purchase-money and interest out of the rents, and should allow J L to continue to occupy the cottage. G, a witness, swore that this was the effect of the parol arrangement, but two witnesses swore that they had heard J W deny it. A short time after this agreement J W asked J L to execute an absolute conveyance of the same life interest to J W's daughter, then an infant, which J L accordingly did; and J W entered into possession of the property, leaving the cottage in J L's possession, rent free. J W wrote letters afterwards to G and to J, saying that he had bought the property out and out, and offered J L an annuity for life if he would give up possession of the cottage. J W, by will, devised his real estate to his daughter, and appointed B his executor and her guardian. B made J L an offer of the annuity on the same terms as J W had done, but the offer was refused. Thereupon B, as the next friend of J W's daughter, brought an action of ejectment against J L, who filed a bill to restrain it, alleging the parol agreement, and praying an injunction to stay the action, and a reconveyance of the property on payment of what was due. One of the Vice Chancellors decided that evidence of the parol agreement was admissible, notwithstanding the provisions of the Statute of Frauds, (29 Car. 2. c. 3.), and made a decree declaring the daughter of J W to be a trustee for J L, who was entitled to redeem on payment of what was due. On appeal, the decision was confirmed. *Lincoln v. Wright*, 28 Law J. Rep. (N.S.) Chanc. 705; 4 De Gex & J. 16.

A parol agreement was entered into for a lease on terms, which by the direction of the proposed lessor, the proposed tenant instructed a solicitor to reduce to writing. The solicitor took down the terms as stated by the tenant, and afterwards prepared from them a draft agreement embodying these and other terms, and sent it to the lessor, who afterwards and without objecting to it, let the tenant into possession and directed the solicitor to prepare a lease in conformity with the draft agreement, but subsequently objected to the lease so prepared, and gave the tenant notice to quit:—Held, first, that the delivery and taking of possession was a sufficient part performance of the agreement as expressed in the draft, to exclude a defence founded on the Statute of Frauds; secondly, that there being a conflict of evidence on the question whether the covenants agreed upon had not been already broken, the proper decree was to direct the lease to be dated at a time antecedent to the alleged breaches, and to require from the plaintiff an undertaking to admit in any action that the lease was executed on the day of the date. *Pain v. Coombs*, 1 De Gex & J. 34; 3 Sm. & G. 249.

Quare—whether possession taken previously to but continued after a parol agreement, may not be such a part performance as to exclude a defence founded on the Statute of Frauds. *Ibid.*

(B) NOTE OR MEMORANDUM IN WRITING.

The defendant purchased various articles at the shop of the plaintiffs, who were silversmiths, and wrote his address in a book of the plaintiffs, called the "order book" at the head of an entry, naming the articles selected, and the prices to be paid for them. That book contained the names of the plaintiffs on the fly-leaf at the beginning, which the defendant did see, or might have seen:—Held, that there was a sufficient signature of a memorandum in writing by both parties to satisfy the 17th section of the Statute of Frauds. *Sarl v. Bourdillon*. 26 Law J. Rep. (n.s.) C.P. 78; 1 Com. B. Rep. N.S. 188.

One of the articles was described as a "candlestick complete, 2l. 4s.," but it was agreed that the candlestick should be fitted with a gallery to carry a shade; and of that agreement there was no statement in the written memorandum:—Held, that the memorandum of the contract was sufficient without such statement, as it contained all that was to be done by the party sought to be charged. *Ibid.*

The defendant, on giving the order, was asked how he proposed to pay, and he said he would give a cheque on his brother:—Held, that it was unnecessary that the memorandum in writing should state the mode of payment. *Ibid.*

The defendant wrote the following: "I beg to inform you that I shall see you paid to the sum of 800l. for the ensuing building which you undertake to build for Messrs. Thomas and Owens, of Cap Coch." (Signed) "Thomas Lake." He intended that it should be given to Thomas Jones, who had contracted to build some houses for Thomas and Owens, but the contract having fallen to the ground, Thomas and Owens afterwards agreed with the plaintiff to build for them, and Owens handed to him the guarantee of the defendant, although he had no authority from the defendant to do so:—Held, in an action upon the guarantee, that, inasmuch as the name of the plaintiff did not in any way appear upon it, there was no sufficient agreement, or memorandum or note of an agreement, within the 4th section of the Statute of Frauds, and therefore that the plaintiff could not recover. *Williams v. Lake*, 29 Law J. Rep. (n.s.) Q.B. 1.

A memorandum of agreement for a lease was signed by the lessee, but the name of the lessor did not appear on any part of the memorandum: Upon demurrer to a bill for specific performance, on the ground that the Statute of Frauds had not been complied with, it was held that a letter written by the lessee subsequently to the memorandum, referring to the lessor by name, was sufficient to satisfy the statute. *Warner v. Willington*, 25 Law J. Rep. (n.s.) Chanc. 662; 3 Drew. 523.

The lessee having signed the memorandum of agreement gave the names of certain persons as referees for his capabilities. The lessor, without accepting the lessee as tenant, either in writing or by parol, sent him the draft lease for approval. The lessee refused to complete, and it was held, upon demurrer to a bill for specific performance, that there had

been no unconditional acceptance by the lessor. Demurrer allowed, but without costs. *Ibid.*

A plaintiff stated in his bill a verbal promise given by a testator, and a subsequent affidavit by the testator referring to the words used by him when he gave the promise:—Held, on demurrer, that the promise was sufficiently stated in the bill, and was in compliance with the requisitions of the 29 Car. 2. c. 3. s. 4. *Barkworth v. Young*, 26 Law J. Rep. (n.s.) Chanc. 153; 4 Drew. 1.

The promise was one from the testator to the intended husband of his daughter, previous to her marriage, that she should share in the testator's property equally with the rest of his children. The daughter married the plaintiff and died in the lifetime of the testator, leaving issue by the plaintiff two children, who survived the testator. The testator died, leaving two daughters him surviving. He gave nothing to the plaintiff's wife on her marriage, and, by his will, after giving a legacy to one of his two surviving daughters, he bequeathed the residue of his property to the other absolutely:—Held, that the plaintiff was entitled to a third of the testator's residuary property in right of his deceased wife, but that her personal representative was a necessary party to the suit. *Ibid.*

A paper was signed by a duly authorized agent; it contained an agreement to do a certain thing, but not any explanation of the necessary details, but it referred to another paper which did contain them:—Held, that the two might be connected together by parol evidence, so as to constitute an agreement sufficient within the Statute of Frauds. *Ridgway v. Wharton*, 27 Law J. Rep. (n.s.) Chanc. 46; 6 H.L. Cas. 238.

A B filed a bill against C D alleging an agreement between them in 1846, for working the T mine, in which C D had a term of years, subject to the payment of seven annual instalments of 500l. each, and paying an account, &c. The bill stated that the mine was afterwards, in 1847, demised by C D to E F on a royalty, and that A B had paid to C D monies on account of their partnership, and on one occasion, in 1849, C D had signed a receipt as follows—"Received from A B 250l., his share of dividend in instalment due to Messrs. B [the lessors] for the T mine." C D set up a totally different agreement to that alleged by the plaintiff, and claimed the benefit of the Statute of Frauds:—Held (affirming the decision of one of the Vice Chancellors), that the subject of agreement was within the meaning of the Statute of Frauds, and that the receipt was not sufficient to take the case out of the operation of the statute. *Caddick v. Skidmore*, 27 Law J. Rep. (n.s.) Chanc. 153; 2 De Gex & J. 52.

During parol negotiations for the purchase of an estate, the vendor wrote to the purchaser's solicitor, proposing that the solicitor's "client" should advance a sum to pay off a mortgage on the property. After further parol negotiations as to the terms, they were agreed upon by parol, and the vendor signed and handed to the purchaser a written statement of the particulars of the property and of the price. On the following day he signed and addressed to the purchaser a letter containing the following passages: "I am about to relet the land at P for another year, concluding you will agree to it. The Lady-dy rents will be mine and the Michaelmas yours:—"

Held, that the signed statement of particulars was not a sufficient memorandum in writing, the purchaser's name not being mentioned in it, and that the defect was not supplied by the correspondence. *Skellon v. Cole*, 1 De Gex & J. 587.

(C) ACCEPTANCE AND RECEIPT.

A complete verbal bargain having been made for the sale of a horse by the plaintiff to the defendant, the plaintiff, before there had been an actual delivery of the horse, asked the defendant to lend him the horse for a short time, as he had two or three journeys to make. The defendant assented, and the horse remained for a fortnight with the plaintiff, and was used in those journeys, and afterwards sent to the defendant, who refused to receive him. In an action for the price of the horse, the jury found that after the bargain was complete the defendant as owner gave the plaintiff permission to keep the horse for a short time:—Held, that there was a sufficient acceptance to satisfy the Statute of Frauds. *Marvin v. Wallace*, 25 Law J. Rep. (N.S.) Q.B. 369; 6 E. & B. 726.

On a sale of goods for the price of 10*l.* or upwards, the bare acceptance of the goods by the vendee as owner is sufficient to satisfy the 17th section of the Statute of Frauds, although the vendee immediately after accepting them states that he does so on terms different from those on which the vendor delivered them; and, in an action for the price, the fact of the contract of sale having been established by the acceptance, parol evidence of its terms is admissible. *Tomkinson v. Staight*, 25 Law J. Rep. (N.S.) C.P. 85; 17 Com. B. Rep. 697.

In an action for 15*l.* 10*s.*, the price of a piano, it was proved that the piano was delivered on the defendant's premises, that the plaintiff then asked ready money for the piano, but the defendant said he was entitled to keep it as security for the payment of certain bills, and refused to deliver it up again to the plaintiff, and there was no memorandum in writing of the sale, but there was conflicting parol evidence as to the terms of the sale; and the jury found for the plaintiff:—Held, that there was no ground for disturbing the verdict and entering a nonsuit. *Ibid.*

The defendant, a wine-merchant at Lancaster, ordered goods above the value of 10*l.* of the plaintiff in London, which were to be sent from "Griffin's Wharf" to the defendant at Lancaster. The goods were delivered at Griffin's Wharf and sent away in a vessel, which was lost upon the voyage. An invoice was sent with a letter to the defendant upon the day of the delivery at the wharf, but no notice was taken of either by the defendant:—Held, in an action to recover the value of the goods, that there was no acceptance within section 17. of the Statute of Frauds. *Hart v. Bush*, 27 Law J. Rep. (N.S.) Q.B. 271; E. B. & E. 494.

A verbal contract was made by P for the purchase from the defendant of 140 quarters of wheat, according to sample, to be delivered in London. The wheat was sent up by the defendant per railway, addressed to P, at the London station of the railway, carriage paid. According to the usual course of business, grain is warehoused by the railway company for fourteen days free of charge, and is removed by the consignee. The wheat was accordingly warehoused at the station, and notice was given to P of its arrival. The next day (Saturday), by P's orders,

his carman obtained from the warehouse a bulk sample of the wheat, which P examined, and said, "Don't cart it home at present." P was at this time in difficulties, and having gone through his accounts, he, the same day, called a meeting of his creditors for the Monday. On that day, the defendant, amongst other creditors, came, when P was willing that the defendant should have the wheat back, but the other creditors interfered, upon which the defendant went to the station and "stopt" the wheat. P having been declared bankrupt,—Held, as between his assignees and the defendant, that, assuming the transitus to have been at an end and the wheat to have reached the consignee's warehouse, there was no acceptance of part of the wheat within the Statute of Frauds, and that the property never vested in the bankrupt. *Nicholson v. Bower*, 28 Law J. Rep. (N.S.) Q.B. 97; 1 E. & E. 172.

The defendant verbally ordered of the plaintiffs at Liverpool stores above the price of 10*l.* for his ship *Phoenix*, to be sent by steamer to Constantinople. The plaintiffs selected the stores, and sent them to the steamer, together with two barrels of flour belonging to the defendant, which he had sent to their warehouse to be so dealt with. The defendant directed the plaintiffs to make out the bill of lading for the stores as shipped in their name, and deliverable to Messrs. H. & Co. at Constantinople, assigning as a reason that the plaintiffs were known to them. The bill of lading was so made out for the whole, including the flour, and the freight paid by the plaintiff. Three days after, on the 16th of October 1855, the defendant repaid them the freight, and the bill of lading was handed to him; he forwarded it to his captain, but it was delayed in reaching him. On receiving it, in March 1856, the captain searched for the stores at Constantinople, but they were not to be found. On the 6th of November 1856 the defendant sent the bill of lading to the plaintiffs, with a letter, saying, "I inclose the bill of lading for stores sent out to the *Phoenix*. Please see after them. I think the master of the steamer must account for them." In an action to recover the price of the stores,—Held, that there was ample evidence of an acceptance and actual receipt by the defendant, within the 17th section of the Statute of Frauds (29 Car. 2. c. 3). *Currie v. Anderson*, 29 Law J. Rep. (N.S.) Q.B. 87.

The defendant gave the plaintiffs a verbal order for two puncheons of rum and a hoghead of brandy, at six months' credit. The plaintiffs made an entry in their warehouse-books of the transfer to the defendant of two specific casks of rum and one cask of brandy, then in their bonded warehouse at Bristol, and sent an invoice to the defendant, describing the casks by marks, stating that they remained in bond; and, after the expiration of six months, the defendant being applied to for payment, asked the plaintiffs' traveller to sell the spirits for him, which he declined to do, and the defendant subsequently wrote to the plaintiffs, inquiring what they would give for them. There was no actual removal of the casks from the bonded warehouse:—Held, that there was no evidence of an actual receipt of the goods to satisfy the Statute of Frauds, 29 Car. 2. c. 4. s. 17. *Castle v. Swooner*, 29 Law J. Rep. (N.S.) Exch. 285; 5 Hurl. & N. 281.

FRIENDLY AND OTHER SOCIETIES.

[The 3 & 4 Vict. c. 110. revived and continued and the Laws relating to Loan Societies amended by 20 & 21 Vict. c. 41.—The 18 & 19 Vict. c. 63, relating to Friendly Societies, amended by 21 & 22 Vict. c. 101.—Members of Benefit Societies prevented forfeiting their interest therein by being enrolled in Yeomanry or Volunteer Corps, by 23 Vict. c. 13.—The 18 & 19 Vict. c. 63, relating to Friendly Societies, amended by 23 & 24 Vict. c. 58.—Further Provision with respect to Monies received from Savings Banks and Friendly Societies made by 23 & 24 Vict. c. 137.]

[Dissolution of—see *Yeates v. Roberts*, 7 Law J. Dig. 521: on appeal, 7 De Gex, M. & G. 227.—And see *BILLS OF EXCHANGE AND PROMISSORY NOTES* (A) (b), *Price v. Taylor*, ante, page 88.]

- (A) RULES.
- (B) MORTGAGES.
- (C) LIABILITY OF MEMBERS.
- (D) ARBITRATION.
- (E) JURISDICTION OF THE COUNTY COURT.

(A) RULES.

[See post (B).]

By the thirty-third rule of a building society it was provided, that every member should pay 10s. per share subscription at every monthly meeting; and any member, not having executed a mortgage to the society, continuing to neglect payment of his monthly subscriptions for six consecutive monthly rights should thereupon cease to be a member of the society, and forfeit all his interest therein. By other rules, the entire management of the society was vested in twelve directors, five to be a quorum. The plaintiff, a member (not having executed a mortgage), for seven consecutive months made default in payment of his monthly subscriptions, but on a subsequent monthly meeting night paid them to two of the directors, who attended for the purpose of receiving subscriptions, and they accepted the arrears, in ignorance of the stringency of the rule, and gave receipts for them. At the first monthly meeting after that, the directors resolved that the plaintiff had, on the sixth default, ceased to be a member of the society, and had forfeited all his interest therein; and they erased his name from the list of members, and returned him the arrears paid by him to the two directors:—Held, that, under the thirty-third rule, the plaintiff had forfeited his interest in the society, and that the acceptance of the arrears by the directors did not waive the forfeiture; and that the rule was not unreasonable. *Card v. Carr*, 26 Law J. Rep. (N.S.) C.P. 118; 1 Com. B. Rep. N.S. 197.

A building society was established and the rules certified under the 6 & 7 Will. 4. c. 82; the directors subsequently changed the name, and sought to convert it into a freehold land society. They made no alteration in the rules, but they applied the funds of the society towards the payment of the purchase-money of a piece of land they contracted to purchase:—Held, that the objects of the society could not be changed, and that the rules of the original society could not be adapted to any altered purpose; that the rules did not authorize the purchase of land,

and that the directors must replace the money; that the trustees were not responsible for the funds, as they only acted ministerially when they signed the cheques for payment; they were, however, refused the costs of the suit. *Grimes v. Harrison*, 28 Law J. Rep. (N.S.) Chanc. 823; 26 Beav. 485.

(B) MORTGAGES.

By the rules of a benefit building society, established under the 6 & 7 Will. 4. c. 82, to form a fund by payments of its shareholders, to enable them to purchase land, every shareholder paying 10s. a month on each share was entitled to receive out of the funds of the society a stated sum in advance and satisfaction on each share towards the purchase of land, viz., 60l. if advanced during the first year and increasing to 120l. in the thirteenth year; and on the other hand shareholders not receiving an advance, on withdrawing from the company, were entitled to a sum commencing with 6l. 3s. 3d. if withdrawing at the end of the first year, and increasing to 120l. if withdrawing at the end of the thirteenth year. Shareholders receiving advances were required to execute to the company a mortgage of the land, with a covenant to pay the subscriptions on his shares according to the rules of the society; but such shareholder might at any time satisfy the security by paying the subscriptions to the end of the thirteenth year of the society's existence, and was thereupon entitled to a receipt by the trustees of the society (indorsed on the mortgage pursuant to section 5. of the 6 & 7 Will. 4. c. 32.) of all monies intended to be secured by the deed. The rules stipulated that the company should terminate when the sum of 120l. for each unadvanced share, with all other expenses and liabilities of the company, should be fully realized, and that the subscription of 10s. a month should continue to be paid until the objects of the company should be fully accomplished:—Held, that although the company contemplated that at the end of the thirteenth year at the furthest, all its objects would be accomplished, yet that if, in consequence of want of funds, such objects were not effected in that time, the shareholders continued liable to the payment of the subscriptions. Held, also, that although a shareholder having received an advance and executed a mortgage was entitled at any time before the termination of the thirteen years to redeem the mortgage by payment of the subscription to the thirteenth year, and although the receipt indorsed on the deed vested the estate in him, such redemption did not operate to discharge him from the covenant to pay the subscriptions according to the rules, and consequently that he continued liable to the subscription after the thirteen years if the objects of the society were not accomplished. *Farmer v. Smith*, 28 Law J. Rep. (N.S.) Exch. 226; 4 Hurl. & N. 196.

A building society is constituted, and is entitled to all the advantages conferred upon such societies, from the time when the certified rules are framed, and not from the date of the certificate. *Williams v. Hayward*, 26 Law J. Rep. (N.S.) Chanc. 289; 23 Beav. 220.

A mortgage taken by a building society before its rules had been certified under the 10 Geo. 4. c. 56. and the 4 & 5 Will. 4. c. 40, which were extended to building societies by the 6 & 7 Will. 4. c. 82, does not require a stamp. *Ibid.*

Members of a building and investment society, which contemplated equal advantage to all, cannot borrow from the fund of the investing members without returning the benefits held out to them by the rules. *Sparrow v. Farmer*, 28 Law J. Rep. (n.s.) Chanc. 537; 26 Beav. 511.

A period fixed for the termination of a building society expired by effluxion of time; the funds, however, were insufficient to pay the investing members the sum it was by the rules calculated they ought to receive upon their shares:—Held, that the borrowing members were, by their rules, entitled to have the deeds relating to property purchased by them with the borrowed money delivered up at the end of the time fixed for the termination of the society, and also to have a receipt indorsed on the deed mortgaging the property to the society, acknowledging the payment of all monies intended to be secured thereby; but as the object of the society was not complete, that all the members still continued liable to pay monthly subscriptions to the funds until they were sufficient to pay to each investing member the sum he was to receive per share if the calculations had realized the proposed objects of the society. *Ibid.*

By a rule in a benefit building society, a member who had purchased or received in advance his shares, might redeem his mortgage on payment of the difference between the amount of profits and subscriptions paid, and the amount expressed to be secured by the deed. In taking the accounts in a redemption suit by a purchasing or borrowing member, credit was given to him for the redemption or interest monies paid by him; and, on appeal by the trustees, this was held to be correct, according to the decision in *Fleming v. Self*, by which the Court considered itself bound. *Smith v. Pilkington*, 29 Law J. Rep. (n.s.) Chanc. 237; 1 De Gex, F. & J. 120.

Some property was mortgaged to a building society, and afterwards to A. The mortgagor borrowed money from B to pay off the building society, which was done on the 4th of September, and a receipt was indorsed on the mortgage. Fourteen days afterwards the mortgagor executed a new mortgage to B:—Held, that the legal estate vested, under the 6 & 7 Will. 4. c. 82, in A and not in B. *Prosser v. Rice*, 28 Beav. 68.

As to the protection afforded by getting in the legal estate from a trustee. *Ibid.*

The trustees of a benefit building society, acting on the rules of the society, declared a bonus of 23s. per share, calculating the amount in forgetfulness as they alleged of the decision in *Fleming v. Self*, 3 De Gex, M. & G. 997, and, therefore, on the assumption that advanced members, that is members who had borrowed money of and executed mortgages to the society, would not be entitled on redeeming those mortgages to anything on account of bonuses. A B, an advanced member, then gave notice of his desire to redeem:—Held, that he was entitled to have credit for the bonus of 23s. on each of his shares, and that the Court would not interfere to relieve the society from the consequences of the act of the trustees. *Archer v. Harrison*, 7 De Gex, M. & G. 404.

(C) LIABILITY OF MEMBERS.

A club established for the supply of coals to its members, by their rules, duly certified, appointed a

secretary and treasurer. The duty of the secretary was, amongst other things, to receive the members' subscriptions, and pay them to the treasurer, and, when necessary, to write to such merchant as the members might select for tenders for coals, to be delivered at the members' houses, and when the tender was accepted by the club, to draw up an agreement for the merchant to sign. The duty of the treasurer was, amongst other things, to pay the coal-merchant as soon after every delivery as he should receive an order, signed by the secretary and chairman, and such order was to be given on the next Thursday night after each delivery. The plaintiff having made a tender, which was accepted, to supply coals to the club, entered into a written agreement, signed by himself and the secretary, to supply 100 tons, "more or less," to be delivered at the members' residences, and he delivered 127 tons according to the directions given by the secretary. When the time for payment arrived there was only sufficient money in the hands of the treasurer, owing to the default of the secretary, to satisfy a portion of the plaintiff's claim: that amount was paid to him, and he sued the defendant, a member of the club, for the residue:—Held, that the defendant was liable. Held, also, that the delivery of 127 tons was according to the contract, which specified "100 tons, more or less." *Cockerell v. Autcompte*, 26 Law J. Rep. (n.s.) C.P. 194; 2 Com. B. Rep. N.S. 440.

The individual members of an industrial and provident society, established under the provisions of the statutes 13 Vict. c. 115, 15 & 16 Vict. cc. 6. and 31, and 17 & 18 Vict. c. 25, may be proceeded against by *scire facias*, on judgments recovered against the officers or trustees of the society for debts of the society. *Myers v. Rawson*, 29 Law J. Rep. (n.s.) Exch. 217; 5 Hurl. & N. 99.

(D) ARBITRATION.

One of the rules of an institution, enrolled under the Friendly Societies Act, provided that every matter in dispute between the institution or any person acting under or on behalf of the institution and any member thereof, or person claiming on account of any such member, should be referred to and decided by arbitrators appointed in pursuance of section 27. of the 10 Geo. 4. c. 56. (which required that the rules of every enrolled friendly society should specify whether a reference of every matter in dispute between any such society or any person acting under them, and any individual member thereof, or person claiming on account of any member, should be made to Justices of the Peace or to arbitrators appointed as therein directed):—Held, that neither the rule nor the statute applied to the case of a claim by the administrator of a member for the amount of a policy of assurance on the life of such member, and, consequently, that those provisions were no answer to an action by the administrator on the policy. *Kelsall v. Tyler*, 25 Law J. Rep. (n.s.) Exch. 153; 11 Exch. Rep. 513.

Semble—that ordinary life policies of assurance, by which the sum assured is payable to the executors or administrators of the assured, are not within the purview of the Friendly Societies Acts. *Ibid.*

A bill by a retiring member of a benefit building society against the trustees, to recover the plaintiff's share was supported, and inquiries and accounts were

directed:—Held, also, that a rule to refer to arbitration did not oust the jurisdiction of this Court in such a case. *Smyth v. Lloyd*, 26 Beav. 507.

In any proceedings at law or in equity respecting a benefit building society, the primary consideration for the Court is, that the legislature has provided a cheap and summary mode of settling any question concerning their affairs by arbitration, with the intention carefully to provide that these societies should not be subject to expensive litigation. The object of these societies is to raise a fund by means of which the members may be enabled to purchase land or houses. The mode by which this is to be done is by investing the subscribed monies upon very advantageous terms under powers given them by statute. Where the rules of such a society authorized the directors to invest the funds on mortgages for ten years at any rate of interest, or in building on or improving land mortgaged to them, and authorized members to withdraw their shares upon giving a certain notice, and provided that such members should not be liable to any future fines, but should be entitled to receive the net amount of their subscriptions paid with interest, and also a share of profits, but no time was specified for making such payments; and the directors had power to pay such claims in the order in which they arose, the amount payable to a withdrawing member having been referred to arbitration:—Held, that it was competent to the arbitrator to consider, when, consistently with the due prosecution of the other objects of the society, such payment should be made, and to fix a time for such payment accordingly. *Armitage v. Walker*, 2 K. & J. 211.

Held, also, that a Court of equity had no jurisdiction to alter the award, unless there was error upon the face of it, or it was shewn to have been corruptly obtained. *Ibid*.

Therefore, where a principal sum and interest alone were awarded, the Court would not calculate whether the amounts were correct according to the rules, or whether the principal sum included profits or not. The award directed a sum to be paid for costs, which the arbitrator had no power to do, except by a rule made after the member had given notice to withdraw:—Held, that this part of the award was bad, but being separable, it did not vitiate the rest. *Ibid*.

(E) JURISDICTION OF THE COUNTY COURT.

The trustees of a friendly society, not being members of the society, *ex mero motu* applied to the county court, under the 18 & 19 Vict. c. 63. s. 41, to restrain the committee of management of the society from obtaining the certificate of the registrar to certain alterations in the rules passed at a meeting which the trustees alleged had been improperly convened:—Held, that the trustees were not "persons interested" within the meaning of that section, and that, therefore, the county Court had no jurisdiction to entertain the application. *In re Hull v. Macfarlane*, 27 Law J. Rep. (N.S.) C.P. 41; 2 Com. B. Rep. N.S. 796.

A friendly society enrolled its rules in 1832, under the 10 Geo. 4. c. 57, and shortly afterwards framed new rules, which were never enrolled or certified. In an action in the county court, by a member against the stewards, for sick pay,—Held, that the society

was a subsisting society under the original rules, by virtue of the 18 & 19 Vict. c. 63. s. 2; and, consequently, that the county Court had jurisdiction, under the 41st section of that act. *In re Meredith v. Whittingham*, 1 Com. B. Rep. N.S. 216.

GAME.

[Incompetency of Defendant to give Evidence himself on information under 1 & 2 Will. 4. c. 32. s. 23, see WITNESS; *Cattell v. Ireson*.]

[The Duties on Game Certificates and Certificates to deal in Game repealed, and in lieu thereof Duties on Excise Licences and Certificates for the like Purposes imposed, by 23 & 24 Vict. c. 90.]

- (A) MANORIAL RIGHTS.
- (B) TRESPASS IN PURSUIT OF.
- (C) CONVICTION: INVALID ADJUDICATION.

(A) MANORIAL RIGHTS.

The plaintiff was the lord of the manor of B, in which there was a tract of pasture land, separated by a fence from the waste, and subject to "cattle-gates" or customary estates of inheritance, holden of the lord by fines (enforceable by seizure), certain small rents payable yearly for each, and certain dues, duties and suit and service. They descended on death to the heir, who was admitted at the lord's court on payment of a fine, and they passed by a customary deed brought into the lord's court by the alienee, who, being presented by the jury or homage was admitted on payment of a fine. Each cattle-gate (of which there were eighty in number) gave the owner of it the right of depasturing a limited number of cattle from the 26th of May, and an unlimited number of sheep from the 10th of October to the 24th of April. From the 24th of April to the 25th of May no cattle of any kind were entitled to be on the land. The owners of the cattle-gates appointed persons, called the "frithman" and the "herd," to attend to the land and the cattle, and they repaired the fences with stones taken from the land and other places, the lord not interfering with the land in any way, except by shooting over it. The owner of a cattle-gate having a house in the manor was entitled to cut peat from the cattle-gate land, to be consumed in his house within the manor, but not elsewhere. A former lord obtained a private act of parliament enabling him to enfranchise "copyhold lands and hereditaments," and under it he enfranchised several cattle-gates, but the owners of unenfranchised and enfranchised cattle-gates exercised and enjoyed their right in the same matter. The plaintiff was himself the owner of several cattle-gates, one of which came to him by forfeiture and the others by purchase. *Lonsdale v. Rigg*, (Ex. Ch.), 26 Law J. Rep. (N.S.) Exch. 196; *nom. Rigg v. Lonsdale*, 1 Hurl. & N. 923: affirming the judgment below, 25 Law J. Rep. (N.S.) Exch. 73; 11 Exch. Rep. 654.

The lord having brought an action for trespass against the owner of a cattle-gate for taking and killing grouse on this land; on a special case stating these facts,—Held, that the defendant, as owner of a cattle-gate, had only a right to the feeding of his

beasts on the pasture land, but no right to the soil thereof, and that the plaintiff, the lord of the manor, was the owner and in possession of the soil and entitled to maintain trespass against the defendant for sporting thereon, and that the grouse shot by the defendant on the pasture land consequently belonged to the plaintiff. *Ibid.*

Held, further, that the fact that the lords of the manor of B had always killed game on the pasture land without obstruction by the cattle-gate owners, that no other person claimed to do so, or did so except by stealth or by licence from the lord of the manor, and that one cattle-gate owner had applied for and obtained leave from the plaintiff to shoot game there, that the plaintiff and his predecessors preserved the game and prevented other persons from searching for game there, did not support a claim by the plaintiff to an exclusive right of killing game there irrespective of his right as owner of the soil. *Ibid.*

The plaintiff was lord of the manor of Nichol Forest, and the defendant's father was owner of portions of land within the manor called the Clint Allotment and the Woodside Allotment. In 1811, the plaintiff's father being lord of the manor, there was within and parcel of it a tract of unenclosed land called The Bailey Hope, being a stinted pasture. The plaintiff's father was owner of the soil of Bailey Hope and entitled to all mines within it, and to other rights and liberties and privileges in and over it, and amongst others, to the exclusive right of shooting over it. The plaintiff, who was the heir of his father, and others, were owners of tenements within the manor and of shield-rooms upon Bailey Hope, in respect of which they and their tenants were entitled to cattle-gates upon it. In 1811 an Inclosure Act enacted that the Commissioners should make allotments of portions of Bailey Hope to the plaintiff's father in respect of his right to the soil, and to him and to the other parties entitled to cattle-gates in respect thereof, and that, notwithstanding the inclosure, the plaintiff's father, his heirs, &c., lords of the said manor, should be taken to be the owners of all the mines, &c., under the stinted pasture, and that nothing therein contained should prejudice, lessen or defeat the title of the plaintiff's father, his heirs, &c., lords of the said manor, to any seigniories, rights, &c., but that he might enjoy the same and all rents, services, &c., courts, &c., and all mines and minerals and all powers of getting the same, and also the right of hunting, shooting, fishing and fowling, in, through and over the stinted pasture, and every part and allotment thereof, and all other rights (except those which are expressly declared to be barred) in as full, ample and beneficial a manner as they respectively could or might have held and enjoyed the same in case the act had not been passed. In 1814 the Commissioners for allotting Bailey Hope allotted to the plaintiff's father 150 acres therein in respect of his estate called Woodside, and an allotment was made to the defendant in respect of his estate called Clint. In 1823 the plaintiff's father and the defendant's grandfather agreed to exchange the Woodside allotment for land belonging to the latter. By the deed conveying the Woodside allotment there was excepted and reserved to the plaintiff's father the liberty of shooting over that allotment. The corresponding deed of exchange

granted to the plaintiff's father the right of shooting on the Woodside allotment, with a covenant that the defendant's grandfather, his heirs, &c., would give notice to the plaintiff's father, his heirs, &c. of every trespass on the said allotment. In 1823 the Woodside allotment came to the defendant's father, and in 1846 he bought the Clint allotment. Since 1831 the owner of these two allotments shot over them as of right, the plaintiff during the same time exercising the right of shooting concurrently. In 1852 the defendant gave the plaintiff's gamekeeper notice not to trespass on the ground, as under the Game Act, 1 & 2 Will. 4. c. 32, he was solely entitled to the game:—Held, first (affirming the judgment below, 25 Law J. Rep. (N.S.) Exch. 42; 11 Exch. Rep. 326), that the plaintiff had the exclusive right of shooting over the Woodside allotment; secondly, reversing the decision below (*Erle, J.* and *Willes, J. dissentientibus*), that the plaintiff had the exclusive right of shooting over the Clint allotment: *Greathead v. Morley* overruled. *Graham v. Ewart* (Ex. Ch.), 26 Law J. Rep. (N.S.) Exch. 97; 1 Hurl. & N. 550: affirmed by the House of Lords, *Ewart v. Graham*, 29 Law J. Rep. (N.S.) Exch. 88; 7 H.L. Cas. 331.

An Inclosure Act (55 Geo. 3. c. 82), after directing one-sixteenth of the common land to be allotted to the lord of the manor as a compensation for his right to the soil, and the residue (with certain exceptions) among the commoners, contained a proviso that nothing in the act should defeat, lessen, or prejudice the right, title, or interest of the lord to the mines and minerals in or under the said commons, or to any seigniories or royalties incident and belonging to the manor, the same being thereby reserved to the lord, with full power for him at all times to hold and enjoy all rents, fines, duties, customs and services, and all courts and perquisites, and liberty of hunting, coursing, fishing and fowling within and throughout the said manor, and all goods and chattels of felons, treasure-trove, waifs, estrays, forfeitures, royalties, jurisdictions, franchises and privileges whatsoever to the said manor incident or appertaining (other than and except such right as could or might be claimed by him as owner of the soil and inheritance of the said commons), in as full, ample and beneficial manner, to all intents and purposes, as if the said act had not been passed. As owner of the soil of the commons, the lord had before the act the free and exclusive right and liberty of shooting and killing game thereon, but there was no right of free chase or free warren within the manor:—Held, that the lord retained no right to shoot over the allotments: *Ewart v. Graham* distinguished. *Bruce v. Halliwell* or *Halliwell*, 29 Law J. Rep. (N.S.) Exch. 297; 5 Hurl. & N. 609.

(B) TRESPASS IN PURSUIT OF.

The tenant of a farm, the right of sporting over which was reserved to the landlord, employed the appellants to kill rabbits upon the farm. They were proceeded against under the 1 & 2 Will. 4. c. 32. s. 30, and were convicted:—Held, that the tenant himself could not be so convicted; that the appellants having acted by his directions, had the same rights as he had, and therefore that the conviction was bad. *Spicer v. Barnard*, 28 Law J. Rep. (N.S.) M.C. 176.

A labourer employed on a farm, the right of sporting over which was reserved to the landlord, was authorized by the tenant to go and kill a rabbit for the labourer's wife. The Justices having found that he killed the rabbit as the servant of the tenant, and by his order,—Held, on the authority of *Spicer v. Barnard*, that the labourer was not liable to be proceeded against, under the 1 & 2 Will. 4. c. 32. s. 30, for a trespass in pursuit of coney. *Padwick v. King*, 29 Law J. Rep. (N.S.) M.C. 42.

It is not necessary that a conviction, under the 1 & 2 Will. 4. c. 32. s. 30, for a trespass in pursuit of game, should be on the information of the owner or occupier of the land, or of a party interested in the game, or of a person authorized by such owner, occupier or party: affirming *Middleton v. Gale*. *Semble*, per *Williams, J.* and *Willis, J.* (*dubitante Keating, J.*), that it is not necessary, in order to support a conviction under the above section, that the defendant should have intended to commit, or have been conscious that he was committing a trespass. *Morden v. Porter*, 29 Law J. Rep. (N.S.) M.C. 213.

(C) CONVICTION: INVALID ADJUDICATION.

A conviction under the Game Act, 1 & 2 Will. 4. c. 32. s. 30, included four persons, and adjudged each of them to forfeit and pay the sum of 2*l.* each, &c., and if the said sums be not paid, that each of them the said C, B, W and S so making default, should be imprisoned for one month, unless the said several sums and the costs and charges of conveying each of them the said C, B, W and S so making default to the said gaol, shall be sooner paid:—Held, that the conviction made each defendant liable to be imprisoned until he had paid the penalty and the expense of conveying, not only himself, but the other persons convicted, and was, therefore, bad, and that this was not a case in which to exercise the power of amendment under the 12 & 13 Vict. c. 45. s. 7. On the hearing of the information, the defendants *bond fide* claimed a right to enter upon the land under an authority from S, who was alleged to be the owner of the land, and asked for an adjournment, as they were not then prepared with evidence, which was refused.—*Semble*, that this was such a *bond fide* claim of right as put an end to the jurisdiction of the Justices. *The Queen v. Cridland*, 27 Law J. Rep. (N.S.) M.C. 28; 7 E. & B. 853.

GAMING.

[Action for money lost by, see *Parsons v. Alexander*, 5 E. & B. 263; 6 Law J. Dig. 322: and see *INDemnITY*.]

- (A) SECURITIES AND WAGERING CONTRACTS.
- (B) STAKEHOLDER.
- (C) "OPEN AND PUBLIC PLACE."
- (D) PENALTIES, APPROPRIATION OF.

(A) SECURITIES AND WAGERING CONTRACTS.

A debtor executed a post-obit bond for payment of a sum of money. The bond recited that the debtor owed money to the obligee. The bond was assigned to a third party, who took the assignment

upon the faith of the debtor's tacit representation that the debt was due as recited in the bond. The debtor afterwards conveyed and assigned his estate and effects to trustees for the benefit of his creditors; and subsequently instituted a suit for the performance of the trusts of the deed. The transferee of the bond applied to be allowed to prove, but was opposed by the debtor, and his claim disallowed by the chief clerk on the ground that the bond was originally given for a gambling debt. The only evidence of the gambling transaction was that of the plaintiff, the debtor:—Held, by one of the Vice Chancellors, overruling the certificate of the chief clerk, that the debt was proveable, for that the plaintiff could not be allowed to set up, as against an innocent transferee, a state of circumstances inconsistent with representations made by the debtor before the transfer, and upon the faith of which the transfer was taken; and upon appeal,—Held, that the decision of the Vice Chancellor was correct, the only evidence in support of the allegation that the debt was a gambling transaction, being that of the plaintiff, the debtor, who was not a trustworthy witness. *Hawker v. Hatfield*, 25 Law J. Rep. (N.S.) Chanc. 558; 3 De Gex, M. & G. 318; 8 Sm. & G. 194.

The defendant, being indebted to the plaintiff and other persons for money lost by betting on a horse-race, applied to the plaintiff for a loan. The plaintiff lent the defendant 2,000*l.* upon the security of a deed, which assigned to the plaintiff certain policies of assurance, and contained a covenant by the defendant to pay the 2,000*l.*, and interest. On the settling day the defendant paid the plaintiff his bets out of the 2,000*l.* In an action by the plaintiff on the covenant, the defendant pleaded that the deed was a mortgage security, part of the consideration for which was a gaming debt. At the trial the Judge told the jury that if the 2,000*l.* was advanced in pursuance of a stipulation or agreement between the plaintiff and defendant that out of it the plaintiff should be paid the money which he had won of the defendant by betting, it was a mere colourable loan and evasion of the statute; but that if there was no such stipulation or agreement, and the plaintiff advanced the 2,000*l.* as a loan for the defendant to dispose of as he pleased, the deed was valid, although the plaintiff expected to be paid out of the money so lent:—Held, in the Exchequer Chamber, on a bill of exceptions, that the direction was right. *Hill v. Fox*, 4 Hurl. & N. 359.

Upon a bargain for the sale of some rags by the plaintiff to the defendant, a difference arose as to the price at which a former sale had been effected; and thereupon the following memorandum was signed by the plaintiff and the defendant:—"Mr. R states that the goods sold by him to Mr. S were invoiced at 5*s.* 9*d.* per cwt. of 112 lb. Mr. S says the price was 6*s.* per cwt. The losing man is to pay for the winner one gallon of the best brandy. The five tons of rags are to be regulated in price according to the above, viz. Mr. R says they are invoiced at 5*s.* 9*d.*; Mr. S says 6*s.* It is also agreed that if Mr. R is wrong, they are to be charged at 3*s.* only; if Mr. S is wrong, he is to pay for the same 6*s.*" The plaintiff turned out to be right, and the defendant paid for a gallon of brandy; but refused to receive the rags at the price of 6*s.* per cwt. Thereupon, the plaintiff brought an action for goods bargained and sold, to

which the defendant pleaded the above facts, averring that the bargain and sale was under and in pursuance of an illegal agreement, by way of gaming and wagering, contrary to the statute:—Held, that, without considering the stipulation as to the brandy, the contract of sale was by way of wagering, within the 18th section of 8 & 9 Vict. c. 109; and the plea, therefore, was a good answer to the action. *Rourke v. Short*, 25 Law J. Rep. (N.S.) Q.B. 196; 5 E. & B. 904.

(B) STAKEHOLDER.

In order to maintain an action against a stakeholder to recover the amount of stakes deposited with him to abide the determination of certain persons on a legal event, the plaintiff must either have the decision in his favour, or shew that it was no longer practicable to obtain it. *Brown v. Overbury*, 25 Law J. Rep. (N.S.) Exch. 169; 11 Exch. Rep. 715.

The plaintiff entered a horse for a subscription stakes, and after the race a dispute arose as to who was the winner. Four stewards had been appointed, whose decision was to be final in case of disputes, but only three acted. They could not agree, and separated without coming to any decision, and the next day the defendant, who was stakeholder, being indemnified, paid the stakes to the owner of another horse. Two of the three stewards subsequently signed a written paper, purporting to be an award of the stakes to the plaintiff, but no second meeting of the stewards had taken place:—Held, that the plaintiff could not maintain an action to recover any part of the stakes. *Ibid*.

Stewards of a horse-race are not in the position of arbitrators between the persons who have horses in the race, and it is not necessary that they should meet together and make a joint decision as to which horse has won. Therefore, where three persons were appointed to act as such stewards of a race in which the plaintiff's horse ran, and two of them decided that the plaintiff was entitled to the stakes, it was held, that this was a sufficient decision, although it was made in the absence of the third steward, and although he dissented from the decision. *Parr v. Winteringham*, 28 Law J. Rep. (N.S.) Q.B. 123; 1 E. & E. 394.

Although the judge of a horse-race has power to decide finally who is entitled to the stakes as winner, such power does not accrue to him until the race has been run. *Carr v. Martinson*, 28 Law J. Rep. (N.S.) Q.B. 126; 1 E. & E. 456.

The plaintiff and H entered into a specific agreement to run one horse against another on a specified day, W C to be the starter, and the money to be given up by the decision of a named judge. W C did not appear on the ground, and H refused to run the race, but the plaintiff's horse walked over the course, and was declared by the judge to be the winner. The plaintiff then demanded the stakes of the defendant, who was stakeholder, and, upon his refusal to hand them over, brought an action against him:—Held, first, that as W was absent, the race could not and did not come off, and, therefore, that the judge had no power to declare that the plaintiff's horse was the winner of the race. Held, secondly, that the plaintiff was entitled to recover his own stake from the defendant, and that there had been a suffi-

cient demand, although he had not demanded it separately from the other. *Ibid*.

The amount of a bet lost at a horse-race was paid by the loser into the hands of a third party, upon the faith of a promise of the latter to pay it to the winner. The person who received the money died before he had paid it to the winner. Claim by the winner to be paid the amount out of the assets of the deceased disallowed. *Beyer v. Adams, in re Law (the claim of Joseph Arkell)*, 26 Law J. Rep. (N.S.) Chanc. 841.

(C) "OPEN AND PUBLIC PLACE."

A conviction under the statute 5 Geo. 4. c. 83. s. 4, which prohibits any person "playing or betting in any street, road, highway, or other open and public place at or with any table or instrument of gaming at any game or pretended game of chance," alleged that the defendant played "in a certain open and public place, to wit, in a third-class carriage used on the L B and S C Railway, with an instrument of gaming, to wit, three cards, at a pretended game of chance called 'odd man':"—Held, that the conviction could not be supported, as it did not appear that the carriage was then used or travelling along the railway for the conveyance of passengers. *Quære*—if it had so appeared, was the offence within the statute? *Ex parte, or In re, Freedstone*, 25 Law J. Rep. (N.S.) M.C. 121; 1 Hurl. & N. 93.

(D) PENALTIES, APPROPRIATION OF.

By section 47. of 2 & 3 Vict. c. 71. (the act for regulating the Metropolitan Police Courts), it is enacted, that where by any act or acts, any penalties or forfeitures, or shares of any penalties or forfeitures, are or shall hereafter be made recoverable in a summary manner before any Justice or Justices of the Peace, and by such act or acts respectively the same are or shall be limited and made payable to, &c., or to any person or persons whomsoever, save the informer, who shall sue for the same, &c., in any case the same, if recovered or adjudged before any of the said Magistrates, shall be recovered for and adjudged to be paid to the Receiver for the Metropolitan Police District, &c. By section 8. of the 17 & 18 Vict. c. 38. (the Act for the Suppression of Gaming Houses), it is enacted, that one-half of any pecuniary penalty, which shall be adjudged to be paid under that act, shall be paid to the person laying the information, &c., and the remaining half shall be applied in aid of the poor-rate of the parish in which the offence was committed, and shall be paid for that purpose to the overseer or other person authorized to receive poor-rates in such parish:—Held, that where a conviction under the latter act took place at a police court in the metropolis, and a penalty was adjudged to be paid, and was paid, the Receiver of the Metropolitan Police District was entitled to claim one-half of such penalty. *Wray v. Ellis*, 28 Law J. Rep. (N.S.) M.C. 45; 1 E. & E. 276.

GAOL.

[See PRISON AND PRISONER.]

GAS.

[The supply of gas to the metropolis better regulated by 23 & 24 Vict. c. 125. The act for regulating the measures used in the sale of gas amended by 23 & 24 Vict. c. 146.]

A local act for the establishment of a gas company (8 & 9 Vict. c. lxxvi.) enacted, that if the company should at any time cause or suffer to be conveyed or to flow into any stream or place for water, any washing, or thing produced by making gas, or should do any act to the water contained in such stream, &c., whereby it should be fouled or corrupted, the company should forfeit for every such offence 200*l.*, and an additional penalty of 20*l.* for every day such washing, &c. should be conveyed or should flow after the expiration of twenty-four hours from notice of the offence served on the company:—Held, that the former penalty was not confined to the case of water wilfully or knowingly fouled, but extended to the case of water in a well fouled by water escaping through a fissure in the gas-tank, occasioned by mining operations in the vicinity. *Hipkins v. the Birmingham and Staffordshire Gaslight Co.*, 29 Law J. Rep. (n.s.) Exch. 169; 5 Hurl. & N. 74.

There is no obligation upon a gas company registered under the 19 & 20 Vict. c. 47, to continue to supply a customer with gas for any particular period: nor does the circumstance of quarterly payments, or the hiring of a meter by the year, or of the company being the only one in the neighbourhood, afford any ground for implying a contract to that effect. *The Hodderdon Gas and Coke Co. v. Haselwood*, 5 Com. B. Rep. 239.

GOODS.

[Places for warehousing Goods for security of duties of Customs, see 23 & 24 Vict. c. 36. And see titles FRAUD, STATUTE OF—SALE.]

GRAMMAR SCHOOL.

[See CHARITY.]

GRAND JURY.

[The Despatch of Business before Grand Juries in England and Wales facilitated by 19 & 20 Vict. c. 54.]

GUARANTIE.

[See the Statute for amending the Law of Scotland affecting Trade and Commerce, 19 & 20 Vict. c. 60.—Consideration for, need not appear by writing, by 19 & 20 Vict. c. 97. s. 3; effect of change in a firm on guarantie to or for the firm, s. 4. And see titles CONTRACT (C), (B), *Pugh v. Stringfield*—FRAUDS, STATUTE OF—PLEADING, Equitable Pleadings.]

(A) CONSTRUCTION OF.

(B) CONSIDERATION.

DIGEST, 1855—60.

(C) DISCHARGE OF LIABILITY ON.

(D) GUARANTEE SOCIETY: ACTION FOR PREMIUMS.

(A) CONSTRUCTION OF.

Where A, at the request of W & D, in consideration of the plaintiff having furnished goods to them, and of the plaintiff forbearing to take proceedings against them, guaranteed to the plaintiff a certain sum on the 13th day of December next,—Held, that forbearance till the 13th of December was a condition precedent to the plaintiff's right to sue A; that the guarantie was not general as to the time of forbearance; and that forbearance for a portion of the time gave the plaintiff no right of action. *Roll v. Cosens*, 25 Law J. Rep. (n.s.) C.P. 254; 18 Com. B. Rep. 673.

The plaintiff had been in the habit of supplying one Edge with goods up to May 1854, at which time Edge owed the plaintiff money for goods, and also on bills of exchange accepted by Edge. For this money the defendant was responsible by virtue of a guarantie given by him. The plaintiff having declined to give further credit to Edge without additional security, it was agreed between the plaintiff and the defendant that the existing guarantie should be delivered up, and the following guarantie substituted in its place:—"In consideration of the credit given by S. Broom to J. Edge, I hereby agree to guarantee the payment of all bills of exchange drawn by the said S. Broom and accepted by J. Edge. Also, I hereby agree to guarantee the payment of any balance that may be due from the said J. Edge to the said S. Broom. This guarantie to include all bills of exchange now running, as well as the balance of account at this day. Dated this 26th day of May 1854":—Held, by *Pollock, C.B. and Martin, B.*, that this guarantie applied to future credit, and that the defendant was liable to the payment of bills of exchange accepted by Edge subsequently to the guarantie. Held, by *Bramwell, B.*, that the guarantie was limited to past transactions. *Broom v. Batchelor*, 25 Law J. Rep. (n.s.) Exch. 299; 1 Hurl. & N. 255.

Defendant being agent to receive rents for A, undertook, upon A giving him an authority to do so, to repay the plaintiff, out of the first money received on A's account, anything the plaintiff might be pleased to advance to A. A gave the defendant this authority: "Please to pay (the plaintiff) the sum of 20*l.* by four instalments, namely, 5*l.* each quarter, from my estate, commencing from the 29th of September 1852, until September 1853; and should any money be owing by me to her after that time, please to pay same way as above":—Held, that the authority was not confined to the payment of the 20*l.*, but authorized the payment of further advances made by the plaintiff to A. *Horslor v. Carpenter*, 27 Law J. Rep. (n.s.) C.P. 1; 3 Com. B. Rep. N.S. 172.

Defendant's counsel at the trial rested the defence exclusively on one issue, and after verdict on that, objected that the Judge had omitted to notice a point of law not arising on that issue, but on another:—Held, that he had precluded himself from the objection, and could not afterwards treat the Judge's omission as a misdirection. *Ibid.*

F covenanted with the three plaintiffs to complete certain houses by a day fixed, on three several parcels of land mortgaged to the three plaintiffs respectively, and they covenanted to advance monies to enable him to do so. In consideration of this arrangement, the defendants jointly and severally guaranteed to the plaintiffs that F should duly fulfil his covenant; and it was agreed that their joint and several liability should not exceed 100%. F having made default,—Held, that the three plaintiffs were entitled to recover in a joint action on this guarantee, in respect of damages sustained by any one of them to the extent of 100%. *Pugh v. Stringfield*, 27 Law J. Rep. (N.S.) C.P. 225; 4 Com. B. Rep. N.S. 864.

(B) CONSIDERATION.

The defendant gave the plaintiff's testator the following guarantee:—"I am aware that my uncles are considerably indebted to you for professional business, and for cash lent, and that it is not in their power to pay you at present, and as in all probability they will become still further indebted to you, though I by no means intend that this letter should create or imply any obligation on your part to increase your claim against them, I am willing to bear you harmless against any loss arising out of the past or future transactions between them and you to a certain extent; and therefore in consideration of your forbearing to press them for immediate payment of the debt now due to you, I hereby engage and agree to guarantee you the payment of any sum they may be indebted to you upon the balance of accounts between you at any time during the next six years to the extent of 1,000l." The testator on this made further advances to the defendant's uncles, who afterwards became bankrupt. In an action on the guarantee against the defendant, it was held that the guarantee was good, and that the plaintiff was entitled to recover the whole amount due from the bankrupts to the testator; a majority of the Court being of opinion that the consideration for the defendant's promise was the testator forbearing to press for immediate payment, and also his making future advances. *Crompton, J.*, however, held, that the only consideration was the testator's forbearing to press for immediate payment. *Sepple*—that the forbearing to press for immediate payment, meant giving the debtor reasonable time; and that a promise to give reasonable time for payment of a debt, is a good consideration for a contract. *Oldershaw v. King* (Ex. Ch.), 26 Law J. Rep. (N.S.) Exch. 120; 2 Hurl. & N. 517.

(C) DISCHARGE OF LIABILITY ON.

Upon the eve of a sale by the sheriff, a surety gave a written guarantee for payment of the judgment debts by instalments, in consideration of the judgment creditors consenting to postpone the sale under the execution. It turned out that the consent of another person was necessary in order to prevent the sale, and in consequence the sale took place. The surety gave notice that, the consideration having failed, the guarantee was at an end. It appeared that representations were made on behalf of the judgment creditors when they took the guarantee that they had power to stop the sale, and that it would be stopped:—Held, that the surety was entitled to have the guarantee delivered up to be can-

celled. *Cooper v. Joel*, 1 De Gex, F. & J. 240; 27 Beav. 815.

(D) GUARANTEE SOCIETY; ACTION FOR PREMIUMS.

By a memorandum of agreement a guarantee company agreed with the defendants, traders, that if they should pay to the company the sums thereinafter mentioned, then the funds of the company should be liable to make good to the defendants nine tenth parts of the loss occasioned in respect of goods sold by them during the term of three years and one month, from the 1st of December 1853 to the 31st of December 1856, by reason of the bankruptcy or insolvency of purchasers, and during any further period in respect whereof the defendants should contribute to the funds of the company, and the company should consent to receive further payments, but subject to the provisions indorsed thereon. One of the provisions indorsed was, that every guarantee should, from the expiration of the original term, be treated as a renewed contract of the like nature and conditions, unless either the member interested therein or the board of directors should give two months' notice of intention not to renew it, and the defendants in consideration thereof agreed to pay to the company 43l. yearly during the term of the guarantee:—Held, that upon the expiration of the original term, without notice, there was a binding contract on the defendants to pay like premiums for another term, and that it was not open to him to cease or refuse to contribute to the funds of the company. Held, also, that the incorporation or agreement for incorporation of the company with another company, and the transfer of its funds thereto, was no answer at law or in equity to an action in the name of the original company for the premiums. *The Solvency Mutual Guarantee Soc. v. York*, 27 Law J. Rep. (N.S.) Exch. 487; 3 Hurl. & N. 588.

GUARDIAN AND WARD,

[See INFANT.]

GUNMAKERS COMPANY,

The 18 & 19 Vict. c. cxlviii, does not make it obligatory on the Gunmakers Company, London, to receive and prove fire-arms by definitive proof, which have been provisionally proved by the Birmingham Company at Birmingham, but which have not been provisionally proved by the Gunmakers Company in London. *Goodman v. Spencer*, 26 Law J. Rep. (N.S.) C.P. 177; 2 Com. B. Rep. N.S. 93.

GUNPOWDER.

[The Law concerning the making, keeping, and carriage of Gunpowder and compositions of an explosive nature, and concerning the manufacture, sale and use of Fireworks, amended by 23 & 24 Vict. c. 139.]

HABEAS CORPUS.

[See ERROR—PARENT AND CHILD: *In re Race*—
VAGRANT ACT: *In re Cross*.]

(A) JURISDICTION TO GRANT.

(B) AD TESTIFICANDUM.

(C) WRIT AND RETURN.

(a) *Admissibility of Affidavits.*

(b) *Substituted Warrant of Commitment.*

(A) JURISDICTION TO GRANT.

[See CERTIORARI (F), *Regina v. Lees*.]

A prisoner in lawful custody for debt is not entitled to a *habeas corpus* for the purpose of enabling him to conduct his own case in a suit for damages; although it might be otherwise under particular circumstances, as, for instance, if the object was to make an application for his discharge, as being wrongfully in custody. *In re Cobbett*, 27 Law J. Rep. (N.S.) Exch. 199; 8 Hurl. & N. 155.

The Courts have no power to issue writs of *habeas corpus* to bring up prisoners for the purpose of moving for or shewing cause against rules,—there being no writ known to the law which is applicable to such a purpose. *Benns v. Moseley*, 2 Com. B. Rep. N.S. 116.

Where an inhabitant of Jersey had been imprisoned there for serving upon another inhabitant process in an English action under the Common Law Procedure Act,—Held, the imprisonment was unlawful, and that the prisoner was entitled to be discharged on a *habeas corpus*. *Dodd's case*, 2 De Gex & J. 510.

Another prisoner who was detained in custody, not only for the above cause, but also for debts under orders purporting to be made by the Royal Court of Jersey, obtained a *habeas corpus* on an affidavit stating that the orders were made when the Court was insufficiently constituted, and without affidavits of debt such as were required by the law of the island. It appeared, however, on the statements of the affidavit, that the prisoner had taken proceedings after the alleged irregularity had occurred:—Held, that the Royal Court was not shewn to have been insufficiently constituted, and must be assumed to be competent to judge of its own law, and that the prisoner was not entitled to his discharge. *Ibid*.

The Court has authority to give to the functionary who brings up a prisoner in obedience to a writ of *habeas corpus* at common law the expenses of so doing, but not his general costs. *Ibid*.

(B) AD TESTIFICANDUM.

The Court or a Judge has power to grant a *habeas corpus* to bring up a prisoner to be examined as a witness before an arbitrator, appointed under 17 & 18 Vict. c. 125, s. 5, for the purpose of stating the facts in dispute between parties, in a special case for the opinion of the Court. *Graham v. Glover*, 25 Law J. Rep. (N.S.) Q.B. 10; 5 E. & B. 591.

The Court granted a writ of *habeas corpus* to bring up a witness, who was in custody for debt, to give evidence before an arbitrator. *Marsden v. Ousebury*, 35 Law J. Rep. (N.S.) C.P. 200; 18 Com. B. Rep. 34.

(C) WRIT AND RETURN.

(a) *Admissibility of Affidavits.*

[See *infra* (b).]

Where a warrant of commitment, setting out a conviction, is good on the face of it, it is doubtful whether, on the return to a writ of *habeas corpus*, affidavits are admissible raising objections not appearing upon the warrant; as, for instance, disclosing a former conviction for the same offence. *Ex parte Baker*, 26 Law J. Rep. (N.S.) M.C. 155.

Thus, in a case under the Masters and Servants Acts, 6 Geo. 3. c. 25. and 4 Geo. 4. c. 34, it is questionable whether the fact that the artificer or labourer has already been convicted and committed for an absconding from his work, he having omitted or neglected to return to his work on his liberation from prison, operates in bar of another conviction for such non-return to work, as for a fresh "absconding," or whether the power of the magistrate is exhausted by the first conviction:—*semble*, that it is not so. *Ibid*.

In such a case, a commitment must disclose that the conviction adjudicated as to an "abatement of wages" under the statute; and where it did not do so, it was held bad, by the majority of the Court (*Watson, B. dissentiente*), and the prisoner was discharged. *Ibid*.

(b) *Substituted Warrant of Commitment.*

Where a prisoner has been lodged in gaol under a bad warrant of commitment, even in the nature of a conviction (as, where the commitment is under the Vagrant Act, 5 Geo. 4. c. 83. s. 4), a good warrant of commitment, subsequently delivered to the gaoler, but before a rule for a *habeas corpus* has been obtained, is a good answer to that rule.—*The Queen v. Richards* confirmed. *Ex parte Cross*, 26 Law J. Rep. (N.S.) M.C. 201; 2 Hurl. & N. 354.

And where a writ of *habeas corpus* was granted to bring up a prisoner convicted under the Vagrant Act, the commitment stating that he had frequented, &c. a public highway, not stating it to be "a place of public resort" or adjacent thereto, and the writ proved abortive, and then a new warrant was delivered to the gaoler, and subsequently a rule nisi was granted for another writ of *habeas corpus*.—Held, that the fact of the second warrant, disclosed upon affidavit, as that warrant would have been a good return to the writ, was an answer to the rule, and the rule was accordingly discharged. *Ibid*.

A warrant of commitment being bad, a second warrant was allowed to be substituted for it as the return to a *habeas corpus*. *Ex parte Smith*, 27 Law J. Rep. (N.S.) M.C. 186: *nom. In re Smith*, 3 Hurl. & N. 227.

Upon a return to a *habeas corpus* affidavits are not admissible to shew that the offence was not committed within the jurisdiction of the Justice. *Ibid*.

On a commitment, under the 11 & 12 Vict. c. 43. s. 5, for aiding a handicraftsman in unlawfully absconding himself from his service,—*Quære*, whether it is any defence that the party charged did not know that there was no lawful excuse for the absconding; but, *semble*, that if it is so, it is a matter arising on "not guilty," and on which the magistrate's adjudication is conclusive. And the point cannot be

raised upon a warrant of commitment stating the offence of the principal sufficiently, with averment of the absence of lawful excuse, and then alleging that the prisoner aided in the commission of the said offence. *Ibid.*

HACKNEY CARRIAGE.

[Liability of Proprietor for Breach of Contract by Driver, see MASTER AND SERVANT: *Powles v. Hider.*]

HARBOUR.

[See PUBLIC BODIES.]

[The Powers of an Act, 13 & 14 Vict. c. 111, relating to the laying down of Railways at Holyhead Harbour, extended by 22 & 23 Vict. c. 60. Further Provision for Improvements in the Harbours of the Isle of Man made by 23 & 24 Vict. c. 56.]

Harbours, Docks and Piers Clauses Act.

The Ribble Navigation Act, 1853, s. 71, imposes certain river dues in respect of goods carried on the river Ribble, for every time of passing certain lines, without saying by whom they are to be paid. The Harbours, Docks and Piers Act, 1847, which is incorporated with the special act, provides, by the 42nd section, that rates in respect of goods shipped or unshipped within the limits of the harbour, dock or pier shall be paid, in case the goods are to be shipped, before shipment, or in case they are to be unshipped, before removal from the premises of the undertakers:—Held, in the case of coals which A had sold to B, and contracted to deliver on board a ship to be provided by B, that even if the 42nd section of the general act be applicable to dues under the 71st section of the special act, A was not liable to the company for such dues; and that A was not the shipper of coals so as to be "owner" within the interpretation clause of the general act. *The Ribble Navigation Co. v. Hargreaves*, 25 Law J. Rep. (n.s.) C.P. 97; 17 Com. B. Rep. 385.

Semle—per *Jervis, C.J.* and *Cresswell, J.*, that the 42nd section of the general act does not apply to the 71st section of the special act. *Ibid.*

The 63rd section of the Harbours, Docks and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), which imposes a penalty upon the master of any vessel who shall without the permission of the harbour master moor the same in the entrance (or within the prescribed limits) of any dock or harbour, and who shall not remove the same upon notice, overrides and extinguishes all local and private rights of property therein. *Gardner v. Whitford*, 4 Com. B. Rep. 665.

Ramsgate Harbour Acts.

[Construction of, as to what vessels are "coasting vessels" or "fishermen." See ACTION (A) (c): *Shepherd v. Hills.*]

The first Ramsgate Harbour Act, the 32 Geo. 3. c. lxxiv., is an act of a local and personal nature. The second act relating to the harbour, the 55 Geo. 3. c. lxxxiv., is an act commonly called public, local and personal. *Shepherd v. Sharp* (Ex. Ch.), 25 Law J. Rep. (n.s.) Exch. 254; 1 Hurl. & N. 115.

By the Ramsgate Harbour Act, 32 Geo. 3. c. lxxiv., a coasting collier carrying coals is liable to pay duty on passing Ramsgate only once a year. *Moore v. Shepherd* (Ex. Ch.), 25 Law J. Rep. (n.s.) Exch. 264; 1 Hurl. & N. 125, *nom. Shepherd v. Moore.*

HAWKER.

To avoid the penalty of the Hawkers Act (50 Geo. 3. c. 41.) on the ground that the goods were exposed for sale in a "legally established market," the market must be one created by grant, and not merely a market *de facto*. *Benjamin v. Andrews*, 27 Law J. Rep. (n.s.) M.C. 310.

Section 20. of that act applies to the offences mentioned in section 17, and therefore a hawker who trades without a licence contrary to section 17. may be arrested for such offence under the powers of section 20. *Ibid.*

HEALTH.

[See PUBLIC HEALTH.]

HIGH SEAS.

[See INDICTMENT, Venue: *The Queen v. Cunningham.*]

HIGHWAY.

[The better Management and Control of the Highways in South Wales enacted by 23 & 24 Vict. c. 68.—Obstruction of Highway, see NUISANCE. Stopping up, see INCLOSURE ACTS. And see TURNPIKE.]

(A) REPAIR.

- (a) *By Local Board of Health.*
- (b) *Ratione Clausura.*
- (c) *Compulsory Repair by Parish.*

(B) FOOTWAYS.

(C) ENCROACHMENT.

(D) DEDICATION.

(E) SURVEYOR.

(A) REPAIR.

- (a) *By Local Board of Health.*

The maintenance of the highways within the district of a local board of health must be provided for by a district rate, and not by a highway rate, whether the district be or be not conterminous with an ancient parochial division. *Taff Vale Rail. Co. v. Cardiff Local Board of Health*, 8 E. & B. 585.

- (b) *Ratione Clausura.*

The liability to repair a highway *ratione clausura* is only on the occupier of the lands inclosed, and not on the owner—So held by *Erle, J.* and *Crompton, J.* By *Erle, J.*, the liability does not attach where the way is not immemorial, or where the land

inclosed has not been used for passage before the inclosure. *The Queen v. Ramoden*, 27 Law J. Rep. (n.s.) M.C. 296; E. B. & E. 949.

(c) *Compulsory Repair by Parish.*

On the hearing of a summons, under the 5 & 6 Will. 4. c. 50. s. 94, against the surveyor of a parish respecting the repair of an alleged highway, if the obligation to repair is denied by the parish, the special Sessions cannot inquire at all into the matter, but are bound, under section 95, to direct an indictment to be preferred against the inhabitants of the parish. *The Queen v. Arnould*, 27 Law J. Rep. (n.s.) Q.B. 92; 8 E. & B. 550.

Inclosure Commissioners, by their award in 1840, set out a public highway which ran in the same track with, and included but straitened and widened an ancient highway repairable by the parish. The road passed through allottable land on each side, except that on one side in one part there was an old inclosure. Before and since the award, the parish had done repairs to the road. No steps had been taken by the Commissioners for putting the road into complete repair, pursuant to the statute 41 Geo. 8. c. 109. ss. 8. and 9; nor had there been any declaration by Justices at their special sessions that the road had been fully and sufficiently formed, completed and repaired:—Held, that the parish was not indictable for not repairing this road. *The Queen v. the Inhabitants of East Hagbourne*, 28 Law J. Rep. (n.s.) M.C. 71; Bell's C.C. 135.

On appeal against a conviction for obstructing a highway, the Sessions confirmed the conviction, subject to a case; and it was brought before this Court by *certiorari*:—Held, that this Court could not take notice of any objections to the conviction not stated in the case. *The Queen v. Thomas*, 7 E. & B. 399.

The case shewed that the road in question was made by turnpike trustees, under a temporary Turnpike Act, which expired in 1848; but the whole line of turnpike road authorized by the act was never completed. That the road as made had been used by the public, and had been repaired by the parish, both before and since the expiration of the act: and the question for the Court was, if there was any evidence that it was a highway compulsorily repairable by the parish:—Held, that there was evidence of a dedication, and of an adoption by the public, and that, though the fact that the road was originally made under the Turnpike Act might explain away such evidence in fact, it did not conclusively in law rebut it. Held, also, that the General Highway Act (5 & 6 Will. 4. c. 50), s. 23, did not apply to a road made by turnpike trustees; and that, consequently, the absence of a certificate by two Justices, &c., as required by that section, did not prevent the road becoming compulsorily repairable by the parish, on a dedication by the owners of the soil in 1848. *Ibid.*

(B) *FOOTWAYS.*

The 24th section of the General Highway Act, 5 & 6 Will. 4. c. 50, which requires the parish surveyor to secure horse and foot causeways from being passed over by carriages, applies only to such causeways as are by the side of carriageways, and therefore, such surveyor is not bound by that statute to protect horse and foot causeways against carriages at

the extremities of such ways. *Ellis v. Woodbridge*, 29 Law J. Rep. (n.s.) M.C. 183.

(C) *ENCROACHMENT.*

The erection of a building within fifteen feet of the centre of a carriageway, which has been repaired by the surveyor for the six months preceding, but not on any part of the highway which has been lately used for the passage, is not an encroachment of which Justices can take summary cognizance under the 69th section of the 5 & 6 Will. 4. c. 50. *Chapman v. Robinson*, 28 Law J. Rep. (n.s.) M.C. 30; 1 E. & E. 25.

(D) *DEDICATION.*

There is an appeal, under section 105. of the 5 & 6 Will. 4. c. 50, to the Quarter Sessions from the decision of the Special Sessions, determining, under the proviso in the 23rd section, as to the utility of a highway proposed to be dedicated to the public. *The Queen v. the Justices of Derbyshire*, 27 Law J. Rep. (n.s.) M.C. 189; E. B. & E. 69.

In an action of trespass for breaking and entering the plaintiff's land, on an issue raised whether there was a highway over the *locus in quo*, there was evidence that there had been a highway over adjacent land, which was then, together with such *locus in quo*, an open common. There was evidence also that for many years the highway was obstructed by part of it being included in an inclosure, which had been illegally made on such common; and that during twenty years of that time the public had deviated a little from the line of way, by going outside such inclosure, and on the *locus in quo*. At the end of such time, and before the plaintiff became the owner of the *locus in quo*, the use of such substituted line of way was discontinued by reason of a new road having been laid out in a different direction by an adjoining land proprietor. Afterwards the obstruction to the old road was removed, and the original line of way was re-opened to the public:—Held, by *Erle, C.J.* and *Byles, J.* (*Williams, J. dissentiente*), that there was no reasonable evidence upon the above facts on which a jury might find that there was, in addition to any other highway, a highway running over the *locus in quo*. *Dawes v. Hawkins*, 29 Law J. Rep. (n.s.) C.P. 343; 8 Com. B. Rep. N.S. 343.

(E) *SURVEYOR.*

In the election of a surveyor of highways, under the statute 5 & 6 Will. 4. c. 50. s. 6, an inhabitant, occupying property liable to be assessed to the highway-rate is entitled to vote, though he has never been actually rated to the highway-rate. *Regina v. Kershaw*, 26 Law J. Rep. (n.s.) M.C. 19; 6 E. & B. 999.

An assistant surveyor, appointed by the highway board of a parish, under 5 & 6 Will. 4. c. 50. s. 18, has no duty thrown upon him of keeping accounts; and therefore is not liable to penalties for not making out and laying before the vestry and Justices in special sessions accounts, pursuant to section 44. *Adams v. Lakeman*, 27 Law J. Rep. (n.s.) M.C. 307; E. B. & E. 615.

Under sections 44. and 105, of statute 5 & 6 Will. 4. c. 50, no appeal lies, on the part of the surveyor of the highways, against an order of Justices at high-

way sessions allowing part of his accounts and disallowing the rest, and ordering him to pay over to his successor the amount disallowed. *Regina v. Justices of Leicestershire*, 8 E. & B. 557.

HOLYHEAD.

[See HARBOUR.]

HORSE-RACE.

[See GAMING, Stakeholder.]

HOUSEBREAKING.

On an indictment charging a person with breaking and entering a house and stealing certain specified chattels, he cannot, though he broke into the house with an intent to steal whatever he might find, be convicted of breaking and entering the house and attempting to steal, under the statute 14 & 15 Vict. c. 100. s. 9, if the chattels in question had been removed from the house before the prisoner went to it. *The Queen v. M'Pherson*, 26 Law J. Rep. (N.S.) M.C. 184; *Deane & B.* 197.

IMPROVEMENT ACTS.

[See PUBLIC WALKS.]

[Majority of Two-thirds of the Ratepayers of any Parish or District, duly assembled, enabled to rate their District in aid of Public Improvements for general Benefit within their District by 23 Vict. c. 30.—The building of Cottages for Labourers, Farm Servants and Artisans by the proprietors of entailed Estates in Scotland facilitated by 23 & 24 Vict. c. 95.]

(A) WIDTH OF STREETS.

(B) UNQUALIFIED PERSON ACTING AS COMMISSIONER.

(A) WIDTH OF STREETS.

By the Manchester Improvement Act, 8 & 9 Vict. v. cxi. s. 29, no street is to be made of less width than 24 feet; and by section 30. "it shall not be lawful to build within the borough any houses with their fronts facing each other which shall be separated from each other by a space of less than 24 feet wide":—Held, that this section applies to prohibit the erection in a street in the borough of two houses at the same time, with their fronts facing each other, within the prescribed distance, and does not affect the erection of buildings not in a street. *The Queen v. Sidebotham*, 28 Law J. Rep. (N.S.) M.C. 189; *Bell's C.C.* 171.

(B) UNQUALIFIED PERSON ACTING AS COMMISSIONER.

The 6th section of the 3 Will. 4. c. lxviii. (for improving the township of Birkenhead), provides that no person shall be capable of acting as a Commissioner in the execution of that act, unless he shall have the qualification thereby required. Section 10. imposes a penalty of 50*l.* on any person who shall act as a Commissioner without being qualified. The

1 Vict. c. xxxiii. repealed the provisions of the 3 Will. 4. c. lxviii., as to the appointment, number, mode of election and qualification of Commissioners. Section 2, after defining the number of the new Commissioners and transferring to them the powers of the former Commissioners, enacts, "that all provisions in the former act contained in reference to the Commissioners thereby appointed shall be held to apply to the Commissioners to be appointed under this act and the acts of such Commissioners, in the same manner as if the same were re-enacted and repeated in that act (except so far as the same are repealed by or are inconsistent with its provisions), and that the two acts shall be construed together as one act." Section 7. requires a different qualification, but there is no clause in the 1 Vict. c. xxxiii. which in terms imposes a penalty on persons acting as Commissioners without such qualification:—Held, that a person who acted as a Commissioner under the 1 Vict. c. xxxiii. without being qualified as required by that act, was liable to the penalty imposed by the 3 Will. 4. c. lxviii. *Gough v. Hardman*, 5 Hurl. & N. 112.

INCLOSURE ACTS.

[The Inclosure Acts amended and explained by 20 & 21 Vict. c. 30.—Provisions of the Acts for the Inclosure, Exchange, and Improvement of Land amended and extended by 22 & 23 Vict. c. 43.—The Inclosure of certain Lands in pursuance of a Special Report of the Inclosure Commissioners for England and Wales, authorized by 19 & 20 Vict. c. 106.—The Inclosure of certain Lands in pursuance of a Special Report of the Inclosure Commissioners for England and Wales authorized by 20 & 21 Vict. c. 20.]

[Rights of Sporting over Inclosed Lands, see GAME; (A) Manorial Rights. And see COMMON—CUSTOM AND PRESCRIPTION (A).]

(A) RIGHT TO MINES AND MINERALS.

(B) RIGHT TO SUPPORT FOR SURFACE LAND FROM MINERALS BELOW.

(C) POWER OF COMMISSIONERS AS TO PUBLIC ROADS AND FOOTWAYS.

(A) RIGHT TO MINES AND MINERALS.

An Inclosure Act directed allotments for public and specific purposes, and that one-fifth should be allotted to the lord of the manor for his interest in the "soil," and that the remainder of the common lands should be divided among the commoners to be held in severalty. And it was declared, that the lord's seigniorial rights were not to be prejudiced, except the right to the "soil," and that the lord might thereafter enjoy all rents, heriots, &c., "and all mines, minerals, quarries and other royalties" as if the act had not been passed:—Held, that the lord retained his rights to the mines and minerals under the lands allotted to the commoners in severalty. *Pretty v. Solly*, 26 Beav. 606.

(B) RIGHT TO SUPPORT FOR SURFACE LAND FROM MINERALS BELOW.

An Inclosure Act provided that the lord of the manor should have power to enter upon the waste

lands allotted thereby, and dig for and get minerals, and erect works for that purpose, making satisfaction to the persons whose allotments should be thereby damaged or injured. Another clause provided that the lord should upon no account open, dig, or carry on any work on the surface within forty yards of any dwelling-house, nor get any coal under any dwelling-house within the perpendicular distance of forty yards from the foundation of any such building. And power was given to persons entitled to dwelling-houses to inspect the mines, in order to see whether works were carried on within the prohibited distance:—Held, that the effect of this was to give the lord a right of entering upon the surface of the allotments, making compensation for surface damage, subject to an absolute prohibition against working at all within forty yards of a dwelling-house, but that it left the common law right of an owner of the surface, to have the support of the minerals below, untouched; and, therefore, that the lord was liable to an action for working the mines so as to cause the surface to subside, although the works were carried on in a proper and usual manner, and not within the prohibited distance. *Roberts v. Haines* (Ex. Ch.), 27 Law J. Rep. (N.S.) Exch. 49 [reported amongst the Exchequer Cases by mistake]; *nom. Haines v. Roberts*, 7 E. & B. 625: affirming the judgment below, 25 Law J. Rep. (N.S.) Q.B. 353; 6 E. & B. 643.

Commissioners, under an Inclosure Act, made an award in 1770 allotting a certain portion of surface land to P, and the minerals underneath the same land to H. The award executed by P and other landowners, but not by H, contained a covenant by the several proprietors, parties thereto, stating "that the said mines so allotted may for ever after be held and enjoyed by the persons to whom the same are assigned, according to the true intent of this award, and be worked and gotten accordingly without interruption of any other persons parties thereto, and those claiming under them respectively, who for the time being may be owners of the surface under which such mines are situate, and without being subject or liable to any action for damage on account of working the same, by reason that the surface may be rendered uneven and less commodious to the occupiers thereof by sinking in hollows or being otherwise defaced and injured; the said proprietors having agreed with each other to accept their respective allotments, subject to any inconvenience or incumbrance which may arise from the cause aforesaid." Ever since the date of the award the surface had been occupied by P and his assignees, whose interests had vested in the plaintiff, and the mines by H and his assignees, who were now represented by the defendant. Houses were built upon the land of P after the award. After they had been standing more than twenty years, the surface land and houses were injured by the subsidence of the soil, caused by the working by the defendant of the underlying minerals. The working had been carried on without any negligence on the part of the defendant, and according to the custom of mining in the neighbourhood:—Held, by the Court (*Cresswell, J. and Watson, B. dissentientibus*), that the plaintiff had acquired the title to the surface soil with only a qualified right of support, and subject to the covenant, and could not, therefore, maintain an action against the defendant for the damage caused to the surface by the working of the mines in the

usual and proper way. *Rowbotham v. Wilson* (Ex. Ch.), 27 Law J. Rep. (N.S.) Q.B. 61; 8 E. & B. 123: affirming the judgment below, 25 Law J. Rep. (N.S.) Q.B. 362; 6 E. & B. 593.

Held, also, in the Court below, that, under the circumstances, no fresh easement giving a right of action had been acquired, in respect of the houses that had been erected upon the land, for more than twenty years before the injury complained of. *Ibid.*

(C) POWER OF COMMISSIONERS AS TO PUBLIC ROADS AND FOOTWAYS.

In 1818 certain Inclosure Commissioners were empowered by a local act of parliament to stop up any public road or footpath through any part or parts of the land in the parish of T, subject to appeal to the Quarter Sessions. The Commissioners made an order for stopping up a footpath in the parish of T, which was continued as a footpath into the parish of S. By the act of stopping up the path in T the residue of the footpath in S became useless as a public thoroughfare:—Held, that the Inclosure Commissioners had power to stop up so much of the footpath as lay in the parish of T, and that the remedy of the parties injured by the order was by appeal. And per *Alderson, B.*, that that part of the footway situated in the parish of S was not destroyed as a footway, but remained as such although left as a *cul-de-sac*. *Gwyn v. Hardwicke* (Ex. Ch.), 25 Law J. Rep. (N.S.) M.C. 97; 1 Hurl. & N. 49.

Gate Fulford and Water Fulford were townships in the parish of Fulford Ambo; and the whole of Gate Fulford and part of Water Fulford constituted the manor of Fulford. The township of Gate Fulford was indicted for non-repair of a road; and the indictment charged the liability as resulting from an Inclosure Act and an award. The Inclosure Act directed that Commissioners by award should divide and allot certain lands in the manor of Fulford, which (it was contended) were shewn by the context to be all in the township of Gate Fulford, and should set out the public and private roads in the lands to be divided and allotted; and that the public road so set out should be repaired by the township of Gate Fulford. The award set out some roads which it termed public highways and roads, some which it termed public carriage roads, and others which it termed private carriage roads. It then set out the road in question, which it termed a "carriage road" simply, and directed that it should be repaired by the inhabitants of "the township of Fulford aforesaid," without specifying which township was meant. Another road, also termed simply a "carriage road," appeared to be set out as a private road. The jury found a verdict for the Crown, subject to the opinion of this Court:—Held, that, as against the township, it sufficiently appeared, from the award, that the road in question was made a public road. *Rapina v. Gate Fulford*, Dears. & B. 74.

The road in question ran through what was now understood to be the township of Water Fulford. Evidence was given that the township of Gate Fulford had, on various occasions, repaired the road, but had also repaired roads in the township which were not public roads:—Held, that, assuming it to be true (as was contended) that the Commissioners had power to award only as to lands in Gate Fulford, the Court would presume that the lands on

which the road was constructed lay, at the time of making the award, in Gate Fulford, the evidence being that from which a jury, if they had been asked the question, might have inferred this. *Ibid.*

Agreed, that if it had appeared that the road so set out had, as to any part, been on land over which the power of the Commissioners did not extend, the award would have been bad as to the whole road. *Ibid.*

INCOME TAX.

[See *REVENUE.*]

INCUMBERED ESTATES ACTS.

[The Period for applying for a Sale under the Acts for facilitating the Sale and Transfer of Incumbered Estates in Ireland extended, and said Acts amended, by 19 & 20 Vict. c. 67.]

INDEMNITY.

[See *CONTRACT* (A), *Barker v. Allan*, *ante*, p. 160.]

[Such persons in the United Kingdom as have omitted to qualify themselves for Offices and Employments indemnified, and the Time limited for those Purposes respectively, extended, by 19 & 20 Vict. c. 73.—Persons in the United Kingdom having omitted to qualify themselves for Offices and Employments indemnified, and the Time limited for those Purposes respectively, extended, by 21 & 22 Vict. c. 54.—Certain Persons who have formed a voluntary Association for the Disposal of Works of Utility and Ornament by Chance or otherwise as Prizes indemnified by 21 & 22 Vict. c. 102.—Persons in the United Kingdom who have omitted to qualify themselves for Offices and Employments indemnified, and the Time limited for those Purposes respectively, extended, by 22 Vict. c. 15.—Persons in the United Kingdom who have omitted to qualify themselves for Offices and Employments indemnified, and the Time limited for those Purposes respectively, extended, by 23 & 24 Vict. c. 60.]

INDIA.

[The better Government of India provided for by 21 & 22 Vict. c. 106.—The 22 & 23 Vict. c. 26, makes further Provision for the Regulation of the Trade with the Indians, and for the Administration of Justice in the North-Western Territories of America.—The Act for the better Government of India amended by 22 & 23 Vict. c. 41.—Doubts removed as to the Authority of the Senior Member of the Council of the Governor-General of India in the Absence of the President by 23 & 24 Vict. c. 87.—The Management of East India Stock, and of the Debts and Obligations of the Government of India, at and by the Bank of England provided for by 23 & 24 Vict. c. 102.—The Secretary of State in Council

of India enabled to raise Money in the United Kingdom for the Service of the Government of India by 23 & 24 Vict. c. 130.]

INDICTMENT.

[The Prevention of Vexatious Indictments for certain Misdemeanors enacted by 22 & 23 Vict. c. 17.]

- (A) FORM AND CONSTRUCTION.
- (B) VENUE.

(A) FORM AND CONSTRUCTION.

The prisoner stole some iron from a canal, in which it was found when the canal was in process of being cleaned. In an indictment against him for stealing the iron, it was held, that the proprietors of the canal had a sufficient property in the iron to justify the alleging the property to be in them. *The Queen v. Rowe*, 28 Law J. Rep. (n.s.) M.C. 128; Bell's C.C. 93.

In an indictment to a count against A for stealing goods, there was added a count charging that A the "goods aforesaid so as aforesaid feloniously stolen" feloniously did receive, knowing them to have been stolen. The jury acquitted A of stealing, but found him guilty on the second count:—Held, that the conviction was good, as the Court, to support the indictment, would, on the second count, reject as irrelevant the averment implied from the words "so as aforesaid," that the goods were stolen by A. *The Queen v. Huntley*, 29 Law J. Rep. (n.s.) M.C. 70; Bell's C.C. 238.

(B) VENUE.

The Bristol Channel between the shores of Glamorganshire and Somersetshire, where it is about ten miles across, and where the one shore is visible from the other on a clear day, is within the bodies of the counties by which it is bounded. Therefore, where a felony was committed on board a ship in this part of the Bristol Channel, about three quarters of a mile from the Glamorganshire shore, it was held that the offence was committed within the body of the county of Glamorgan. *The Queen v. Cunningham*, 28 Law J. Rep. (n.s.) M.C. 66; Bell's C.C. 72.

An indictment charged three prisoners with felonious wounding with intent to do grievous bodily harm; the jury found two guilty of the felony alleged, and the third guilty of the misdemeanor of unlawfully wounding: the conviction was held good. *Ibid.*

INDUSTRIAL AND PROVIDENT SOCIETIES.

[See *FRIENDLY AND OTHER SOCIETIES—PARTIES TO ACTIONS.*]

[The 17 & 18 Vict. 25. amended by the 19 & 20 Vict. c. 40.]

INDUSTRIAL AND REFORMATORY SCHOOLS.

[Further Provision for rendering Reformatory and Industrial Schools in Scotland more available for the Benefit of vagrant Children made by 19 & 20 Vict. c. 28.—The Care and Education of vagrant, destitute, and disorderly Children better provided for, and Industrial Schools extended, by 20 & 21 Vict. c. 48.—The Establishment and Extension of Reformatory Schools in England promoted by 20 & 21 Vict. c. 55.—The Industrial Schools Act, 1857, amended by 23 & 24 Vict. c. 108.]

INFANT.

[The 18 & 19 Vict. c. 43. enabling Infants, with the Approbation of the Court of Chancery, to make binding Settlements of their Real and Personal Estate on Marriage, explained by the 23 & 24 Vict. c. 83.]

[See INDUSTRIAL AND REFORMATORY SCHOOLS—PARENT AND CHILD.]

- (A) MAINTENANCE.
- (B) SETTLEMENT ON MARRIAGE.
- (C) DISPOSITION OF PROPERTY.
- (D) CONTRACTS.
- (E) GUARDIAN.
- (F) CUSTODY OF.
- (G) WARD OF COURT.
- (H) ACTIONS BY.

(A) MAINTENANCE.

A B, after his brother's bankruptcy, took the brother's children into his family and maintained them; after A B's decease,—Held, that his widow and executrix could not retain the sums expended for maintenance out of a legacy given to the children by their grandfather. Held, also, that she could retain the premium paid by A B to apprentice one of his nephews out of the legacy, to which, at the time the premium was paid, the nephew was contingently entitled. *Worthington v. M'Craw*, 26 Law J. Rep. (N.S.) Chanc. 286; 28 Beav. 81.

(B) SETTLEMENT ON MARRIAGE.

Upon a petition under the 18 & 19 Vict. c. 43. for enabling infants, with the approbation of the Court of Chancery, to make settlements of their property on marriage, the Court will not direct an inquiry as to the propriety of the proposed marriage. *In re Dalton*, 25 Law J. Rep. (N.S.) Chanc. 751; 6 De Gex, M. & G. 201; 3 Sm. & G. 331.

Whether on an application under the 18 & 19 Vict. c. 43. the Court will direct an inquiry, or require evidence as to the propriety of the proposed marriage? *Re Catherine Strong*, 26 Law J. Rep. (N.S.) Chanc. 64.

On the marriage between a minor of seventeen and a widow of thirty-two, possessed of 1,000*l.* in business, he covenanted by settlement to pay 1,000*l.* to a trustee, upon trust for the separate use of the lady for life, and if she should die in his lifetime, for the children of the lady by a former marriage. After the marriage the husband possessed himself of the

stock of the wife's business, and carried it on till her death, seven years afterwards. The trustee demanded payment of the 1,000*l.*, and on the husband refusing to pay, he filed a bill on behalf of the children of the former marriage. The husband set up as his defence that he was an infant, and that the wife knew the fact, at the time of the marriage. The evidence proved the infancy, and an assertion by the husband to the wife's solicitor that he was of age, but it also proved that the wife knew of the infancy. One of the Vice Chancellors decreed that, on the grounds of misrepresentation and acquiescence, the infancy was no defence, and made a decree for the plaintiff. On appeal,—Held, reversing that decision, that the bill must be dismissed, for that the case upon the evidence must be taken as if the fact of infancy had been stated in the settlement; that the rights of the husband must, as to the ground of acquiescence, be taken to be the same as on the day after his marriage; that to deprive an infant of the privilege of infancy, more is necessary than shewing he made a false representation, for it must be proved that the party to whom it is made was deceived, and that contracts made with an infant, known to be so, are binding on those who enter into them, for infancy is a legal privilege, and not to be broken in upon on slight grounds. *Nelson v. Stocker*, 27 Law J. Rep. (N.S.) Chanc. 760; 4 De Gex & J. 458.

(C) DISPOSITION OF PROPERTY.

An infant, without shewing that he had ever been in possession of an estate, filed a bill against a party (who had been in possession under an alleged agreement with the plaintiff's ancestor to purchase) to obtain a declaration of his rights and for an account of the rents.—Held, that he must first establish his title at law, and notwithstanding a general allegation that the defendant admitted the plaintiff's legal title, a demurrer to the bill was allowed. *Crowther v. Crowther*, 26 Law J. Rep. (N.S.) Chanc. 702; 28 Beav. 305.

Held, also, that the plaintiff was not entitled to treat the defendant as a bailiff accountable to him, his entry, though made during infancy, being under an alleged agreement to purchase the plaintiff's interest in the estate. *Ibid.*

A party in possession of an infant's estate under a voidable deed, treated as his bailiff, and made to account for the rents for more than six years before the filing of the bill. *Manney v. Williams*, 22 Beav. 452.

(D) CONTRACTS.

A sold goods to an infant, and delivered them to B for the purpose of being worked up by him for the vendee. The vendee afterwards, and after a portion of the goods had been used in performance of the work, went with A to B's shop, and desired that the remainder might be returned to A: B thereupon said, "I will return them or pay for them" at a price then agreed upon.—Held, that it was competent to A thus to rescind the contract without writing; and that, supposing the agreement so to do was one which the infant himself might have repudiated, it was not competent to B to object that the rescission was void, as not being for the infant's benefit. *Douglas v. Watson*, 17 Com. B. Rep. 685.

An infant engaged in partnership, for entering

into which he paid 1,500*l.* which he borrowed of his mother for the purpose. Before he attained his majority he signified his dissent from the contract. The parties with whom he acted as partner became bankrupt, and afterwards the infant attained twenty-one, and repudiated the contract. He sought to prove against the bankrupts' estate for the 1,500*l.*, but the proof was rejected in the court of one of the Commissioners:—Held, on appeal, that the rejection was proper, for that he could not have recovered back the money, either before or after he came of age, from the bankrupts had they remained solvent. *Ex parte Taylor, in re Burrows*, 25 Law J. Rep. (N.S.) Bankr. 35; 8 De Gex, M. & G. 254.

O K, one of two partners, executed, together with his partner and another person, a joint and several bond, to secure money lent to the partnership. As part of the security, he agreed to effect a policy of assurance on his life, and for that purpose signed a declaration that he was of the age of twenty-two years. O K was, in fact, an infant; and after he attained twenty-one he became bankrupt. The lenders of the money were admitted to prove against O K's separate estate; and, on appeal,—Held, that the fraudulent misrepresentation of O K, the bankrupt, as to age, rendered him, although an infant, liable in equity to the debt, and the appeal was dismissed. *Ex parte The Unity Joint-Stock Mutual Banking Assoc., in re King*, 27 Law J. Rep. (N.S.) Bankr. 33; 3 De Gex & J. 63.

An infant on coming of age may ratify securities given by him during his minority without receiving any further consideration, but he must, on the occasion, have full knowledge and complete information respecting the transaction. *Kay v. Smith*, 21 Beav. 522.

The plaintiff had during his minority accepted bills to a considerable amount, which he handed to A, who raised money on them from B and C in whose hands the bills had remained. Immediately on coming of age the plaintiff, in the belief, brought about by the misrepresentations of A, B and C, that the bills were in circulation and that they had bought them up for the plaintiff, gave to B and C securities for the amount of the bills in their hands. The bills were set aside, unconditionally, on the ground of the misrepresentation and the want of due information. *Ibid.*

(E) GUARDIAN.

Observations as to the duty of guardians to watch over their wards. *Kay v. Johnston*, 21 Beav. 536.

(F) CUSTODY OF.

The Court of Chancery cannot decide upon the custody of infants simply with reference to what is most for their benefit, and cannot interfere with the rights of a father, unless he so conducts himself as to render it essential to the safety and welfare of the children in some serious and important respect, either physically, intellectually or morally, that they should be removed from his custody. *In re Curtis*, 28 Law J. Rep. (N.S.) Chanc. 458.

Upon petition by a wife for the custody of her children, after having obtained a decree of judicial separation against her husband in the Matrimonial Court on the ground of cruelty, this Court held, upon the affidavits and circumstances brought forward, that there were no grounds for attributing such

undue harshness, severity or cruelty to the husband, with regard to his children, as to render him unfit to have the management of them, and dismissed the petition. *Ibid.*

(G) WARD OF COURT.

[*Martin v. Forster*, 7 Law J. Dig. 335; 7 De Gex, M. & G. 98.]

A female infant ward of court entitled to real and personal estate was married without the leave of the Court, and the Court ordered a settlement to be made excluding the husband, and gave the wife a power of appointment. The settlement was executed by her after she attained twenty-one, but it contained no conveyance, and was not acknowledged by her pursuant to the statute 3 & 4 Will. 4. c. 74. The wife afterwards became entitled to more real estates, and a further settlement was ordered; but she died before it was affirmed, having made a will in exercise of the power in favour of W W. The owner of the newly-acquired real estate had during his life covenanted to charge a sufficient portion of it with an annuity of 200*l.* The heir-at-law of the ward claimed all her real estate, and, as to that lastly acquired, that the covenant to charge the annuity should be satisfied out of the covenantor's personal estate, if sufficient; and the Court, affirming a decree of the Master of the Rolls, held, in favour of the heir-at-law, first, that the real estate passed to the heir, for that the power of appointment was not validly created, the settlement not having been acknowledged by the wife; and, secondly, that the personal estate was the primary fund for the payment of the annuity. *Field v. Moore and Field v. Brown*, 25 Law J. Rep. (N.S.) Chanc. 66; 7 De Gex, M. & G. 691; 24 Law J. Rep. (N.S.) Chanc. 161; 19 Beav. 176.

A power of appointment over her real estate can be reserved to an adult woman by an ante-nuptial agreement for a settlement, but cannot be so by a post-nuptial settlement. *Ibid.*

A female infant cannot contract, nor can her parents or guardians for her, for a power of appointment to her over her real estate; nor has the Court of Chancery any greater power to contract for its infant wards as to their real estate. No valid settlement of a female infant's real estate can be made upon her marriage by virtue of any agreement by her, or her parents or guardians, or by the authority of this Court. *Ibid.*

Upon the marriage of two infants, one being a ward of Court, the Court has no power to compel a settlement to be made by either of them during minority, even of the infant ward's personal estate. *Ibid.*

A Roman Catholic gentleman married a lady of the same persuasion. A son was born a few days after the death of the father. The child was baptized in the Roman Catholic faith, and was for five years brought up by his mother as a member of that Church. The mother then became a member of the Church of England, and for four years, without any proved remonstrance on the part of the husband's relations, who were all Roman Catholics, she brought the child up as a Protestant. The husband's relations filed a bill to make the infant a ward of Court, and to have the paternal uncle appointed his guardian. The Master of the Rolls, without seeing

the boy, who was then ten years old, appointed his mother sole guardian; and, on appeal, the Lords Justices, after having an interview with the infant, affirmed the decision. *Stourton v. Stourton*, 26 Law J. Rep. (N.S.) Chanc. 354.

In determining the course of education of an infant ward of the Court, the Court will as a general rule direct the infant to be brought up in the religion of his father, unless it seems reason to consider that the benefit of the infant will be sacrificed. Where the father has not expressed any wish on the subject, and the child has been educated in a faith different from that of his father, and there has been delay in applying to the Court, during which the child has received strong religious impressions contrary to those of his father, the Court will not disturb them. *Ibid.*

The Court will examine the infant in such a case, in order to ascertain, not the wishes of the infant, but what will be for its benefit, and act accordingly. *Ibid.*

Money belonging absolutely to a young lady under age having been paid into court under the Trustees' Relief Act, and an order made upon petition under that act for payment of part of the dividends to her testamentary guardian for her maintenance, in pursuance of an order for an allowance for her maintenance made upon an application at chambers:—Held, that the infant was made thereby a ward of Court. *In re Hedge's Settlement*, 3 Kay & J. 218.

(H) ACTIONS.

The plaintiff, a child of five years old, was under the care of his grandmother, who purchased a ticket for herself and another for him, from A to B on the defendants' railway. While crossing the line at A, to be ready for their train, they were both knocked down and injured by another train. The accident was partly owing to the defendants' negligence, but there was also such negligence on the part of the grandmother as would have prevented her from recovering from the defendants:—Held, that there was a complete identification of the plaintiff with the grandmother, and that by reason of her negligence the action in his name could not be maintained. *Waite v. the North-Eastern Rail. Co.*, 27 Law J. Rep. (N.S.) Q.B. 417; E. B. & E. 719.

Where an attorney had been employed by the father of an infant to bring an action for a personal injury to the infant, on the understanding that in the event of his recovering damages he would not charge extra costs, and he did recover damages:—Held, that the infant, by his father, could sue the attorney for the damages, and that the attorney could not detain any part for extra costs, even although, through defect in plaintiff's evidence in the original action, and other circumstances, such costs had turned out greater in amount than could have been expected. *Collins v. Brook*, 28 Law J. Rep. (N.S.) Exch. 143; 4 Hurl. & N. 270: affirmed by the Exchequer Chamber, 29 Law J. Rep. (N.S.) Exch. 255; 5 Hurl. & N. 700.

INFERIOR COURT.

[See Costs (B) (c).]

[The acts relating to the county courts amended by 19 & 20 Vict. c. 103.—An omission as to certain

salaries in a Schedule to the Act to amend the Acts relating to County Courts, supplied by 20 & 21 Vict. c. 36.—Re-arrangement of the districts of the county courts among the Judges thereof enacted by 21 & 22 Vict. c. 74.—The 32nd section of the act "for the more easy recovery of small debts and demands in England" repealed, and further provision made in lieu thereof, by 22 Vict. c. 6; 27 Law J. Stat. 9.—Abolition of manor courts and the better recovery of small debts in Ireland enacted by 22 Vict. c. 14.—Power of imprisonment for small debts exercised by the county court Judges limited by 22 & 23 Vict. c. 57.]

(A) JUDGES: AUTHORITY OF DEPUTY JUDGE.

(B) OFFICERS.

- (a) *Vacation of Office.*
- (b) *Duties and Liabilities.*

(C) JURISDICTION OF THE COURT.

- (a) *When concurrent with the Superior Courts.*
- (b) *Title to Land in question.*
- (c) *Whole Cause of Action within the District.*
- (d) *Residence to acquire Jurisdiction.*
- (e) *Legacies.*
- (f) *Friendly Societies: Disputes between Members and Officers.*
- (g) *Insolvent: Creditors' Petition.*
- (h) *To commit, after Discharge under Insolvent Act.*
- (i) *Prohibition.*

(D) PRACTICE: NEW TRIAL.

(E) COSTS: JURISDICTION TO AWARD.

(F) AUTHORITY OF THE SUPERIOR COURTS.

- (a) *Mandamus.*
- (b) *Rule.*
- (c) *Staying Proceedings.*

(G) REMOVAL OF CAUSES.

(H) APPEAL TO THE SUPERIOR COURTS.

- (a) *When it lies.*
- (b) *Stating, Signing, and Altering Case.*
- (c) *Notice and Security for Costs.*

(I) LANDLORD'S RIGHTS ON SEIZURE OF GOODS.

(K) ABUSE OF PROCESS.

(A) JUDGES: AUTHORITY OF DEPUTY JUDGE.

A plaint was heard before a deputy Judge of a county court, and he, after the death of the Judge whose deputy he was, sent a written statement of his decision to the late Judge's successor, who received and entered it as his judgment. The Court (without expressly deciding that the judgment so entered was void) granted a rule nisi for a prohibition against proceeding upon it, in order to give the parties an opportunity of applying to the new Judge for a rehearing. *In re Hoey v. M'Farlane*, 4 Com. B. Rep. 718.

(B) OFFICERS.

- (a) *Vacation of Office.*

Under an appointment, pursuant to 9 & 10 Vict. c. 95. s. 25, of two, to execute jointly the office of clerk to a county court, the death of one does not vacate the office as to the other. *The Queen v. Wake*, 27 Law J. Rep. (N.S.) Q.B. 11; 8 E. & B. 384.

(b) *Duties and Liabilities.*

The assistant clerk of a county court is "an officer of the court" within the meaning of the 29th section of the 9 & 10 Vict. c. 95, as explained by the 18 & 14 Vict. c. 61; and is therefore liable to the penalty imposed by section 30, if he practises as an attorney in the court. *Ackroyd v. Gill*, 25 Law J. Rep. (N.S.) Q.B. 111; 5 E. & B. 808.

An application by the high bailiff of a county court to a deputy Judge of such Court, for a warrant, under the statute 14 & 15 Vict. c. 52. s. 1, and the obtaining and issuing of such warrant by the high bailiff, is not a proceeding in the county court, within the statute 9 & 10 Vict. c. 95. ss. 29. and 30, by which it is made penal for the officers of the county court to be directly or indirectly engaged as attorney or agent for any party in any proceeding in that court. *Warden v. Stone*, 26 Law J. Rep. (N.S.) Q.B. 200; 7 E. & B. 603.

Upon an interpleader summons, under 9 & 10 Vict. c. 95. s. 118, the Judge of the county court had decided that the goods seized were the goods of the claimant, but no complaint had been made before him as to the breaking and entering the house of the claimant. The claimant afterwards brought an action against the bailiff of the county court for breaking and entering his house and taking his goods, under colour of a warrant of execution, and recovered damages; whereupon the bailiff applied for a rule to stay the proceedings, upon the ground that a claim had already been made and adjudicated upon in respect of the same cause of action: the Court refused to interfere. *Mercer v. Stanbury*, 2 Hurl. & N. 155, note.

(C) JURISDICTION OF THE COURT.

(a) *When concurrent with the Superior Courts.*

[*Lake v. Butler*, 5 E. & B. 92; 6 Law J. Dig. 338.]

Messrs. P & Co. kept a receiving-house in U. Street, within the jurisdiction of the County Court of S, and received goods there, as agents for the defendants and other railway companies, to be transmitted by their respective railways, and gave receipts in the names of the companies:—Held, that the defendants did not carry on business within the jurisdiction of the County Court of S, under the 128th section of the County Courts Act, 9 & 10 Vict. c. 95. *Minor v. the London and North-Western Rail. Co.*, 26 Law J. Rep. (N.S.) C.P. 39; 1 Com. B. Rep. N.S. 325.

Where the plaintiff carries on business in the district of one, and the defendant dwells or carries on business in that of another of the metropolitan county courts, but the plaintiff dwells more than twenty miles from the defendant, the plaintiff has the option of suing in the superior Courts, under the 9 & 10 Vict. c. 95. s. 128, notwithstanding the 18th section of the 19 & 20 Vict. c. 108. *Waterlow v. Dobson*, 27 Law J. Rep. (N.S.) Q.B. 54; 8 E. & B. 585.

By the City of London Small Debts Court Act, 1852, (15 & 16 Vict. c. lxxvii.) s. 118, all actions which before the act might be brought in the superior Courts, where the plaintiff dwells more than twenty miles from the defendant, may be brought in the superior Court, at the election of the plaintiff. The plaintiff, a member of parliament, had a house

in London (within twenty miles of the defendant), in which he resided only for about three months in the year, in order to attend in parliament, and he resided chiefly the rest of the year at his iron-works in the country (more than twenty miles from the defendant), and he was residing there at the time when he brought an action in this Court, for a cause within the jurisdiction of the City Small Debts Court, in which he recovered not more than 50*l.*:—Held, that the plaintiff "dwelt" in London, and therefore did not dwell more than twenty miles from the defendant, and that the defendant was entitled, under section 119, to enter a suggestion to deprive the plaintiff of costs. *Bailey v. Bryant*, 28 Law J. Rep. (N.S.) Q.B. 86; 1 E. & B. 340.

The word "dwells," in section 128. of the 9 & 10 Vict. c. 95, which provides that actions may be brought in the superior Court where the plaintiff dwells more than twenty miles from the defendant, refers to the plaintiff's ordinary dwelling; and a plaintiff temporarily in custody in a gaol at the time of action brought does not dwell there within the meaning of that section. *Dunston v. Paterson*, 28 Law J. Rep. (N.S.) C.P. 97; 5 Com. B. Rep. N.S. 267.

Where the Judge, before whom an action, which might have been brought in the county court, is tried, is of opinion that there was not sufficient ground for bringing it in the superior Court, and therefore refuses to make an order, under the 15 & 16 Vict. c. 54. s. 4, entitling the plaintiff to costs, the Court will not review his decision unless it is satisfied that he has acted on an erroneous view of the facts or the law of the case. *Ibid.*

The plaintiff had two permanent dwelling-places, one situate less, the other situate more, than twenty miles from the defendant; at the time of action brought in the superior Court, for a cause within the jurisdiction of the county court, he was residing with his family at the latter:—Held, that the superior Court had concurrent jurisdiction with the county Court within the meaning of the 9 & 10 Vict. c. 95. s. 128, and that the plaintiff was entitled to his costs under the 15 & 16 Vict. c. 54. s. 4; differing from the decision of the Court of Queen's Bench in *Bailey v. Bryant*. *Butler v. Ablewhite*, 28 Law J. Rep. (N.S.) C.P. 292; 6 Com. B. Rep. N.S. 740.

Three years before action brought, the plaintiff hired a house at Margate, and from that time had his wife, family and servants permanently established there, he and his family occupying that house as their dwelling and home. He at the same time carried on business as a law-stationer in London, and occupied three houses there. He was in the habit of passing three or four days of each week in London, occupying two rooms in one of the houses, which rooms had been fitted up for his residence while staying in town. He always absented himself from London, and resided with his family at Margate whenever his business would allow. In the winter and early spring he was usually in London four days in each week; during the rest of the year, he was usually in Margate three and occasionally four days in the week. On the day upon which the action was brought he was in London; but when the writ was issued he was on his way to Margate. The defendant dwelt in London, more than twenty miles from Margate. At the trial, the jury gave the plaintiff a

verdict for 12*l.*:—Held, that the plaintiff dwelt at Margate, and not in London, and, therefore, that he was entitled to his costs in the action. *Kerr v. Haynes*, 29 Law J. Rep. (n.s.) Q.B. 70.

The plaintiff had two permanent places of residence,—one in London, where the defendant dwelt, and where the cause of action accrued,—the other more than twenty miles from London. At the time of bringing the action, the plaintiff was living with his family at his country residence:—Held, a case of concurrent jurisdiction, and that the plaintiff was entitled to costs under the 15 & 16 Vict. c. 54. s. 4. *Butler v. Ablewhite*, 5 Com. B. Rep. N.S. 740.

(b) *Title to Land in Question.*

The county court, or two Justices, have exclusive jurisdiction to try an action for the recovery of money paid by pariah authorities for the abatement of a nuisance, and the costs thereof, under the 11 & 12 Vict. c. 123. s. 3, the Nuisances Removal Act, although the title to land may be in question. *The Guardians of the Poor of Hertford Union v. Kimpson*, 25 Law J. Rep. (n.s.) M.C. 41; 11 Exch. Rep. 295.

On a plaint in the county court, brought by a landlord against his tenant for the recovery of a small tenement (under 19 & 20 Vict. c. 108. s. 50), where the defendant sets up as a defence that he has given up possession to a third party, who made a *bond fide* claim, the Judge ought not to refuse to hear the case on the ground that title comes in question, until he has ascertained and decided that the defendant gave up possession by compulsion; because if he gave it up voluntarily, he would be estopped from setting up the third person's title against his landlord's, and the Court would have jurisdiction. *In re Emery v. Barnett*, 27 Law J. Rep. (n.s.) C.P. 216; 4 Com. B. Rep. N.S. 423.

A was found taking sand from premises in the occupation of B (under a lease), and was given into custody by B on a charge of stealing it. On appearing before a magistrate, A denying that B had any right to the land, the charge was dismissed as involving a question of title. A afterwards sued B in the county court for false imprisonment. A prohibition having issued under a Judge's order,—the Court set it aside, on the ground that no question of title could arise on the hearing. *Everysfield v. Newman*, 4 Com. B. Rep. N.S. 418.

(c) *Whole Cause of Action within the District.*

The defendant, by a letter written and posted out of the district of a particular county court, ordered the plaintiff to do certain work; the letter was received and the work done by the plaintiff within the district. A plaint having been issued from that county court to recover the price of the work,—Held, that the whole cause of action arose within the district, and the county court had, therefore, jurisdiction, under the 9 & 10 Vict. c. 95. s. 60. *In the matter of a plaint of Newcombe v. De Roos*, 29 Law J. Rep. (n.s.) Q.B. 4.

(d) *Residence to acquire Jurisdiction.*

It is no objection to the jurisdiction of a county court (under the last County Courts Act, 19 & 20 Vict. c. 108. s. 18.) that the plaintiff has become resident within the district of the court for the very

purpose of giving it jurisdiction; provided that the residence was actually and *bond fide*, and not colourably and collusively, acquired before the issuing of the summons. *Massey v. Burton*, 27 Law J. Rep. (n.s.) Exch. 101; 2 Hurl. & N. 597.

(e) *Legacies.*

[See INJUNCTION (B), *Neighbour v. Brown*.]

A testator bequeathed to the defendant 100*l.* in trust to pay that amount to the plaintiff on his attaining twenty-one years, and in the mean time to invest it and to pay the plaintiff the interest, with power to the defendant, whom he styled "trustee," to advance either the part or the whole for the education, &c. of the plaintiff, or otherwise for his benefit during his infancy. The plaintiff, on attaining his majority, sued the defendant in the county court for the residue of the 100*l.*, part having been applied pursuant to the terms of the will:—Held, that the county court had no jurisdiction, the 100*l.* not having been given as a legacy, but by way of trust. *Phillips v. Hewston*, 25 Law J. Rep. (n.s.) Exch. 133; *nom. Hewston v. Phillips*, 11 Exch. Rep. 699.

(f) *Friendly Societies: Disputes between Members and Officers.*

The 18 & 19 Vict. c. 63. s. 41. gives the county court jurisdiction to decide disputes between members and officers of friendly societies certified under that act; and by section 44, in the case of societies the rules of which have not been certified, disputes are to be settled as in the case of certified societies, provided a copy of their rules is deposited with the registrar:—Held, that this does not give the county court jurisdiction where the rules of a society are deposited with the registrar after the dispute arises, but before the plaint is entered in the county court. *The Queen v. Trafford*; *In re Smith v. Pryce*, 28 Law J. Rep. (n.s.) Q.B. 95; 7 E. & B. 339.

(g) *Insolvent: Creditors' Petition.*

Under the 10th section of the 10 & 11 Vict. c. 102, coupled with the provisions of the 1 & 2 Vict. c. 110, the Court for the relief of Insolvent Debtors has power to refer the petition and schedule of an insolvent to the Judge of the proper county court, and the Judge has jurisdiction to hear and adjudicate thereon, where the petition is by creditors as well as where it is by the insolvent himself. *Ex parte Greenwood*, 27 Law J. Rep. (n.s.) Q.B. 28; *nom. R. v. Dowling*, 8 E. & B. 605.

(h) *To commit, after Discharge under Insolvent Act.*

The jurisdiction of a Judge of a county court to commit a defendant to prison by warrant upon a judgment summons, issued under the 9 & 10 Vict. c. 95. s. 99, is at an end after the defendant has obtained a valid order of discharge under the Insolvent Debtors Act, upon a petition, the schedule to which contains the judgment debt. *In re Copeland v. Rose*, 26 Law J. Rep. (n.s.) Q.B. 251; 7 E. & B. 679.

(i) *Prohibition.*

A plaint was brought, in the County Court of Wiltshire, for (as stated in the particulars) "that the defendant did assault and imprison, and did detain

in custody the wife of the plaintiff without any reasonable or probable cause.' The evidence adduced at the hearing of the case shewed that, upon an unfounded suspicion of the plaintiff's wife having committed a felony, the defendant had not merely made a complaint and charge to a policeman, but had expressly directed him to follow her and take her into custody, which the policeman accordingly did. Some circumstances also appeared in evidence which were properly the subject of an action for malicious prosecution:—Held, that the plaintiff being for trespass and false imprisonment, which was within the jurisdiction of the county court, it was no ground for a writ of prohibition that the Judge, in his judgment, had used expressions from which it appeared that he had dealt with the facts, upon the question of damages, as if it were a case for malicious prosecution. *In re Chivers v. Savage*, 26 Law J. Rep. (N.S.) Q.B. 85; 5 E. & B. 697.

Upon a question of prohibition to the county court, the Court will look not merely at the plain and particulars, but at the actual facts. And if, upon the particulars, coupled with the facts, it appears that the claim is in substance for damage arising out of a matter excluded from the jurisdiction of the Court (as malicious prosecution), a prohibition will be granted. *Hunt v. the South Staffordshire Rail. Co.*, 26 Law J. Rep. (N.S.) Exch. 374; 2 Hurl. & N. 451.

Thus, where the plaintiff was for expenses incurred and loss of time by the plaintiff in attendances before the magistrates, on a charge by the station-master of the defendants (a railway company) against the plaintiff, when the same was dismissed; and it appeared on the affidavits that the plaintiff had been summoned for riding in the carriages of the company without having first paid his fare; and that the charge had been dismissed, and costs ordered to be paid to him, and that there was no contract or transaction between the plaintiff and the company, except the above:—Held, that an order for a writ of prohibition had been rightly issued, the real claim, if any, being for malicious prosecution, and the plaintiff being a mere evasion of the County Courts Act, 9 & 10 Vict. c. 95. s. 58, taking away from the county courts jurisdiction in cases of malicious prosecution. *Ibid.*

(D) PRACTICE: NEW TRIAL.

A county court Judge having once refused to grant a new trial under the power conferred on him by the 9 & 10 Vict. c. 95. s. 89, is *functus officio*, and cannot grant one afterwards, on changing his mind. *Great Northern Rail. Co. v. Mossop*, 25 Law J. Rep. (N.S.) C.P. 23; 17 Com. B. Rep. 130.

Inferior Courts have, generally speaking, no right to grant new trials without the aid of a statutory power to do so. *Ibid.*

(E) COSTS: JURISDICTION TO AWARD.

The Judge of the county court has no jurisdiction to award costs to the defendant when it appears that title to land, &c. comes in question. *Langford v. Partridge*, 26 Law J. Rep. (N.S.) Exch. 147; 1 Hurl. & N. 621.

Section 79. of the County Courts Act, 9 & 10 Vict. c. 95, giving power to the Judge to award costs in cases of failure of proof on the part of the plaintiff, does not apply where the case is out of the jurisdic-

tion of the Court, but only where there is a failure of proof in cases within the jurisdiction. *Ibid.*

Section 88. of the same act in like manner only applies to cases within the jurisdiction of the county court. *Ibid.*

Where a county court Judge has taken time to consider as to nonsuiting a plaintiff, on the ground of want of jurisdiction, by reason of the title to land coming in question, and a prohibition issued before he had decided, and he then nonsuited the plaintiff and awarded costs of nonsuit to the defendant, the writ of prohibition was made absolute. *Ibid.*

Under the last County Courts Act, 19 & 20 Vict. c. 108. s. 42, the doctrine that prohibition as to cases in county courts is taken away from the superior Courts, must depend upon the question whether the prohibition should go or not. *Ibid.*

(F) AUTHORITY OF THE SUPERIOR COURTS.

(a) *Mandamus.*

The Judge of a county court having, on the day fixed for the hearing of a petition in insolvency, the insolvent not attending, adjourned it *sine die*.—Held, that this Court had no jurisdiction to compel the Judge to fix a day for the hearing, or to order the petition to be taken off the file for an alleged informality not making it a nullity. *In re Corbett*, 28 Law J. Rep. (N.S.) Exch. 254; 4 Hurl. & N. 352.

(b) *Rule.*

A county court Judge having refused to hear an interpleader summons, and ordered money to be paid out of court, with costs to be paid by the claimant, on the ground of the insufficiency of the particulars, a rule was obtained, under the 19 & 20 Vict. c. 108. s. 43, calling on the county court Judge to hear the summons. No cause being shewn, the Court made the rule absolute; ordering the costs of the rule to abide the event of the interpleader issue, and discharging the claimant from the costs in the court below. *In re Whitehead v. Procter*, 3 Hurl. & N. 582.

(c) *Staying Proceedings.*

The Court will not stay proceedings in an action for damage arising out of a seizure under a county court execution, merely because there has been an interpleader order in the county court in favour of the plaintiff, the plaintiff containing no claim for damages, and there having been no adjudication except as to the right to the goods taken. *Jones v. Williams*, 28 Law J. Rep. (N.S.) Exch. 324; 4 Hurl. & N. 706.

(G) REMOVAL OF CAUSES.

The prerogative of the Crown to remove into the Court of Exchequer a cause in another court touching the Crown revenue, is not affected by the County Courts Act, 9 & 10 Vict. c. 95. *Mountjoy v. Wood*, 1 Hurl. & N. 58.

(H) APPEAL TO THE SUPERIOR COURTS.

(a) *When it lies.*

An appeal lies from the decision of a county court Judge in an interpleader case, where the value of the goods seized exceeds 20*l.*, although the claim in the original plaint is below 20*l.*, and also although the question does not appear to have been one of pure

law. *Vallance v. Naish*, 27 Law J. Rep. (N.S.) Exch. 142; 2 Hurl. & N. 712.

The defendant, against whom a verdict, with 50*l.* damages, had been given on a plaint in the county court, appealed, under the 13 & 14 Vict. c. 61. s. 14, from the Judge's direction; upon which, under the 143rd rule regulating the practice of the county courts, execution was stayed. The parties, not being able to agree upon a case, submitted it to the Judge, under section 15, who died without having settled it. The defendant, before any steps had been taken by the plaintiff to enforce the judgment, moved for a rule to prohibit him from issuing execution, or for a *certiorari* to move the plaint into this court:—Held, that the application was premature. *Quære*—What becomes of the appeal? *M'Allum* or *M'Cullum v. Cookson*, 28 Law J. Rep. (N.S.) C.P. 1; 5 Com. B. Rep. N.S. 498.

No appeal lies, under statute 13 & 14 Vict. c. 61. s. 14, to this Court from the decision of a county court on an interlocutory matter, such as the taxation of costs under statute 19 & 20 Vict. c. 108. s. 34. An appeal on such a matter having been brought, this Court refused to hear the point argued, on the ground that they had no jurisdiction to decide such a point, but entertained the appeal so far as to dismiss it with costs. *Carr v. Stringer*, E. B. & E. 123.

(b) *Stating, Signing, and Altering Case.*

Where a county court Judge, in stating a case for the opinion of this Court, under the 13 & 14 Vict. c. 61. s. 14, sets out evidence which shews a total absence of foundation for the conclusion at which he has arrived,—the Court will reverse his decision. *The British Industry Life Assur. Co. v. Ward*, 17 Com. B. Rep. 644.

By the 145th of the County Court Rules (framed under the 19 & 20 Vict. c. 108. s. 32.), "All cases on appeal shall, unless the Judge otherwise order, be presented to him for signature at the court holden next after twelve clear days from the day on which judgment was pronounced, and shall then be signed by the Judge; . . . and if the appellant do not comply with this rule, the successful party may proceed on the judgment, unless the Judge otherwise order:—Held, that this rule was not intended to cut down the right of appeal, as given by the 13 & 14 Vict. c. 61. ss. 14. and 15, but only, in order to prevent delay, to enable the successful party to proceed on the judgment, if the appellant did not conform to the rule and proceed with his appeal in the course prescribed; and that the county court Judge was therefore bound to settle and sign the case, although it was first submitted to him at a court subsequent to that required by the rule. *Ex parte Furber*, on this point, approved. *Quære*—Whether the County Court Rules could override the provisions of an act of parliament. *In re Hacking v. Lee*, 29 Law J. Rep. (N.S.) Q. B. 204.

Seem, that the county court Judge has (under the 15th section of the 13 & 14 Vict. c. 61, and of the 145th rules of practice issued under the authority of the 19 & 20 Vict. c. 108. s. 32.) no power to alter or add to an appeal case after it has been agreed on and signed by the parties or by their attorneys. *Warner v. Riddiford*, 4 Com. B. Rep. 180.

(c) *Notice and Security for Costs.*

The Court will not strike out an appeal from a

county court where a case has been settled and signed by the county court Judge, on the objection that the grounds of appeal are not stated in the notice of appeal; for the statement of the grounds of appeal is not a condition precedent to the jurisdiction of the superior Courts, but a requirement for the information of the Judge below. *Evans v. Mathews*, 26 Law J. Rep. (N.S.) Q. B. 166.

On appeal from a county court, by 13 & 14 Vict. c. 61. s. 14, security for costs, &c., as well as notice of appeal, must be given within ten days after the decision appealed against. Notice of appeal having been given within the ten days and security after that time, the county court Judge, notwithstanding objection by the respondent that the security was too late, settled and signed the appeal; the appeal having been set down for argument, the Court held they had no jurisdiction to hear it, and ordered it to be struck out. *Stone v. Dean*, 27 Law J. Rep (N.S.) Q. B. 319; E. B. & E. 504.

(I) LANDLORD'S RIGHTS ON SEIZURE OF GOODS.

Where the goods of a third person are seized under an execution from the county court, the landlord of the execution debtor is not entitled to be paid arrears of rent under the statute 19 & 20 Vict. c. 108. s. 75. The case of *Beard v. Knight* supported. *Wilcoxon v. Searby, re Foulgar v. Taylor*, 29 Law J. Rep. (N.S.) Exch. 154; 5 Hurl. & N. 202.

Where the landlord appears upon the hearing of an interpleader summons in the county court, he, as well as the execution creditor and the claimant, has a right of appeal. *Ibid.*

An affidavit of an attesting witness of a bill of sale under the 17 & 18 Vict. c. 36. in this form:—"The paper writing hereunto annexed is a true copy of a bill of sale, bearing date, &c., and made between W T, of &c., of the one part, and G S, of &c., of the other part" (following the description in the bill of sale)—is a sufficient description by the deponent of the residence, &c. of the parties. *Ibid.*

(K) ABUSE OF PROCESS.

The prisoner, being a creditor of J R to the amount of 10*s.*, sent a letter to the latter, purporting to have been signed by the clerk of the county court, demanding payment, and in default threatening proceedings in the county court. The wife of J R came to the prisoner, who told her he had ordered the county court to send the letter, on which she paid him the 10*s.*, and thereupon he asked for 1*s.* 3*d.* for the county court expenses, saying he wanted to put the full amount in the receipt. She, however, did not pay him any more.—Held (*dissentiente Bramwell, B.*), that the prisoner was guilty of felony for having acted, and professed to act under a false colour and pretence of the process of the county court under section 57. of the statute 9 & 10 Vict. c. 95:—Held, per *Bramwell, B.*, that the above-named clause of the enactment in question was only intended to punish fraudulently acting under real process of the county court, and did not apply to the case of a person fraudulently attempting to obtain money by falsely pretending to have process of court, and to be acting under it. *The Queen v. Evans*, 26 Law J. Rep. (N.S.) M.C. 92; Dears. & B. 236.

The prisoner, who had a claim for a debt against the prosecutor, sent him the following paper by post:—"In the county court of Leicestershire, at Melton Mowbray. Castle, plaintiff; Charles, defendant. Take notice, that you are required to produce at the above court, on the trial of this cause, on the 17th day of September instant, the several accounts and memorandums given to you, or to your wife, by the above plaintiff at various times. Dated this 2nd day of September 1857. By the plaintiff to Mr. Thomas Charles, the above defendant. Balance of account, 3s. 5½d." No plaint had, in fact, been taken out in the county court:—Held, that a conviction for delivering a paper falsely purporting to be a process of the county court, under the statute 9 & 10 Vict. c. 95. s. 57, could not be sustained, as the paper did not purport to be a process of the Court, and was only a notice to produce. *The Queen v. Castle*, 27 Law J. Rep. (n.s.) M.C. 70; Dears. & B. 363.

The prisoner had obtained a blank form of instructions to be filled up by the plaintiffs for the purpose of having a county court summons issued against the defendants. This he filled up, and, without any authority, signed it "W G, Registrar of the Taunton Court." The form stated his own name, Alexander Richmond, as plaintiff, the name of a debtor to himself, as defendant, the residences of both of them, the amount claimed, 9s. 6d., and the nature of the claim, goods sold and delivered. On the back the prisoner wrote,—"Unless the whole amount claimed by Alexander Richmond, draper, of Taunton, is paid on Saturday, an execution warrant will be immediately issued against you. Witness my signature, W G." This he sent to the debtor with the view to obtain payment:—Held, that the prisoner was indictable under section 57. of the statute 9 & 10 Vict. c. 95, on the charge of acting or professing to act under false colour and pretence of the process of the county court. *The Queen v. Richmond*, 28 Law J. Rep. (n.s.) M.C. 188; Bell's C.C. 142.

INFORMATION.

[See QUO WARRANTO.]

Where an information, at the suit of the Attorney General, for penalties for smuggling, charged some defendants in one set of counts, and other defendants in another set of counts,—Held, that, even assuming the proceeding to be irregular, the objection could not be taken by arrest of judgment, as the Attorney General might cure the defect by entering a *nolle prosequi* to the objectionable counts. *The Attorney General v. Buck or Ruck*, 25 Law J. Rep. (n.s.) Exch. 206; 11 Exch. Rep. 763; affirmed, 27 Law J. Rep. (n.s.) Exch. 313; 3 Hurl. & N. 188.

INJUNCTION.

[Under the Railway and Canal Traffic Act, see titles CARRIER and RAILWAY.]

(A) SPECIAL INJUNCTION.

(a) When Granted or Decreed.

- (1) *In general.*
- (2) *Trade Marks.*

(3) *Nuisances.*

(b) *When Refused or Dissolved.*

(B) TO RESTRAIN PROCEEDINGS AT LAW.

(C) PRACTICE.

(a) *Application for Injunction.*

- (b) *Dissolving the Injunction.*
- (c) *Undertaking.*
- (d) *Establishing Title at Law.*
- (e) *Trade Restrictions.*
- (f) *Reference as to Damages.*
- (g) *Costs.*

(D) WRIT OF INJUNCTION.

(A) SPECIAL INJUNCTION.

(a) When Granted or Decreed.

(1) *In general.*

A servant carrying out milk at weekly wages, with trade allowances, will be restrained from trading on his own account in contravention of an agreement signed by him not to carry on the same business, &c., within the same district, for two years after ceasing to be employed or leaving the service of his master, his successors or assigns. *Benwell v. Jans*, 26 Law J. Rep. (n.s.) Chanc. 663; 24 Bear. 307.

A retired officer of the army, entitled to a pension granted by the Crown, in consideration of wounds received by him while in the service, assigned it for valuable consideration, and, pursuant to his covenant in the deed of assignment, executed to the assignee a power of attorney, in the form required by the War Office, to enable him to receive the same. The pension was expressed in the warrant granting it, to be payable "until further order," and at the foot of the form of declaration issued by the Paymaster General, to be filled up and signed by the grantee on applying for payment of the quarterly instalments of the pension, were these words:—"This allowance cannot be assigned as security for a loan of money." The assignor, after allowing the assignee of the pension, by means of the power of attorney executed to him, to receive two quarterly instalments of the annuity, revoked the power, and thenceforth received it himself. The Court, on motion by the assignee, granted an injunction to restrain the assignor from receiving the pension, and from executing any power of attorney authorizing any person other than the plaintiff to receive it. *Knight v. Bulkeley*, 27 Law J. Rep. (n.s.) Chanc. 592.

One of the Vice Chancellors refused to decree the specific performance of a charter-party, or to grant an injunction at the suit of the charterer to restrain a mortgagee of the ship, who had notice of the charter-party, from making a sale in pursuance of his power of sale contained in the mortgage-deed; but the Lords Justices, considering that where property is contracted to be used in a particular manner, and a purchaser buys that property, with notice of that contract, he is bound not to use it otherwise than in accordance with the contract:—Held, that the plaintiff was entitled to an injunction to restrain the mortgagee from exercising his power of sale, and from interfering with the ship on her voyage, the injunction to continue till the hearing of the cause, and the plaintiff undertaking to be answerable in damages. *De Mattos v. Gibson*, 28 Law J. Rep. (n.s.) Chanc. 165.

The defendant, a retired storekeeper of one of Her Majesty's dockyards, entitled to payment from the Treasury of a pension or superannuation allowance of 155*l.* a year, assigned such pension to the plaintiffs, to secure a loan of money. The defendant afterwards became insolvent, and included the debt due upon the plaintiffs' security in his schedule of debts. The Commissioner of the Insolvent Debtors Court, by his order, made in the presence of counsel for the plaintiffs, recommended that 50*l.* a year, part of the insolvent's pension, should be paid by the Paymaster General to the provisional assignee of the Insolvent Debtors Court, for the benefit of the general creditors of the insolvent. The plaintiffs declined to prove as creditors under the insolvency; but, having filed their bill, moved in this Court for an injunction to restrain the defendant from applying for, or receiving, or enabling any other person to receive the balance of his pension left after the appropriation of the annual sum recommended by the Commissioner. Order accordingly. *Lloyd v. Eagle*, 28 Law J. Rep. (n.s.) Chanc. 389.

Where, by an act of parliament, a corporation were directed to cause a piece of land to be drained and levelled, and kept in a proper condition for purposes of public recreation, the Court restrained the corporation by injunction from permitting a cattle fair to be held on such piece of land. *The Attorney General v. the Corporation of Southampton*, 29 Law J. Rep. (n.s.) Chanc. 282; 1 Giff. 363.

Where specific chattels are necessary for carrying on a particular trade, and a right is asserted by those who have acquired a lien upon them to sell them, the Court has jurisdiction to restrain, by injunction, a threatened sale, where an injury would ensue from such sale to the trader or other person whose right would be interrupted, and whose position in life would be injured by a sale. *North v. the Great Northern Rail. Co.*, 29 Law J. Rep. (n.s.) Chanc. 301; 2 Giff. 64.

The plaintiffs having published a song, on the title-page of which was a portrait of Madame Anna Thillon, and the words "Minnie, sung by Madame Anna Thillon and Miss Dolby at Jullien's Concerts, written by George Lindley," &c.; and this song having become very popular, the defendant subsequently published another song consisting of different words to the same air (in which there was no copy-right), with a title-page, on which was a different portrait of Madame Anna Thillon, copied from an American publication, and the words "Minnie, dear Minnie. Madame Anna Thillon":—Held, that this was an obvious attempt to pass off the defendant's publication for that of the plaintiffs, which had obtained the public favour; and this attempt was restrained by an interlocutory injunction without imposing upon the parties the necessity of trying the right at law. Held, also, that the words "written by George Lindley," who was chiefly known as a musical composer, on the title-page of the plaintiffs' song, did not so clearly manifest an intention to mislead the public into the belief that the music was composed by him, as to deprive the plaintiffs of their right to the injunction. *Chappell v. Davidson*, 2 Kay & J. 128; 8 De Gex, M. & G. 1.

Nor did the entry at Stationers' Hall of the music as well as the words of the song, although the plaintiffs might have entered only those parts of the

publication to which they had an exclusive right. *Ibid.*

The defendant could not escape his liability by cautioning his shopmen to explain to purchasers that his song was not the same as the plaintiffs', because he could not secure that retail-dealers purchasing from him would give the same information to their customers. *Ibid.*

An interim injunction having been granted, the defendant, instead of submitting, insisted on his right to continue the publication of his song:—Held, that he must pay the costs of a motion against him to continue the injunction, although it appeared that no application had been made to him by the plaintiffs previously to the filing of the bill. *Ibid.*

Another part of the plaintiffs' case being, that the defendant had pirated two bars of music, which had been added by the plaintiffs to the original air, the Court refused to extend the injunction to restrain such piracy until the fact had been established by a trial at law. *Ibid.*

Where the construction of a contract is clear, and the breach clear, it is not a question of damage; but the mere circumstance of the breach of covenant affords sufficient ground for the Court to interfere by injunction. *Tipping v. Eckersley*, 2 Kay & J. 264.

And, *semble*, the Court may so interfere, whether the breach has or has not been actually committed, provided the defendant claims and insists on a right to do the act which would constitute such breach. *Ibid.*

Defendants demised to plaintiff a plot of land, one-half of an adjoining brook, a cotton-mill, reservoir and steam-engine of 100-horse power, on the plot of land, and the use of a weir below the mill, for the purpose of holding up the water of the brook from the weir to the level of the bed of the brook at a bridge above the mill, "and the free use and enjoyment of so much of the stream of water which usually flowed down the brook adjoining the plot of land as should be necessary for effectually supplying with water and working the said steam-engine, or any other steam-engine of like power and capacity"; and covenant not to construct any other weir or dam between the weir and bridge, and for quiet enjoyment of the demised premises according to the tenor of the demise. Shortly afterwards the defendants erected, a little below the bridge, but above the plaintiff's mill, a new cotton-mill and steam-engine, with a reservoir, which drew off water from the brook between the plaintiff's reservoir and the bridge, and they discharged the heated water which they had used for their new mill into the brook, whereby on one occasion they raised the temperature of the water which the plaintiff had to use for condensing his engine from 57° to 68°. All the engineering witnesses agreed that every additional degree of heat above 41° renders water less fit for condensing purposes. It was also deposed, that on another occasion, in consequence of the increased temperature, the plaintiff's engine worked "nearly half a stroke per minute less" than the usual rate of twenty-eight strokes per minute. Upon motion for a decree the Court granted a perpetual injunction, restraining the defendants from discharging heated water, so as to increase the temperature of the water which the plaintiff used for con-

denning; being of opinion that the evidence, exclusive of that as to the actual diminution in the working of the engine, shewed a material interference with the quality of the water to which the plaintiff was entitled under the demise; and that the question, whether such interference was such as to give him a right to damages, was one which he was not obliged to try. *Ibid.*

But so much of the motion as sought to restrain the defendants from diverting the water for their new mill was directed to stand over, upon terms of the plaintiff bringing an action; the plaintiff having failed to shew that he had ever yet been deprived by the defendants of the quantity of water necessary for effectually supplying and working his engine, although it appeared from the evidence that he had great reason to fear that he would be so deprived. *Ibid.*

Injunction to restrain defendants in possession from stripping an estate of timber, granted upon motion by a plaintiff claiming under a title at law. *Neale v. Cripps*, 4 Kay & J. 472.

Landlord restrained by injunction from interfering with his tenant in the exercise of the exclusive right of sporting and killing game according to an agreement not under seal, until a lease should be executed under seal according to such agreement pursuant to the decree in the cause. *Frogley v. the Earl of Lovelace*. John. 333.

But whether the Court would have interfered by injunction, in case the agreement had been already entered into by an instrument under seal—*quære*. *Ibid.*

A dwelling-house with grounds and ornamental water were demised, together with the control of a plantation (which was on the opposite side of the ornamental water and belonged to the lessor, but was not demised to the lessee), for the purpose of preventing trespassers thereon, but so as not to interfere with the persons employed by the lessor, his heirs or assigns. The lease referred to a plan on which the plantation was represented:—Held, that on the construction of the lease as explained by the plan, the lessor was not at liberty during the term to destroy the plantation, and an injunction was granted to restrain him from so doing. *Nicholson v. Rose*, 4 De Gex & J. 10.

(2) Trade Marks.

Where a printer had been in the habit of printing and selling indiscriminately labels containing a copy, or colourable imitation, of the trade mark of the plaintiff, the celebrated manufacturer of eau de Cologne, and the plaintiff had filed his bill for an injunction to restrain such printing and selling, which was granted by Wood, V.C., the Lord Chancellor dissolved the injunction, on the ground that it appeared by the evidence that there was a legitimate object for which these labels might be applied by retail dealers, viz., to replace soiled labels affixed to bottles containing the genuine eau de Cologne of the plaintiff. *Farina v. Silverlock*, 26 Law J. Rep. (N.S.) Chanc. 11; 6 De Gex, M. & G. 214.

There is no copyright in a trade mark. *Ibid.*

The bill was filed, by an American trading company, incorporated by the law of the State of Connecticut, in the United States of America, for an

injunction to restrain the defendant, a manufacturer, of Birmingham, from continuing the fraudulent use, as alleged, of the trade marks of the plaintiffs, and for an account of the profits made by him from such use. The defendant, by his answer, admitted the user of the trade marks complained of, but by way of rebuttal of the charge of fraud, stated that in so using the said trade marks he had only followed a custom prevalent at Birmingham for manufacturers of goods of the kind sold by the plaintiffs, to affix on the goods ordered by merchants a particular trade mark, relying on the respectability of the merchant, when known to them, for the fact that those merchants had authority to act as agents of, or by way of licence from, the person entitled to the exclusive use of the trade marks; and, further, that he had been informed that the plaintiffs themselves had ordered goods to be manufactured at Birmingham, with their own trade mark upon them, for the purpose of sale in foreign countries. These statements of the defendant were left uncontradicted by the plaintiffs. The Court, upon motion for decree, ordered that an interim injunction, which the defendant had previously submitted to, should be continued for a year, with liberty to the plaintiffs to bring an action within that time to try their right at law; and in case of their not proceeding at law and to trial within that time, then that their bill should thereupon stand dismissed, with costs. *The Collins Co. v. Reeves*, 28 Law J. Rep. (N.S.) Chanc. 56.

If one trader, by using the trade marks or labels of another trader, provokes a suit for the interference of the Court, the defendant, though he withdraws the mark or labels, and consents to a perpetual injunction, will still be liable to the costs of the suit, and if he does not pay them, or refuses to pay them, the plaintiff will be justified in setting down the cause and bringing it on for hearing. *Burgess v. Hill*, 28 Law J. Rep. (N.S.) Chanc. 356; 26 Beav. 244.

Injunction to restrain the sale in bottles stamped with plaintiff's name and address, followed by the words "genuine superior aerated waters" of soda-water not manufactured by the plaintiff, dissolved, the Court being of opinion upon the evidence that the defendant was not shewn to have used the bottles either with an intention, or so as in fact to mislead the public. *Welch v. Knott*, 4 Kay & J. 747.

But the user of such bottles, so as in fact to mislead the public, though unintentionally, would be restrained:—*obiter*. *Ibid.*

Whether or not the onus was thrown upon the defendant of informing the public that it was not the plaintiff's soda-water he was selling—*quære*. *Ibid.*

Perpetual injunction to restrain a printer from printing or selling labels similar to those used by the plaintiff as his trade mark, notwithstanding the possibility that the same labels so printed and sold might be purchased *bona fide* and for the purpose of being applied to articles of the plaintiff's own manufacture from which his labels had been lost. *Farina v. Silverlock*, 4 Kay & J. 650.

Defendant, insisting upon an adverse right after being made aware that the plaintiff had been defrauded through his agency, ordered to pay the costs of all the proceedings both at law and in equity. *Ibid.*

Observations of Lord Chancellor Cranworth, in *Parina v. Silverlock* (8 De Gex, M. & G. 214; 26 Law J. Rep. (N.S.) Chanc. 11) explained. *Ibid.*

There is no property in a trade mark, but a person who has been in the habit of using a particular mark may prevent other persons from fraudulently taking advantage of the reputation which his goods have acquired by using his mark in order to pass off their goods as his to his injury. *The Collins Company v. Brown*, 3 Kay & J. 423.

A foreign manufacturer has a remedy by suit in this country for an injunction and account of profits against a manufacturer here who has committed a fraud upon him by using his trade mark for the purpose of inducing the public to believe that the goods so marked were manufactured by the foreigner. *Ibid.*

This relief is founded upon the personal injury caused to the plaintiff by the defendant's fraud, and exists, although the plaintiff resides and carries on his business in another country, and has no establishment here, and does not even sell his goods in this country. *Ibid.*

(3) Nuisances.

The Board of Works of the W District passed a resolution that no privies or cesspools should be allowed in that district, and on the 27th of January 1857 served a notice on the owner of cottages, requiring him, within fourteen days, to convert privies into water-closets, and threatening compulsory proceedings in case of neglect. In June following they served a second notice, which, like the former, was entitled, in the Metropolis Local Management Act (18 & 19 Vict. c. 120.) and in the Nuisances Removal and Diseases Prevention Act (18 & 19 Vict. c. 121), stating that as the former notice had not been attended to, they should, within seven days, enter and enforce the provisions of those acts against the owner. On the 7th of November, they entered and commenced the works, whereupon the owner filed a bill for an injunction which one of the Vice Chancellors granted:—Held (affirming that decision), that the Board had exceeded its powers in coming to the resolution; that under the Nuisances Removal Act, they had no authority to enter unless a previous order of Justices of the Peace had been disobeyed; and that the jurisdiction of the Court of Chancery to interfere by injunction was not ousted by the 211th section of the Metropolis Local Management Act, giving an appeal to the Metropolitan Board of Works. *Tiskler v. the Board of Works for the Wandsworth District*, 27 Law J. Rep. (N.S.) Chanc. 342; 2 De Gex & J. 261; 1 Giff. 412.

A board of works, empowered as above, is bound to exercise its authority with regard to the circumstances of each particular case, and it is their bounden duty to keep strictly within their powers, and not to be guided by any fancied views of the spirit of the act. *Ibid.*

A road was altered in 1855 in a manner which the plaintiff considered likely to retard the escape of water in time of flood, and thus to aggravate the mischief done by floods to the plaintiff's property, and especially to do him serious damage on the occurrence of great floods, such as might be expected every twenty or thirty years. While the works were in progress, in February 1855, the plain-

tiff threatened to take proceedings to stop them. After their completion slight floods occurred, in 1855 and 1856, without doing serious mischief, and in 1857 a great flood occurred; shortly after which, in December 1857, the plaintiff filed a bill to have the road restored to its condition before 1855, and to have compensation for the damage done by the flood in 1857:—Held, that the fact of no serious damage being done in the interval did not excuse the plaintiff's delay, and that he was not entitled to have the bill retained pending a trial. The bill was accordingly dismissed with costs without prejudice to any proceedings at law. *Wicks v. Hunt, Johns*, 172.

Semble—that the Chancery Amendment Act, 1858, does not extend the jurisdiction of the Court to cases where there is a plain common law remedy, and where the Court would not have interfered before that statute. *Ibid.*

(b) When Refused or Dissolved.

The plaintiff sold two leasehold houses, one to the defendant and another to L. The conveyance to the defendant contained by mistake a part of the property intended to be sold to L, but which the defendant believed he was purchasing. Upon a bill filed against the defendant by L, he was directed to re-convey to L that portion which by mistake was included in the assignment to him. The defendant then brought an action at law against the plaintiff, the vendor, for damages under his covenant against incumbrances. An equitable plea was put in by the plaintiff, who now filed a bill for an injunction to restrain the action; but the injunction was refused. *Wild v. Hillas*, 28 Law J. Rep. (N.S.) Chanc. 170.

A company, incorporated in a foreign country according to its laws, and to be carried on there, was under the control of a body of trustees in London. By the constitution of the company half the shares were preferential shares in respect of dividends, the other half not. There was power given to the holders of two-thirds of the stock to increase the capital, this power to be exercised by vote at a special meeting of the company. A large proportion of the capital was held by British subjects. The affairs of the company were such as to require that further capital should be raised, and the directors proposed a resolution that 800 ordinary shares should be converted into preferential shares, and the resolution was carried at a meeting of the company. A shareholder of ordinary shares filed a bill, and obtained an injunction to restrain the execution of the object of the resolution. The directors then obtained a resolution, "that they should take the necessary steps abroad for increasing the preferential capital," whereupon the present bill was filed, by the same shareholder, and one of the Vice Chancellors granted an injunction to restrain such proceedings:—Held, on appeal, that considering the domicile and purposes of the company, an injunction ought not to issue, there appearing on the face of the bill no equity to restrain the managers in the foreign country from making an application to the legislature there. *Bill v. the Sierra Nevada Lake Water and Mining Co.*, 29 Law J. Rep. (N.S.) Chanc. 176; 1 De Gex, F. & J. 177.

Tenant under an agreement for a lease having

filed a bill to restrain his lessor from obstructing the ancient lights in the premises comprised in the agreement, but not asking to have the agreement specifically performed. Motion for injunction refused. *Fox v. Purcell*, 3 Sm. & G. 242.

Where a bill was filed by a single shareholder against the directors of a banking company and the banking company, for an injunction to restrain the directors from paying a dividend already declared, and from declaring or paying any future dividend except out of the profits of the bank, but the other shareholders were not before the Court, the Court granted an injunction as to future dividends, but refused to restrain the dividend which had been declared, on the ground that the declaration of the dividend gave the shareholders a legal right to the payment of that dividend, and that the Court could not, in the absence of the shareholders, interfere with that right. *Fawcett v. Laurie*, 1 Dr. & Sm. 192.

A plaintiff, in order to enable him to file a bill on behalf of himself and other persons, must have a common interest with such persons. *Ibid*.

Where equitable relief by way of injunction is sought in aid of a legal right, the Court, unless such right is clear, will not, except with the consent of both parties, declare the legal right, and grant a perpetual injunction founded on such declaration, but will require the question to be tried at law. In a case where the defendant claimed a right under an act of parliament to do the acts sought by the bill to be restrained, a perpetual injunction was granted by one of the Vice Chancellors:—Held, on appeal, that, it not being clear upon the construction of the act of parliament that it did not authorize what the defendants proposed to do, they were entitled to the opinion of a Court of common law upon the question. *Mayor, &c. of Cardiff v. Cardiff Waterworks Co.*, 4 De Gex & J. 596.

(B) TO RESTRAIN PROCEEDINGS AT LAW.

Upon bill filed to restrain an action at law for damages by reason of the non-performance of a covenant in a deed to pay premiums upon a policy, the Court held that, under the Common Law Procedure Act of 1854, it was optional and not compulsory upon a defendant at law to put in an equitable plea; and that if the defendant did not choose to avail himself of his right he could not be compelled to plead an equitable defence, although the question might be more proper for the decision of a Court of law. Injunction granted upon motion to restrain the action until the hearing. *Kingsford v. Swinford*, 28 Law J. Rep. (n.s.) Chanc. 418.

The 88rd section of the Common Law Procedure Act, giving a right to plead an equitable defence, is only permissive, and not compulsory; and a defendant at law who has not exercised his option of putting in an equitable plea may come for an injunction to restrain the action, as he might have done before that act. *Gomperts v. Pooley*, 28 Law J. Rep. (n.s.) Chanc. 484; 4 Drew. 448.

A plaintiff, who filed a bill against parties abroad, and on an affidavit of merits obtained an injunction to stay proceedings at law, cannot, upon a sufficient answer being put in, retain the injunction upon inferences to be drawn from a previous evasive answer and the proceedings taken upon the excep-

tions. And though it was suggested that the bill had been amended and filed, the injunction was dissolved. *Mollett v. Enquist*, 28 Law J. Rep. (n.s.) Chanc. 507; 26 Beav. 466.

A B obtained against C D a decree for specific performance of an agreement. Having sustained damage by reason of the breach of the agreement, A B brought an action at law for damages for the breach. C D pleaded the proceedings in the suit, by way of equitable defence at law, under section 83. of the 17 & 18 Vict. c. 125, but the plea was overruled. C D then filed a bill against A B for an injunction to restrain his action:—Held, first, that A B having submitted his legal rights to the jurisdiction of a Court of equity, was not entitled to proceed at law; secondly, that the fact of C D having pleaded an equitable defence at law did not preclude him from filing his bill to restrain the action; and, thirdly, that the 88rd section of the Common Law Procedure Act referred to a defence based upon the principles which governed a Court of equity, and not upon its forms and practice. *Prothero v. Phelps*; *Phelps v. Prothero*, 25 Law J. Rep. (n.s.) Chanc. 105; 7 De Gex, M. & G. 722.

Legatees who have mortgaged their interest in a legacy, will be restrained from prosecuting a suit in the county court to obtain payment of the same from the executors. *Neighbour v. Brown*, 26 Law J. Rep. (n.s.) Chanc. 670.

A plaintiff filing a bill for discovery in aid of his defence to an action at law is at liberty, after filing interrogatories, to move to stay proceedings in the action without waiting for an answer, or even for the expiration of the eight days allowed under the old practice. *Lloyd v. Adams*, 4 Kay & J. 487.

Motion to stay trial of an action until answer to such a bill refused on the ground of delay and nearness of the trial, notwithstanding the bill was filed eleven days after discharge of a rule for the defendant to shew cause why he should not be orally examined or file a better affidavit, and notwithstanding notice of motion was given before the expiration of the time to answer the bill. *Ibid*.

The plaintiffs were a company of shipowners, on whose behalf the defendant, as their broker, had policies. Plaintiffs had instituted proceedings in a competent court in Genoa against the defendant for an account, to which suit the defendant had appeared. Before final decree in the foreign court the defendant commenced actions in England against the insurers upon one of the policies which had resulted in a loss:—Held, on demurrer, that it was competent for the plaintiffs to file a bill to restrain the action, and to have a receiver of the policy monies pending the foreign litigation. *The Transatlantic Co. v. Pietroni*, Johns. 604.

The Court of Chancery exercises a discretion in permitting actions at law to proceed; but it will never permit its decisions to be questioned in a Court of law. Therefore, where an action of trover was brought against a sheriff for an ejectment under a writ of assistance, issued in pursuance of an order of the Court, an injunction was granted, restraining further proceedings in such action, although the action also sought damages for a trespass by the sheriff in taking chattels not included in the order. *Walker v. Micklethwait*, 1 Dr. & Sm. 49.

Bills of exchange in the hands of foreign indorsees

for value were accepted in England on the faith of the genuineness of a bill of lading, which was presented to the acceptor with the bills of exchange by the indorsees, but which afterwards proved to have been forged by the drawer. The indorsees were unaffected with notice of the forgery when they obtained the acceptance. In a suit by the acceptor against the indorsees for delivery up of the bills, and an injunction against negotiating or proceeding at law upon them,—Held, that on the defendants' undertaking to deliver up the bills, in the event of the judgment at law being against them, no injunction ought to be granted. *Thiedman v. Goldschmidt*, 1 De Gex, F. & J. 4; 1 Giff. 142.

Where a defendant at law to an action on a promissory note pleaded that it was given for a wagering debt, and filed a bill to have it delivered up and to restrain the action on the same ground, but the answer denied the allegation in the bill:—Held, that he was not entitled to retain an injunction which he had obtained before the answer was filed. *Fox v. Hill*, 2 De Gex & J. 358.

Quere—whether, under the present practice, an injunction ought to be granted for want of answer. *Ibid*.

As to the right of a plaintiff in a bill of discovery in aid of an action at law to an injunction to restrain the action until full discovery is given. *Harris v. Collett*, 26 Beav. 222.

Semble—that a *prima facie* case must be shown, and that the Court will not allow a contest on affidavit on a motion for such an injunction. *Ibid*.

(C) PRACTICE.

(a) Application for Injunction.

Upon an application for an injunction to restrain proceedings at law, an affidavit of merits must be made by the plaintiff, though he had no personal knowledge of the facts stated in the bill. An affidavit by the solicitor, who had investigated the case, is not sufficient. *Mollett v. Enequist*, 27 Law J. Rep. (n.s.) Chanc. 815; 25 Beav. 609.

Where a defendant to a bill filed for an injunction to restrain the infringement of a patent, or for leave to bring an action at law, stated by his answer that the invention was not novel and that the plaintiff's patent was invalid, the Court, on a motion by the plaintiff, without his having made an affidavit as to the novelty of the invention or validity of the patent, refused to grant him an injunction, or to give leave to bring an action, unless he produced a clear and distinct affidavit that the invention was novel and the patent valid, but allowed the motion to stand over for that purpose. *Whitton v. Jennings*, 1 Dr. & Sm. 110.

(b) Dissolving the Injunction.

Where an injunction is granted until answer "or further order," it is not dissolved *ipso facto* by the defendant's putting in a sufficient answer, but remains in force until it is discharged by order of the Court, the practice in this respect not being altered by the 15 & 16 Vict. c. 86. *Oodleen v. Oakley*, 2 De Gex, F. & J. 158.

(c) Undertaking.

Since the act 21 & 22 Vict. c. 27, s. 2, empowering the Court to award damages in cases in which it

has jurisdiction to entertain an application for an injunction against the commission of any wrongful act, the Court will be more strict than ever in requiring the plaintiff, as a condition previous to his obtaining an interim injunction against the alleged infringement of a patent, to abide by any order it may make as to damages. *Tuck v. Silver*, Johns. 210.

In an alleged fraudulent imitation of a musical publication (independently of copyright), where the Court did not consider the fraud clearly made out,—Held, that an injunction ought only to be continued on the terms of the plaintiff undertaking to bring an action, and to be answerable in damages. *Semble*—that it is now almost universally the practice, on granting an interlocutory injunction, to require an undertaking to be answerable in damages. *Chappell v. Davidson*, 8 De Gex, M. & G. 1.

(d) Establishing Title at Law.

In a suit to restrain an alleged infringement of plaintiff's copyright in a design registered under the act, 5 & 6 Vict. c. 100, the defendant does not lose his right to require the plaintiff to establish his title in an action at law, although he delays doing so until the hearing of the cause, and has previously moved to dissolve, upon a ground which cannot be maintained. But the defendants ordered to pay the costs of motion to dissolve, that motion being useless whatever might be the result of the cause. *Norton v. Nichols*, 4 Kay & J. 475.

(e) Trade Restrictions.

For the purposes of an injunction not to carry on business within a fixed distance from a particular place, that distance must be measured as the crow flies, and not by the nearest practicable route. *Duignan v. Walker*, 28 Law J. Rep. (n.s.) Chanc. 867; Johns. 446.

(f) Reference as to Damages.

An injunction granted on an undertaking to be answerable in damages was afterwards dissolved. The defendant moved to dismiss the plaintiff's bill for want of prosecution, and for a reference to ascertain the amount of damages:—Held, that the time for obtaining such reference had not arrived. *Southworth v. Taylor*, 29 Law J. Rep. (n.s.) Chanc. 868; 28 Beav. 616.

(g) Costs.

A notice of motion was given by the defendant to dissolve an *ex parte* injunction obtained on affidavit. The motion was abandoned:—Held, that the plaintiff was entitled to full costs, though the defendant had filed no affidavit in support of his motion. *Davis v. the South-Eastern Rail. Co.*, 28 Beav. 549.

A suit was instituted to restrain the user of a trade mark, and for an account. No application was made to the defendant before suit, and the defendant said he would have desisted if applied to. At the hearing the account was abandoned, but a perpetual injunction was granted:—Held, that the defendant must pay the costs. *Burgess v. Hately*, 26 Beav. 249.

(D) WRIT OF INJUNCTION.

Where a Court of equity has issued an order for

an injunction restraining a party from bringing an action, the Court will enforce such order by staying proceedings under the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76. s. 226, although no writ of injunction has been actually issued. *Cobbett v. Ludlam*, 25 Law J. Rep. (N.S.) Exch. 25; 11 Exch. Rep. 446.

A Court of common law cannot grant an injunction in an action of ejectment, under the 82nd section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. *Baylis v. Legros*, 26 Law J. Rep. (N.S.) C.P. 176; 2 Com. B. Rep. N.S. 316.

INNKEEPER.

Liability for Goods of Guest.

Where the goods of a guest at an inn are lost, the innkeeper is liable as for breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances. Where there is such negligence, the innkeeper is not responsible. Therefore, where an innkeeper set up such negligence, in answer to an action by the owner for the loss of goods, and the Judge told the jury that the innkeeper was responsible unless there had been gross negligence on the part of the owner, but did not explain what would constitute gross negligence,—Held, a misdirection, inasmuch as the jury might have understood that the plaintiff was entitled to recover unless there had been an absence on his part of even the loosest degree of care. *Cashill v. Wright*, 6 E. & B. 891.

Lien on Goods of Third Party.

An innkeeper's lien extends to goods brought to his inn by a guest, though they belong to a third party, provided they are such as a person might ordinarily travel with. *Snead v. Watkins*, 26 Law J. Rep. (N.S.) C.P. 57; 1 Com. B. Rep. N.S. 267.

INQUISITION.

[See CORONER.]

INSOLVENT.

(A) PROTECTION FROM PROCESS: INTERIM ORDER.

(B) DISCHARGE.

(a) Construction and Operation of Statutes.

(b) Operation of the Discharge.

(1) New Security for Payment of Old Debt.

(2) Description of Debts and Creditors in Schedule.

(C) ASSIGNMENT.

(a) Their Powers and Rights over Debtor's Property.

(1) In general.

(2) Surplus Estate.

(3) Excepted Property under 20l.

(b) Trover by: Fraudulent Conveyance.

(D) RIGHT OF INSOLVENT TO SUE.

(E) RIGHTS OF SCHEDULED CREDITORS.

(A) PROTECTION FROM PROCESS: INTERIM ORDER.

An interim order of protection, granted under 5 & 6 Vict. c. 116. and 7 & 8 Vict. c. 96, protects only such property of the insolvent as would pass to and be distributed by his assignees, under those acts. As those statutes contain no provision enabling the assignees to obtain the profits of a benefice, a *sequestrari facias* may be issued by a plaintiff in an action after the defendant has obtained an interim order for protection. *Parry v. Jones*, 26 Law J. Rep. (N.S.) C.P. 36; 1 Com. B. Rep. N.S. 339.

A trustee was ordered to pay money into court. He neglected to pay, and was thereupon attached. The sheriff made a return, stating that before he received the writ the trustee obtained from the county court an interim order for protection. After this return the final order for protection was made. The sheriff was called upon to shew cause why he should not be committed for not having arrested the trustee:—Held, that the return was sufficient; that the interim order was a protection; and that the 26th section of the statute 7 & 8 Vict. c. 96. applied to equitable as well as legal debts. *Wyllie v. Green*, 26 Law J. Rep. (N.S.) Chanc. 839; 1 De Gex & J. 410.

(B) DISCHARGE.

(a) Construction and Operation of Statutes.

Partial relief to an insolvent debtor, under an act of parliament, will not debar him from obtaining full relief under a subsequent act of parliament. *In re Gordon*, 29 Law J. Rep. (N.S.) Chanc. 352; 28 Beav. 5; 1 De Gex, F. & J. 381.

Insolvency is a continuing liability, from which relief can only be obtained by an absolute discharge. *Ibid.*

Relief from arrest protects the person only; it still leaves the party insolvent. *Ibid.*

Under the 9 Geo. 4. c. 73. an insolvent debtor at Calcutta obtained an order freeing him from arrest; but he could not obtain a full discharge from all debts, as he was unable to comply with the provisions of section 68. of that statute. The 4 & 5 Will. 4. c. 79. declared that persons who were then or should become insolvent debtors, within the meaning of the 9 Geo. 4. c. 73, should, on certain specified conditions, be discharged from all liabilities. The insolvent, under this act, obtained his full discharge. Upon a claim by a creditor of the insolvent at the time he obtained relief from arrest,—Held, that the application under the first statute was not *res adjudicata*; that the insolvency was continuing, and not determined by the protection from arrest; that he was entitled to relief under the 4 & 5 Will. 4. c. 79, and that it discharged his estate from all existing liabilities. *Ibid.*

The "full discharge" (of a prisoner) "from custody, without any adjudication" by the Court, under the provisions of the 37th section of the 2 & 3 Vict. c. 110. means a discharge from prison in a complete and unconditional form. The word "full," as applied to the word "discharge," is explained by the 38th section, which shews that the insolvent

may obtain a discharge from prison on bail, or upon conditions not amounting to a full discharge. *Basham v. Smith*, 22 Beav. 190.

Therefore, where a vesting order was made, and before any final order of adjudication, or any further step taken, the insolvent was discharged by the detaining creditor, and no re-vesting order was ever made, it was held, that the discharge was a "full discharge," under the 37th section, and that afterwards acquired property did not pass to the provisional assignee under that insolvency. *Ibid*.

Observation, as to the danger of allowing a party to mend his case, upon a reference back to chambers, after it has been brought before the Court, and the exact point in which the evidence is thought to be defective is known. *Ibid*.

(b) *Operation of the Discharge.*

(1) *New Security for Payment of Old Debt.*

An insolvent mortgagor, after his discharge from a mortgage debt of 1,000*l.*, agreed with the assignees of the mortgage to give them 200*l.* and a bond for payment of 800*l.*, the assignees agreeing to enter satisfaction of a registered judgment, to enable the insolvent to dispose of other property. The bond was given and satisfaction entered. In an action on the bond, the jury having found that the arrangement was, that the insolvent should purchase the plaintiffs' interest in the mortgaged premises and so get rid of the registered judgment,—Held, that the bond was not void as being a new contract or security for payment of the original debt, within the meaning of the statute 1 & 2 Vict. c. 110. s. 91. *Ambrose v. Cook*, 26 Law J. Rep. (n.s.) Exch. 278; 2 Hurl. & N. 73.

(2) *Description of Debts and Creditors in Schedule.*

The defendant being indebted to the plaintiffs became insolvent and obtained his discharge, under 1 & 2 Vict. c. 110. In the list of creditors in his schedule he described the plaintiffs as bankers, 32, Clement's Lane, City, their right address being 32, Abchurch Lane, City, and notice of the hearing of the petition was directed to Clement's Lane, but was served at Abchurch Lane, but the plaintiffs denied having received it:—Held, that the description was sufficient, and that the defendant was discharged from the debt. *Brown v. Thompson*, 25 Law J. Rep. (n.s.) C.P. 55; 17 Com. B. Rep. 245.

To an action by the indorsee of a promissory note for 1,000*l.*, made by the defendant, payable to *John Jackson Lee*, the defendant pleaded his discharge under the Insolvent Debtors Act, 1 & 2 Vict. c. 110, and gave in evidence his schedule, in which *James Jackson Lee* was described as creditor on a bond for 1,000*l.* The plaintiff's name was not mentioned in the schedule, and it was proved that the defendant had at one time known, but had forgotten, that the plaintiff was the holder of the note in question:—Held, that this was not a full and true description of the debt sued for, so as to satisfy the 69th and 75th sections. *Finney v. Cecil*, 26 Law J. Rep. (n.s.) C.P. 53; 1 Com. B. Rep. N.S. 117.

To a declaration upon a bill of exchange by indorsee against acceptor, the defendant pleaded a discharge by the Insolvent Court. In his schedule he had included the drawer of the bill amongst his creditors; and with regard to him stated, "I gave bill for 30*l.*,

due in September 1854." The defendant did not know that the bill had been indorsed over by the drawer. The jury gave a verdict for the defendant:—Held, that the description was not insufficient by reason of there being no statement that the holder was not known. *Booth v. Coldman*, 28 Law J. Rep. (n.s.) Q.B. 137; 1 E. & E. 414.

The plaintiffs and the defendant, being partners, entered into a deed for the dissolution of the partnership; and the defendant covenanted that he would, upon, &c., pay to the plaintiffs the sum of 60*l.* as and for the purchase-money of certain stock in trade, furniture and effects mentioned in the deed. The defendant afterwards petitioned the Insolvent Court, and was duly discharged by order of that Court. In his schedule the plaintiffs were inserted as creditors for 186*l.* 13*s.* 1*d.* and 573*l.* 15*s.* 4*d.*, which sums included the sum of 60*l.*; and the debt was described in this way—"I am liable to these creditors for one-third of any deficiency of these amounts that may arise upon a realization of the assets of the late firm of Beasley, Franklin & Meadows, which I assigned to them, amounting to 781*l.* 19*s.* 3*d.*":—Held, that the discharge was no bar to the action for the recovery of the 60*l.*, as the debt was not described in the schedule. *Franklin v. Beasley*, 28 Law J. Rep. (n.s.) Q.B. 161; 1 E. & E. 425.

(C) ASSIGNEES.

(a) *Their Powers and Rights over Debtor's Property.*

(1) *In general.*

By deed-poll, dated in November 1847, A, for valuable consideration, assigned a reversionary interest, contingent upon his surviving a tenant for life in a trust fund, to which he was entitled under a testator's will, to B; and in April 1849, while resident at Bombay, A became insolvent there. He thereupon petitioned the Insolvent Court at Bombay for his discharge from prison, and by an order of the Court made on the 16th of April, upon that petition, all his estate and effects became, under the provisions of the 11 & 12 Vict. c. 21. s. 7, vested in the official assignee of the Court. In 1850 the tenant for life of the fund died, and then B, for the first time, gave notice of the deed of assignment of November 1847 to the surviving trustee of the fund:—Held, that, as against the official assignee, B was entitled to the fund comprised in her security. *In re Pole's Trust*, 25 Law J. Rep. (n.s.) Chanc. 862; 3 Sm. & G. 325.

An insolvent, who was tenant in tail of one-fourth of an estate, expectant on the decease of his father, in his schedule filed under the Insolvent Act stated that he was possessed of no real estate. He obtained his discharge in 1825. He subsequently became entitled to one-third of another fourth of the same estate, as tenant in tail. After the decease of his father, he mortgaged his interest in the estate, and, in 1831, became a bankrupt, and, under his bankruptcy, a disentailing deed was executed, and a partition made. The assignee in insolvency discovered, in 1853, the interest of the insolvent in the estate, and, upon a bill filed by him against the assignee in bankruptcy and the mortgagee, he was declared entitled to the estate; but, upon further consideration, —Held, at the Rolls, that under the 1 Geo. 4. c. 119, the assignee of the insolvent took no interest in one-twelfth of the estate beyond the life of the tenant a

that the proposal for the particular policy stipulated that if it contained any untrue statement, the policy should be void, and that it did contain an untrue statement. *Wood v. Dwarria*, 25 Law J. Rep. (N.S.) Exch. 129; 11 Exch. Rep. 493.

To an action against an assurance company to recover the amount of a policy of assurance, the defendants pleaded that the policy was made on the express condition that, if any statement contained in the declaration, the foundation of the policy, were untrue, or if the insurance should have been obtained through any misrepresentation, concealment, or untrue averment, then the policy should be null and void; and the plea then averred that the declaration did contain a false statement (mentioning it). Replication, upon equitable grounds, that before the policy was entered into the defendants published to the plaintiff and others a prospectus, whereby they undertook, to persons who should effect insurances, that all their policies should be indisputable except in cases of fraud; and that the plaintiff effected the policy upon the faith of such statement and undertaking, and that, by reason of the premises, it was in equity subject to the terms that it should be indisputable except in case of fraud, and that the alleged false statement was not fraudulent. Rejoinder, that after the publication of the prospectus, the plaintiff proposed to effect the said insurance, and delivered a declaration into the office; and that in and by such proposal and declaration the plaintiff declared that the particulars therein were correct and true throughout, and agreed that that proposal and declaration should be the basis of the contract, and that if it should appear that any fraudulent concealment or untrue statement was inserted therein, then the policy should be absolutely null and void; that the said declaration did contain a false and untrue statement, as alleged in the plea, and that the policy was agreed to be made, and was made upon the terms and upon the basis of the said proposal and declaration, and that at the time of the making of the said policy there was not any promise or undertaking by the defendants that the policy should be indisputable except in cases of fraud:—Held, on demurrer to this rejoinder, that it disclosed no answer to the replication; and that if the defendants denied that the policy was effected on the faith of their prospectus, the proper course was to traverse that allegation in the replication. *Ibid*.

(c) Charge on Assets only: Priority.

The deed of settlement of an assurance company provided that every policy should contain a reference to the deed, and a proviso that it should take effect only out of the funds which "should, under the provisions of the deed at the time when the liability should accrue, be at the disposal of the directors." It also directed that all sums insured should be paid three months after proof of death; that a capital fund and a life assurance fund should be formed from the subscriptions and the premiums respectively; and that the latter was to be applied in payment of management, expenses and losses on policies, and that any deficiency was to be made up by the capital fund. A policy was granted, stipulating that the funds remaining at the time of any claim or demand unapplied and undisposed of, and inapplicable to prior demands pursuant to the deed, should be liable to

answer the demands, and negating individual liability:—Held, that this constituted a charge on the funds, and that it took priority from the date of proof of death, although not payable until three months later. *Re Athenaeum Life Assur. Soc., ex parte the Prince of Wales Life Assur. Soc.*, Johns. 683.

(d) Quarterly or Annual Premiums.

A policy of assurance was in the following form:—"Sum assured, 1,000*l*.; annual premium, 3*s*. 6*d*.; whole term; payable by quarterly instalments of 8*l*. 5*s*. each." It then stated that a proposal had been made to effect an insurance on the life of B, and proceeded: "Whereas the said assured has paid to the said company the sum of 8*l*. 5*s*. as the premium for the said assurance until the 2nd day of November 1856; now this policy witnesses, that if B shall die before the termination of twelve calendar months from the date hereof, or shall live beyond such period, and the said assured, or his assigns," &c., "shall on or before that period, or on or before the expiration of every succeeding twelve months, provided the said B shall be still living, pay, or cause to be paid, at the office for the time being of the said company, the annual amount of premium," then the funds, &c. of the company shall be liable to pay the 1,000*l*. There was a proviso, "that if the said B shall happen to die before the whole of the said quarterly payments shall have become payable under these presents for the year in which he shall so die, it shall be lawful for the said directors to deduct and retain from the said sum of 1,000*l*. so much as will be sufficient to pay and satisfy the whole of the said premiums for that year, reckoning the said year to commence from the second day of August":—Held, in the Exchequer Chamber, reversing the judgment of the Court of Queen's Bench (27 Law J. Rep. (N.S.) Q.B. 227; E. B. & E. 156), that this was a yearly and not a quarterly policy; and that the circumstance that B died after the third quarterly instalment of premium had become due, and before it had been paid, did not avoid the policy, or disentitle the assured to recover on it. *Sheridan v. the Phoenix Life Assur. Co.* (Ex. Ch.), 28 Law J. Rep. (N.S.) Q.B. 94; E. B. & E. 156.

(e) Payment of Premiums after Death of Assured.

By a policy of insurance, effected by the plaintiff with the defendants, on the life of J, the defendants agreed to pay to the plaintiff the sum insured within three months after the decease of J, provided the plaintiff paid the annual premium "on or before the 18th of October in every succeeding year during the natural life of J." By one of the conditions indorsed on the policy the same was to be void if, *inter alia*, the yearly premiums were not paid within thirty days after they became due; but the policy might be revived within three calendar months, on satisfactory proof of the health of the insured. After the expiration of thirty days from the 18th of October 1855, but within the three months, viz. on the 15th of November 1855, the plaintiff paid an annual premium, for which the defendants gave a receipt, expressed to be for "the premium for renewal of policy to the 18th of October 1856." At the time this payment was made and receipt given J was

dead, he having died on the 12th of November 1855, but neither the plaintiff nor the defendants were aware of that fact:—Held, in an action by the plaintiff to recover the sum insured, that the receipt of the premium, under such circumstances, did not operate as a waiver by the defendants of the fact of J's death so as to revive the policy. *Prichard v. the Merchants and Traders' Mutual Life Insur. Soc.*, 27 Law J. Rep. (n.s.) C.P. 169; 3 Com. B. Rep. N.S. 622.

Seemle, per Willes, J., that, as the contract was to pay the sum insured on the future death of J, the defendants would not have been bound to accept the premium, even if it had been offered within the thirty days, if J were then dead. *Ibid.*

(f) *Memorandum as to Extra Risk.*

The plaintiffs effected with the defendants a policy on the life of A, on the 23rd of June 1853. On the 20th, one of the plaintiffs, who was also the agent of the defendants, through whom the policy was effected, had written to the defendants, "A proceeds to Belize about the end of the month." On the back of the policy the following memorandum was indorsed, of even date with the policy:—"The life assured under this policy being about to proceed to and reside at Belize, in the State of Honduras, and an extra premium of twenty guineas having been paid for the extra risk for such residence for one year, permission is hereby granted to the life assured to proceed to and reside at Belize aforesaid, and for the time aforesaid, and for so long thereafter as the extra premium shall from time to time be paid, along with the premiums payable on this policy, as within expressed." The twenty guineas was paid on the 23rd of June, but A did not proceed to Belize till 1856; he arrived in August, and died within a year of his arrival, no second extra premium having been paid:—Held, upon the true construction of the memorandum, that it contained a permission for a year's residence at Belize, not limited to any particular year, and therefore that the plaintiffs were entitled to recover the sum assured. *Notman v. the Anchor Assur. Co.*, 27 Law J. Rep. (n.s.) C.P. 275; 4 Com. B. Rep. N.S. 464.

(B) BY ONE OFFICE IN ANOTHER.

G, in consideration of 6,832*l.* paid to him by the Globe Insurance Company, granted to them an annuity of 800*l.* for his life, and assigned to them his life interest in large funds to secure the payment thereof. By the same deed he covenanted with the trustees of the company that, in case they should at any time insure any sum of money not exceeding 6,832*l.* upon his life, and should pay any additional premium or premiums by reason of his going beyond seas, then all such sum and sums of money as should be advanced by them for such additional premium or premiums might be retained by them out of the property assigned to them in trust. Shortly afterwards, the company, which had two departments, one an insurance department and the other an annuity department, effected a policy of insurance upon the life of G in their insurance department, whereby, in consideration of an annual premium of 329*l.*, the sum of 6,832*l.* was assured to be paid to the trustees of the Globe Insurance Company out of the funds of the company upon the death of G.

The annual premiums were accordingly regularly paid upon this policy by cheques signed by three of the directors of the Globe Insurance Company on behalf of the company, the amount of such cheques being paid by the bankers of the company on account of the annuity department of the company to the credit of the life insurance department thereof. In 1842 G went beyond seas, and thenceforth additional rates of insurance upon the policy were paid by means of cheques drawn and paid in the same manner:—Held, that as against the trust funds assigned by way of security to the company, the company were not entitled to deduct the sums they had paid in respect of additional rates of premium. *Greg v. Ellison*, 25 Law J. Rep. (n.s.) Chanc. 666; 1 Giff. 438.

(C) VARIATION OF POLICY FROM AGREEMENT.

R & K entered into negotiations with C, the London agent of a Scottish insurance company, for the purpose of effecting a policy on the life of H, a merchant; and it was verbally agreed between R & K and C that the policy should be granted authorizing the assured, under certain conditions, to make voyages in the way of business to the ports of Morocco and other ports in the Mediterranean, and on the coasts of Africa and Asia. A written proposal, in the handwriting of one of the partners R & K, was communicated by C to the company, in the following terms, differing by mistake, as R & K alleged, from the agreement they had previously made with C:—"Mr. H to be at liberty to visit, on business, Tangiers, or any other port within the Mediterranean, without subjecting himself to any extra premium, or having to apply for a licence; but it is understood that he is not to reside out of Europe at any place in the Mediterranean beyond the period of three months, or to go to the interior of Asia and Africa. The above memorandum to be indorsed on the policy." A policy was accordingly granted, whereby 2,000*l.* was assured to be paid to R & K after the death of H, with a proviso that in case the said H should depart beyond the limits of Europe the policy should be void. A memorandum was indorsed on the policy to the effect that, notwithstanding the restriction contained in it, H should enjoy such liberty as mentioned in the above-written proposal. H, in the course of his business, visited Casa Blanca, a small port on the Atlantic coast of Morocco, south of Tangiers, and died there before he had resided three months. The Court, on a bill being filed for that purpose by R & K, refused to rectify the policy, as against the company, so as to express the true agreement between R & K and C, but declared the policy to be not binding on either the plaintiffs or the company; and ordered the premiums which the plaintiffs had paid to be refunded, as having been paid by mistake, and the policy to be delivered up to the defendants. *Powder v. the Scottish Equitable Life Insur. Soc. and Ritchie*, 28 Law J. Rep. (n.s.) Chanc. 225.

(D) INSURABLE INTEREST.

In every policy on the life of another, the name of the person who is really interested at the time of effecting the policy, or for whose benefit the policy is effected, must be inserted as the person interested; and the omission, or erroneous statement of the

person interested, *per se* avoids the policy, whether it be a wagering policy or not. *Hodson v. the Observer Life Assur. Soc.*, 26 Law J. Rep. (N.S.) Q.B. 303; 8 E. & B. 40.

To an action by the executor of J S on a policy of insurance on his life, the defendants pleaded that the policy was, in fact, made by one T S, in the name and in the pretended behalf of J S, but for the use, benefit, and on account and behalf of the said T S himself, and not for the use, benefit, or on account of the said J S; and that T S had not, at the time of making the policy, nor before, nor at the death of the said J S, any interest in the life of J S, and that the policy was a gaming or wagering policy, contrary to the statute:—Held, that the plea was an answer to the action. *Semble*—that the plea would not be proved by shewing that the policy was made in consequence of a suggestion from the son of the assured, to his father that he ought to insure his life, and that the son supplied the money for the premiums. *Shilling v. the Accidental Death Insur. Co.*, 26 Law J. Rep. (N.S.) Exch. 266; 2 Hurl. & N. 42.

Although, where insurance is really effected by the party insured, the mere circumstance that another party pays the premiums may not be conclusive, or even, *per se*, sufficient evidence to warrant a jury (or the Court upon a special verdict) in finding that the interest was not in the insured—*Tristram v. Hardey and Shilling v. the Accidental Death Insurance Company*; yet where the insurance is effected, by the party nominally insured, at the instance of and for the benefit of another, who is to pay the premiums, and in pursuance of an arrangement between them, under which he immediately secures the sole benefit of it (by assignment or bequest), the evidence will be so conclusive that the interest is really in the third party (so that the policy is void for not having been in his name), that the Court will set aside a verdict for the plaintiff in an action brought by him or his representatives upon it. *Shilling v. the Accidental Death Insur. Co.*, 27 Law J. Rep. (N.S.) Exch. 16.

(E) UNTRUE AVERTMENTS.

A policy of insurance under seal, after reciting that the plaintiffs were interested in the life of J, and had delivered to the defendants, an insurance company, a proposal for insurance therein, whereby it was declared that J was of a certain age and was not subject to certain diseases, and that the defendants had thereupon undertaken the proposed assurance, subject to the terms and conditions therein and thereunder expressed, and that the plaintiffs had paid a certain premium, witnessed that the defendants agreed that if J died within the year, or within any year for which the plaintiffs had paid the premium, the property of the company should be liable to pay the sum insured. The policy contained certain provisos, and terms and conditions in the usual form were added underneath it. J was subject to certain diseases, which the plaintiffs in their proposal stated he was not, but the plaintiffs did not know it until after J's death:—Held (reversing the judgment below, 26 Law J. Rep. (N.S.) Q.B. 266; 8 E. & B. 232), that the plaintiffs were nevertheless entitled to recover the sum assured, as it was not a condition precedent to their right to have the contract fulfilled that their state-

ment respecting J's health should be true. *Wheeleton v. Hardisty* (Ex. Ch.), 27 Law J. Rep. (N.S.) Q.B. 241.

The plaintiffs replied to the above plea, on equitable grounds, that the defendants had published a prospectus stating that all insurances with them should be unquestionable, except where fraud might be practised in obtaining them; that the plaintiffs effected the policy on the faith of this prospectus, and that no fraud was practised in obtaining the assurance. In support of this replication, the plaintiffs merely put in evidence a prospectus, produced, after notice, by the defendants, and admitted by them to have been generally circulated by them before and at the time the policy was effected by the plaintiffs:—Held, by *Wightman, J., Erie, J. and Orompton, J.*, that there was no evidence from which the jury might reasonably presume that the plaintiffs had seen the prospectus and effected the policy on the faith of it; by *Lord Campbell, C.J.*, that there was evidence from which such a presumption might have been drawn. Held, also, by *Lord Campbell, C.J.*, that the replication was good, and that "fraud" in the prospectus meant personal fraud of the assured, and did not extend to that of the life and referees. But, *quære*, by *Wightman, J., Erie, J. and Orompton, J.*, whether the replication was good. And, *semble*, by those Judges, that "fraud" would include fraud of the life or referees. *Ibid.* 26 Law J. Rep. (N.S.) Q.B. 265; 8 E. & B. 232.

At the time of effecting a life policy with an insurance company the insured signed a written declaration, which it was agreed should be the basis of the contract of insurance, in which he declared, *inter alia*, that he was not aware of any disorder or circumstance tending to shorten his life. He was aware at the time that he had had certain illnesses, which did, in fact, tend to shorten his life, but he was not aware that they had such a tendency:—Held, in an action to recover the amount of the policy, that, in order to render the declaration untrue, so as to defeat the policy, it was necessary to shew not only that the insured was aware that he had had those illnesses, but also that he was aware that they tended to shorten his life. *Jones v. the Provincial Insur. Com.*, 26 Law J. Rep. (N.S.) C.P. 272; 3 Com. B. Rep. N.S. 65.

Where, at the trial, the defendants' counsel relied upon one particular point, and advisedly abstained from raising others which might have been raised, on the argument of a rule for a new trial on the ground of misdirection, the Court confined them to the point raised at the trial. *Ibid.*

A policy of insurance effected by T on his own life was subject to a condition that it was to be void, "in case any fraudulent or untrue statement was contained in any of the documents deposited with the company in relation to the insurance by the assured," &c. Among such documents was one called the "personal statement" containing questions which T was required to answer, and his answers to them, as follows:—Q. "Whether had, since infancy, any disease requiring confinement?"—A. "No." Q. "How often has medical attendance been required?"—A. "One year ago." Q. "For what disease?"—A. "Disordered stomach." Q. "For what period confined to the house or bed?"—A. "A week." Q. "Name and address of medi-

cal attendant employed on occasion of such disease?"—A. "Dr. R." The facts were that, subsequently to the occasion on which he was attended by Dr. R, he had had another and very dangerous illness, for which he had been attended by three other medical men. In an action against the insurance company, to recover the amount of the policy, the jury found that T had withheld no material information:—Held, that by the above answers T had, in effect, denied that he had had any disease requiring confinement, except on the occasion when he was attended by Dr. R. And, on the authority of *Anderson v. Fitzgerald*, that, inasmuch as such statement was untrue, the policy was void, notwithstanding the finding of the jury. *Cussenov v. the British Equitable Assur. Co.*, 28 Law J. Rep. (n.s.) C.P. 259; 6 Com. B. Rep. N.S. 437: affirmed in Ex. Ch. 29 Law J. Rep. (n.s.) C.P. 160.

In another document, called the "Proposal," also containing questions, which T was required to answer, was the following:—Q. "Names and addresses of the usual medical attendant, and the last medical attendant?"—A. "Dr. C." Dr. C. was T's usual medical attendant, but was not his last medical attendant. *Quære*—whether this answer was to be construed to be an answer to both branches of the question, and so an untrue statement within the condition, or as an answer to the first branch only. *Ibid.*

By a form of proposal for insurance, the name, residence, profession, or occupation of the person whose life was proposed to be insured were required to be stated. The plaintiff was an ironmonger; in the Proposal he described himself as "J T P, Esquire, Saltley Hall," where he resided. He omitted to state that he was an ironmonger. The policy which was granted on this Proposal contained a clause that, if any statement in the Proposal were untrue, or if the policy had been obtained, or should thereafter be continued, through any misrepresentation, concealment, or any untrue averment whatsoever, the policy should be void. The same premium would have been required of the plaintiff if he had stated his occupation of ironmonger:—Held, that the policy was not avoided by reason of the manner in which the plaintiff had described himself in the Proposal. *Perrins v. the Marine and General Travellers Insur. Co.* (Ex. Ch.), 29 Law J. Rep. (n.s.) Q.B. 242: affirming the judgment below, 29 Law J. Rep. (n.s.) Q.B. 17.

(F) FRAUD.

Life policy obtained for fraudulent purposes declared void, and the premium already paid to the insurance office applied in payment of the costs. *Princes of Wales, &c. Assoc. Co. v. Palmer*, 25 Beav. 605.

(G) RIGHT TO THE POLICY.

A mortgagee, by way of collateral security for his mortgage debt, insured in his own name the life of his debtor, the latter paying the premiums upon the policy. The debtor afterwards took the benefit of the Insolvent Debtors Act, obtained the ordinary vesting order, and, having put in his schedule, in which the mortgage debt was specified, and the policy, as one of the securities for payment of such debt, obtained his discharge. The debtor, after sur-

viving the mortgagee, died, and the insurance company paid the amount due upon the policy to the personal representatives of the mortgagee, who, after retaining thereout the amount of their debt and costs, paid the balance into court. The balance being claimed by the assignee in insolvency of the debtor, on the one hand, and by his personal representatives on the other,—Held, that the title of the assignee in insolvency was to be preferred. *In re Storrie's Trust*, 28 Law J. Rep. (n.s.) Chanc. 888; 1 Giff. 94.

Where A pays the premium upon a policy on his life, but the benefit of it is claimed by B, the onus of proof lies on the latter, even though the policy stands in his name. *Pfeffer v. Brown*, 28 Beav. 891.

(H) ASSIGNMENT OF THE POLICY.

B, a merchant at Valparaiso, insured his life in England under a policy of insurance, which was subject to the following condition: "This policy will be void if the life assured die by his own hands, the hands of justice, by duelling, or by suicide; but if any third party have acquired a *bona fide* interest therein, by assignment or by legal or equitable lien for a valuable consideration, or as security for money, the assurance thereby effected shall, nevertheless, to the extent of such interest, be valid and of full effect." On the 9th of July 1856, while the policy was running, B became bankrupt, and, according to the law prevailing at Valparaiso, his property became vested, by operation of law, in the escribano, or notary, attached to the Consulado Court. On the 14th of July B committed suicide. On the 15th of July a meeting of his creditors was held, and the plaintiffs were appointed assignees, upon which the property of B became vested in them. An action having been brought to recover the amount insured under the policy, it was held, that the plaintiffs were not entitled to recover, as they were not such third parties as were referred to in the exception contained in the condition. *Jackson v. Forster* (Ex. Ch.), 29 Law J. Rep. (n.s.) Q.B. 8; 1 E. & E. 463: affirming the judgment below, 28 Law J. Rep. (n.s.) Q.B. 166; 1 E. & E. 463.

A policy of assurance contained a proviso that in case the assured should commit suicide the policy should be cancelled by the return of the premiums, except the policy should have been legally assigned:—Held, that the policy was forfeited, though the assured committed suicide while in an unsound state of mind. Held, also, that a deposit of the policy by the assured, as a security for monies advanced, amounted to a legal assignment within the meaning of the policy. *Dufaur v. the Professional Life Assur. Co.*, 27 Law J. Rep. (n.s.) Chanc. 817; 25 Beav. 599.

A policy of assurance on the life of E W was subject to a condition avoiding it on suicide, but provided that in case the policy should have been assigned to other parties for a valuable consideration six calendar months before the death of the assured, it should remain in force to the extent of the beneficial interest therein of the party to whom it should have been assigned. E W deposited the policy with the plaintiff. The policy was accompanied by a letter, stating that it was to be held "as security, in case of death or otherwise, for any notes of hand or

bills of exchange you may have cashed for me." From that time a current account existed between the parties; the plaintiff cashed or discounted for E W divers bills of exchange, and frequently took renewals of them as they came due. E W afterwards shot himself. At that time a sum of money was due to the plaintiff by E W on several outstanding bills of exchange, &c. exceeding the amount payable on the policy; but none of them bore date much more than two months before the death of E W. Upon a bill to obtain payment of the sums insured,—Held, that the policy was duly assigned; that the security continued from the date of the deposit, notwithstanding the consideration for it was fluctuating; that the payment or withdrawal of the earlier bills did not necessitate a fresh deposit; and that it was, and was intended to be, a security for what was due on the current account at the death of E W or otherwise. *Jones v. the Consolidated Investment and Assur. Co.*, 28 Law J. Rep. (N.S.) Chanc. 66; 26 Beav. 256.

(I) LOST POLICY.

Sums secured by life policies alleged to have been lost or destroyed in the lifetime of the insurer, ordered to be paid to his administratrix by the insurance company without any other indemnity than the decree of the Court. *Crookatt v. Ford*, 25 Law J. Rep. (N.S.) Chanc. 552.

2.—INSURANCE AGAINST FIRE.

[The Laws relating to the Duties on Fire Insurances amended by 19 & 20 Vict. c. 22.]

(A) CONSTRUCTION OF THE POLICY OR CONTRACT OF INSURANCE.

A policy of insurance against fire contained, among others, the following conditions: that the amount of loss should be paid immediately after the same should be established to the satisfaction of the directors; that all persons insured sustaining any damage by fire should forthwith give notice thereof to the company, and, within fifteen days after the loss, deliver in as particular an account of their loss or damage as the nature of the case would admit of; and in case any difference or dispute should arise between the insured and the company touching the loss or damage, such differences should be referred to arbitration, and the award of the arbitrators be conclusive on all parties.—Held, that the delivery of particulars within fifteen days after the loss was a condition precedent to the right to sue on the policy, and that the reference to arbitration of the amount of the loss was not a condition precedent to the right to sue on the policy. A condition in a contract to refer to arbitration any question which may arise out of the contract will be, if so stated, a condition precedent to the right to sue on the contract; but unless the condition expressly stipulate that until arbitration had no action shall be brought, its performance is not precedent to the right to sue on the contract. In cases where the condition is not precedent to the right to sue, if either party sue without offering to refer, it is open to the other party to apply for a reference under the provisions of section 11. of the Common Law Procedure Act, 1854. *Roper v. London*, 28 Law J. Rep. (N.S.) Q.B. 260.

(B) DESCRIPTION OF PREMISES INSURED.

In a policy of insurance against fire, one of the conditions was that "the nature and material structure" of the building should be truly described, and another that it should be stated whether any hazardous business was carried on:—Held, that an omission to mention a steam-engine *bond fids* used in the building, but only to grind corn for the horses used on the premises, was not a want of proper description, avoiding the policy. *Baxendale v. Harding*, 28 Law J. Rep. (N.S.) Exch. 236; 4 Hurl. & N. 445.

(C) INSURABLE INTEREST: GOODS IN TRUST.

Warehousemen and wharfingers with whom goods are deposited have an insurable interest in such goods, although there has been no previous authority to insure given by the real owners, nor any notice given to them of such insurance. Such goods are properly described in a policy as "goods in trust." The insurers are entitled in such a case to recover from the insurance office the full value of the goods destroyed by fire, but are liable to account to the true owners for the excess of the money received beyond the amount of their own charges in respect of such goods. *Waters v. the Monarch Life and Fire Insur. Co.*, 25 Law J. Rep. (N.S.) Q.B. 102; 5 E. & B. 870.

The plaintiffs, being common carriers, effected a policy, one of the conditions of which was, that "goods held in trust or on commission are to be insured as such, otherwise the policy will not extend to cover such property," and 15,000*l.* was declared to be on "goods, their (the plaintiffs) own and in trust as carriers" in a certain warehouse; by the policy, the funds of the insurers were to be "liable to pay, reinstate, or make good to the assured all damage and loss which they might suffer by fire on the property therein particularized":—Held, that the plaintiffs insured the whole value of any goods sent to them to be carried, and not merely their own interest as carriers; and that they could recover from the insurers the value of a packet of silk destroyed in their warehouse by an accidental fire, although by reason of its not having been declared under the Carriers Act, they were not liable as carriers for its loss. *The London and North-Western Rail. Co. v. Glyn*, 28 Law J. Rep. (N.S.) Q.B. 188; 1 E. & E. 652.

(D) ALTERATION OF THE RISK.

A policy of assurance against fire, in the description of the buildings, after stating that part of the lower story was used as a boiler-house, added, "No steam-engine employed on the premises. The steam from the said boiler being used for heating water and warming the shops.—N.B. The process of melting tallow by steam in the said boiler-house and the use of two pipe-stoves in the said building are hereby allowed." The rates of insurance were stated as common, hazardous, doubly hazardous and special risk. The seventh condition provided that if, after the insurance, the risk should be increased by the erection of any stove, &c., or by any other alteration of circumstances, and the particulars were not indorsed on the policy by the secretary, and a higher premium paid if required, the insurance should be

of no force. The assured paid as for a special risk. Some time after the policy had been effected the assured erected a steam-engine on the premises and supplied it with steam from the boiler, but gave no notice of it to the insurance office. It was found as a fact, that the risk to the office was not increased by the erection of the steam-engine. The premises were destroyed by an accidental fire, not attributable to the use of the steam-engine:—Held, (reversing the judgment of the Exchequer, 25 Law J. Rep. (N.S.) Exch. 291; 1 Hurl. & N. 320), that, taking the policy together, there was no implied warranty that the premises should continue in the state in which they were described as being at the time when the policy was effected; and that the alteration of the premises by the erection of the steam-engine did not avoid the policy, though no notice had been given to the office, as it had not increased the risk. *Stokes v. Cox* (Ex. Ch.), 26 Law J. Rep. (N.S.) Exch. 113; 1 Hurl. & N. 533.

(E) REINSTATING BUILDINGS.

If one of the parties to a contract stipulates for the option of performing his part in one of two lawful ways, he is, after having once made his election, bound by such election; and if the performance be impossible and not illegal, he is liable to damages for not being able to perform it. In an action on a policy of insurance against fire, which contained a condition, by which the society reserved to itself the right of reinstatement in preference to the payment of claims, the defendants pleaded that, having elected to reinstate the insured premises, they were proceeding with the reinstatement thereof, when, by order of the Commissioners of Sewers lawfully acting in that behalf, the premises were taken down as being in a dangerous condition, such condition not being caused by the fire; and that if the said premises had not been so taken down, they would have proceeded with the reinstatement, and would have restored them to the condition they were in before the fire:—Held, on demurrer, per *Lord Campbell, C.J.*, *Crompton, J.* and *Hill, J.*, that such plea was bad: *Erle, J.* dissentiens. *Brown v. the Royal Insur. Soc.*, 28 Law J. Rep. (N.S.) Q.B. 275.

An insurance company who had insured a house from fire, with an option to reinstate it, in the event of a fire, having elected to reinstate it, employed the defendant, a builder, to reinstate it, who used the old walls so far as they remained; and when he had finished all but a little of the painting, gave one of the insured a small sum to complete it, and got him to sign a certificate that the work was complete, and received payment from the company. The old walls, not bearing the weight of the new work, "bulged." The assured sued the company for not duly reinstating the house, and they defended the action, without the defendant's authority, and the assured recovered damages. The company then sued the builder on his contract (the breach being an insufficient and imperfect reinstating), and also for fraudulent representation; and for the costs. The Judge told the jury that the defendant was only bound to put the building as nearly as possible in the same state as before the fire; and they found that he had done so, and that the building was not less secure than before. At the close of the case the plaintiffs relied on the omission of the painting;

but the jury found that the value was nominal, and that in getting the certificate there was no fraud. The verdict was entered for the defendant, the Judge telling the jury that, in the absence of any express authority to defend the former action, the company could not recover costs:—Held, that the direction was right, and that the plaintiffs were not entitled to a verdict, even for nominal damages; and that no amendment could be allowed. *The Times Fire Assur. Co. v. Hawks*, 28 Law J. Rep. (N.S.) Exch. 317.

S.—INSURANCE AGAINST ACCIDENTS.

(A) DEATH BY DROWNING: EVIDENCE.

A policy of insurance against any injury caused by accident or violence within the meaning of the policy, contained a proviso "that no claim should be made under the policy in respect of any injury, unless the same should be caused by some outward and visible means, of which satisfactory proof could be furnished to the directors." A claim was made by the executors of an assured person, upon evidence that he went to bathe in the sea, and was not seen alive afterwards, his clothes being found on the beach and his body subsequently washed ashore:—Held, that there was no evidence of a death from injury within the meaning of the policy. *Trew v. the Railway Passengers Assur. Co.*, 29 Law J. Rep. (N.S.) Exch. 218; 5 Hurl. & N. 211.

(B) WHOLLY DISABLED FROM FOLLOWING BUSINESS.

By a policy of insurance against accident the insured was entitled to a fixed weekly payment in the event of an accident causing bodily injury to the insured "of so serious a nature as wholly to disable him from following his usual business, occupation or pursuits." The insured, an attorney, sprained his ankle, which confined him to the sofa in a room adjoining his bedroom for a month, and prevented his going down stairs. Some part of his business was stopped, but clerks carried on other parts of it, and he could write letters, consult law books, and give advice and directions to his clerks:—Held, by the Court (which had liberty to draw inferences of fact), that the plaintiff was wholly disabled from following his usual business, occupation or pursuits within the meaning of the policy. *Hooper v. the Accidental Death Insur. Co.* (Ex. Ch.), 29 Law J. Rep. (N.S.) Exch. 484; 5 Hurl. & N. 557; affirming the judgment below, 29 Law J. Rep. (N.S.) Exch. 340; 5 Hurl. & N. 546.

(C) PAYMENT OF PREMIUMS.

The testator of the plaintiffs, on the 22nd of January 1851, effected a policy of insurance against death or injury by accident with the defendants, which provided that he, the insured, on or before or within twenty-one days after the 22nd of January 1852, and on or before or within twenty-one days of the 22nd of January in every succeeding year, so long as the acting directors for the time being of the said company should accept the same, should pay to the defendants the annual premium of 12*l.* The policy was made subject to certain conditions indorsed on it. The first was, that, provided the pre-

mium should be paid within the twenty-one days, the policy should not be void, notwithstanding the happening before the expiration of them of the event upon which the policy should become payable by its terms. The second condition provided, that if the premium should be unpaid for the twenty-one days after it became due, the policy should be absolutely void; and the fourth condition stipulated that in every case where a new premium should become payable, the directors should be at liberty to terminate the risk by refusing to accept the premium. The insured met with an accident on the 27th of January 1856, and died on the 1st of February. On the 4th of February, notice was given to the company of his death, and a correspondence took place between the secretary and the attorney of the plaintiffs, the executors. Neither the secretary nor the plaintiffs knew, at the commencement of the correspondence, that the premium due on the 22nd of January had not been paid; but the secretary became aware of that fact on the 8th of February, and did not give notice of it to the plaintiffs till the twenty-one days had expired. The jury found, that the defendants had intentionally withheld the information from the plaintiffs to prevent them from paying up the premium within the twenty-one days:—Held, first, that the defendants were not estopped by their conduct from setting up the non-payment of the premium within the twenty-one days, and therefore, by the second condition, the policy was void. Secondly, that the payment in the first condition must mean such a payment by the insured as was mentioned in the body of the policy, and therefore the executors were not entitled to pay the premium after the death of the insured; and if they had tendered it, the directors might have refused it. Thirdly, that, under the fourth condition, neither the insured nor his executors had an absolute right to keep alive the policy by payment or tender within the twenty-one days; the directors having the power to keep it alive or refuse to do so at their pleasure: commenting on *Turleton v. Staniforth and Salvin v. James. Simpson v. the Accidental Death Insur. Co.*, 26 Law J. Rep. (N.S.) C.P. 289; 2 Com. Rep. N.S. 257.

INTEREST.

[Person interested in Prosecutions, see *QUO WARRANTO.*]

WHEN RECOVERABLE.

[See *Noble v. the National Discount and Banking Co.*, title *MONEY HAD AND RECEIVED.*]

The defendants entered into the following agreement with the plaintiff,—"In consideration of your discounting for us the under-mentioned bill, we do hereby undertake, if the same is not wholly paid at maturity, to pay, as interest thereon, 17*l.* 10*s.* for each month any portion of which shall have elapsed after maturity of the said bill and until the entire amount of the same is wholly paid and satisfied: all payments made by us to be applied first in liquidation of interest, and afterwards in reduction of the said principal sum of 350*l.*" In an action upon the above contract, for non-payment of the stipulated interest,—Held, that a plea shewing that the plaintiff had indorsed over the bill to a third person, was

a good answer, inasmuch as the interest could only be claimed as accessory to the bill. *Florence v. Drayson*, 1 Com. B. Rep. N.S. 584.

In consideration of the plaintiff's discounting a bill, the defendant, jointly and severally with D, undertook if the same was not paid at maturity to pay, as interest thereon, 20*l.* for each month afterwards. The bill was not paid at maturity, and the plaintiff issued a writ against the defendant, and by the indorsement thereon claimed the amount of the bill and interest at 20*l.* per month as per agreement; but the declaration in the action was on the bill only, and contained no count upon the agreement or for interest, and the plaintiff recovered judgment by default for the amount of the bill only. The plaintiff having brought a second action against the defendant upon the agreement for interest,—Held, that the action was maintainable for interest due before the judgment was recovered, but not for interest due subsequently to it. *Florence v. Jennings*, 26 Law J. Rep. (N.S.) C.P. 274; 2 Com. B. Rep. N.S. 454.

RATE OF RECOVERABLE.

In an action against the drawer of a bill for 200*l.*, with 10*l.* per cent. interest, it was held, that the holder might recover interest at 10*l.* per cent. from the time when the bill became due, as well as for the time during which it was running. *Keene v. Keene*, 27 Law J. Rep. (N.S.) C.P. 88; 3 Com. B. Rep. N.S. 144.

INTERPLEADER.

1.—INTERPLEADER AT LAW.

- (A) INTERFERENCE.
 - (a) *In general.*
 - (b) *Relief to the Sheriff.*
- (B) EVIDENCE.
- (C) COSTS.
 - (a) *Of Mixed Witnesses.*
 - (b) *Security for.*
- (D) PRACTICE: STAYING PROCEEDINGS.

2.—INTERPLEADER IN EQUITY.

- (A) BILL FOR.
 - (a) *When sustainable.*
 - (b) *Filing.*
- (B) PLEADING AND PRACTICE.
- (C) COSTS: SCALE OF.

1.—INTERPLEADER AT LAW.

- (A) INTERFERENCE.
 - (a) *In general.*

Where the Bank of A, at Melbourne, drew on the defendants a bill payable at thirty days' sight to the order of S A, and S A indorsed to the plaintiff, and the defendants accepted, and before the bill became due J A gave the defendants notice that he was the husband of S A, and had remitted the bill from Melbourne, and directed them not to pay the bill without his indorsement; and the defendants refused to pay the plaintiff when the bill became due, and the plain-

tiff commenced an action against them, this Court refused, on the application of the defendants, to make a rule absolute for an interpleader issue between the plaintiff and J A, on the ground that even if the case came under the Interpleader Act at all, (which they doubted,) it would be impossible to frame an issue on which the plaintiff could try the question, whether the defendants were not estopped by their acceptance from denying the right of S A to indorse. *Baker v. the Bank of Australasia*, 26 Law J. Rep. (N.S.) C.P. 93; 1 Com. B. Rep. N.S. 515.

A, being in possession of a house, deposited the title-deeds with a bank as a security for a loan. Amongst them was what was purported to be a grant to B, deceased, in fee. A died. B's heir demanded the grant from the bank, claiming it as his property. A's heir, who was in possession of the house, paid off the advance, and demanded the deeds deposited. The bank gave up all but the grant claimed by B's heir, which they refused to give to either party. B's heir brought trover against the bank; A's heir threatened to sue the bank. On a rule under the Interpleader Act, this Court relieved the bank, though in the relation of bailee to the person represented by the claimant: *Crompton, J. v. Roberts*. *Roberts v. Bell*, 7 E. & B. 323.

(b) Relief to the Sheriff.

The sheriff is entitled to call upon the execution creditor and claimants to interplead, unless he has acted dishonestly, or his conduct has prejudiced either of the parties. *In re Holt v. Frost*, 28 Law J. Rep. (N.S.) Exch. 55; 3 Hurl. & N. 821.

The fact, therefore, that the sheriff had, down to the seizure of the execution debtor's goods, acted as the attorney of a claimant, and had given him notice of the execution, is not alone sufficient to prevent his calling on the parties to interplead. *Ibid.*

Where an execution has been levied, and a landlord makes a claim upon the sheriff for rent, which the execution creditor has not expressly disputed, although the claim may be disputable, whether as regards the amount of rent due (on the construction of the lease), or as regards the liability of the property which has been seized to distrain, the sheriff is not entitled to an interpleader, at all events, unless the landlord claims any part of the property. And, *semble*, that in no case where the claim is for rent can there be an interpleader. *Bateman v. Farnsworth*, 29 Law J. Rep. (N.S.) Exch. 365.

(B) EVIDENCE.

In an interpleader issue between a claimant under a *bond fide* bill of sale duly registered and an execution creditor of the assignor, the latter cannot set up a prior bill of sale to a third party, also *bond fide*, but void as against execution creditors for want of due registration under the 17 & 18 Vict. c. 36. s. 1. *Edwards v. English*, 26 Law J. Rep. (N.S.) Q.B. 193; 7 E. & B. 564.

The statute 19 & 20 Vict. c. 97. has no retrospective operation, and does not affect rights existing at the time of its passing. *Williams v. Smith*, 26 Law J. Rep. (N.S.) Exch. 371; 2 Hurl. & N. 443.

Where it appeared on an interpleader issue, that the plaintiff, the claimant, had purchased chattels from the execution debtor after a writ of *f. fa.*

against the seller had been delivered to the sheriff, and that the statute passed before the purchase, but after the delivery of the writ,—it was held, that, even assuming that the plaintiff had not had any notice of the writ at the time of the purchase, &c., the chattels at the time the statute passed were already bound by delivery of the writ. *Ibid.*

Quere—whether notice of a writ without notice of its amount is sufficient. *Ibid.*

In an interpleader suit, the question being between a claimant under a bill of sale from the sheriff and an execution creditor, the bill of sale, though it may not *per se* be sufficient *prima facie* evidence of the title of the claimant, is so, coupled with some evidence of a prior seizure by the sheriff. *Hornidge v. Cooper*, 27 Law J. Rep. (N.S.) Exch. 314.

In an interpleader issue to try whether certain goods were the property of the plaintiff as against the defendant, the execution creditor, it was proved that the goods were, at the time of the seizure, in the possession of the execution debtor, to whom they had been let by the plaintiff. The goods were in fact the property of W, who had lent them to the plaintiff, who was his agent, allowing her to let them as owner to whom she would:—Held, that the plaintiff had sustained her claim. *Green v. Stevens*, 2 Hurl. & N. 146.

(C) COSTS.

(a) Of mixed Witnesses.

The rule applicable to the taxation of costs in an action does not apply to the costs of mixed witnesses in an interpleader issue, under 1 & 2 Will. 4. c. 58. The correct rule is to ascertain the extent to which each party has substantially succeeded, without reference to which party is plaintiff and which is defendant. *Davis v. Clifton*, 25 Law J. Rep. (N.S.) Q.B. 344; *a.c. Clifton v. Davis*, 6 E. & B. 392.

(b) Security for.

The plaintiff, the assignee of an insolvent debtor sued the defendant for the proceeds of goods entrusted to him by the insolvent before his insolvency, for sale. The insolvent claimed them as executor, and the assignee and the insolvent were ordered to interplead, on the defendant bringing the money into court. The Court refused to make it a condition of the order, that the insolvent or the defendant should give security for costs. *Ridgway v. Jones*, 29 Law J. Rep. (N.S.) Q.B. 97.

(D) PRACTICE: STAYING PROCEEDINGS.

The power of the Court or a Judge, under the Interpleader Act, 1 & 2 Will. 4. c. 58, to stay proceedings in actions against the sheriff, is not confined to disputed claims to the goods seized, but extends to actions of trespass against him for breaking and entering the house of the claimant. *Wister v. Bartholomew*, 25 Law J. Rep. (N.S.) Exch. 62; 11 Exch. Rep. 704.

A Judge at chambers on an interpleader order has authority to restrain an action against the execution creditor, as well as against the sheriff. *Carpenter v. Pearce*, 27 Law J. Rep. (N.S.) Exch. 143.

2.—INTERPLEADER IN EQUITY.

(A) BILL FOR.

(a) When sustainable.

The mortgagees of lands in settlement, by the direction and with the concurrence of the donee of a power under the settlement, granted a lease at an annual rent to the plaintiff, who, with the assent of the mortgagees, covenanted to pay the rent to the donee of the power, unless it should be demanded by the mortgagees. The deed of settlement, as well as the power contained therein, was referred to, but its terms were not set out, in the indenture of lease. The rent payable under the lease having fallen into arrear was claimed of the plaintiff both by the surviving trustee of the settlement and by the donee of the power therein:—Held, that a bill of interpleader filed against the counter claimants could not be sustained. *Cook v. the Earl of Rosslyn*, 28 Law J. Rep. (N.S.) Chanc. 883; 1 Giff. 167.

(b) Filing.

A merchant at Nantes contracted with a London firm for a supply of coal. The London firm contracted with another London house to supply the goods, which the latter did, and delivered the same to the Nantes merchant. The firm who shipped the goods brought an action for the amount against the Nantes merchant in December, and arrested one of the firm who was then in London. Upon putting in bail he quitted England, and with his partner remained at Nantes until after the action was tried on the 18th of February. Their attorney, by inadvertence, not being instructed to defend the action, a verdict was taken by default. On the 16th of April they moved for a new trial, which was refused. Having obtained leave to file an interpleader bill against the original London firm and against the firm which brought the action, they moved for an injunction to restrain the plaintiffs in the action from issuing execution on the judgment, and from taking out of the Court of Queen's Bench the amount which the Nantes merchant had paid in as a term of staying execution. The Master of the Rolls refused the motion for an injunction; and, upon appeal, his decision was affirmed, the Lords Justices being of opinion that the bill was filed too late, and that it was substantially a bill for a new trial. *Larabrie v. Brown*, 26 Law J. Rep. (N.S.) Chanc. 605; 1 De Gex & J. 204; 23 Beav. 607.

The plaintiff in an interpleader suit being abroad, leave was given, *valent quantum*, to file the bill without the plaintiff's affidavit of no collusion, but with an affidavit by the plaintiff's solicitor of his belief that there was no collusion. *Larabrie v. Brown*, 26 Law J. Rep. (N.S.) Chanc. 416; 1 De Gex & J. 204; 23 Beav. 607.

A sheriff seized certain goods under a *f. fa.* Notice was given to the sheriff that the goods belonged to another person, who threatened to take proceedings at law to recover them. The sheriff filed a bill to restrain the proceedings and for interpleader. Upon motion for an injunction, the Court, without deciding whether the sheriff could file a bill of interpleader, held, that there being no statement in the bill that the sheriff knew the goods to belong to the person upon whom he distrained, and the plaintiff not having used due diligence in filing the bill, the

motion must be refused, with costs. *Tyfton v. Harding*, 29 Law J. Rep. (N.S.) Chanc. 225.

(B) PLEADING AND PRACTICE.

A bill of interpleader stated a demise by a former Earl of S to the plaintiff of certain lands forming part of an estate settled by act of parliament in perpetuity upon the Earldom of S, that Earl T claimed the rent due from the plaintiff as heir to the Earldom of S, and other defendants claimed the same rent under a disentailing deed executed by the last Earl of S and his will. Plea, by the defendants alleged to claim as devisees, that the premises in question were not portion of the estate settled by the act:—Held, sufficient. *Major v. Earl Talbot*, 27 Law J. Rep. (N.S.) Chanc. 165.

In an interpleader suit the only question up to the hearing is, whether the defendants shall interplead; and therefore where one defendant only had gone into evidence on the question between the defendants, the Court directed an inquiry. *Cathedral v. Davies*, 1 Giff. 326.

(C) COSTS: SCALE OF.

In an interpleader suit, where the matter in dispute is under 1,000*l.*, the costs to be charged, under the Orders of the 30th of January 1857, must be upon the lower scale. *Gibbs v. Gibbs*, 27 Law J. Rep. (N.S.) Chanc. 677.

INTERROGATORIES.

[See PRACTICE, AT LAW.]

ISLE OF MAN.

[See HARBOUR.]

INVENTORY DUTY.

[In Scotland, see REVENUE.]

JERSEY.

[See BILLS OF EXCHANGE AND PROMISSORY NOTES (H), *Godfray v. Coulman*, ante, p. 98.]

An act of the States of Jersey for opening the Bar of the Cour Royale, hitherto confined to six advocates, confirmed by the Queen in Council. Compensation to the six advocates of that Court, for consequent loss by reason of throwing open the Bar refused. *The Jersey Bar*, 13 Moore's P.C. 263.

The Prison Board of Jersey, constituted by the Order in Council of the 11th of December 1837, is upon the same footing as visiting Justices in England, and is not liable to a detaining creditor in damages, for the escape of a prisoner in custody on meane process for debt, by reason of the negligence of the gaoler, although such gaoler was appointed by the Board, as incident to the management of the gaol. *Le Breton v. Aubin*, 10 Moore's P.C. 17.

The Royal Court of Jersey having refused to hear witnesses tendered by a defendant to an action, in

support of one of his pleas, and great delay having occurred from the course pursued, the judicial committee, under the powers of the statute 3 & 4 Will. 4. c. 41. s. 7, appointed a special examiner to take further evidence in the island, confining his inquiry to certain facts, and directing him to report the same within a limited time: the appeal to stand over for the production of his report and to be argued with reference only to the effect produced upon the entire case by such additional evidence. *Falle v. Le Sueur*, 12 Moore's P.C. 501.

H entered into contract with F for certain work to be done by H to houses in Jersey, payment to be made by F at stated periods. Two other agreements were contemporaneously made between the same parties for the purchase of pieces of land adjoining, for building other houses. These contracts were to be passed "*devant Justice*" within one year (which was not done). H commenced the work, and F paid him a first instalment. H being unable to complete the work, transferred his contract to L, and F assented to the transfer, upon condition that the agreements for the purchase and sale between him and H should be passed before the Royal Court. H afterwards became a bankrupt, and F was declared *tenant après décret* to his estate. L finished the work, F having recognized L as being substituted for H. F refused to pay L on the ground that the completion of the other agreements with H was a condition precedent to the right to recover for the work done:—Held, in the circumstances, that as F had recognized and suffered the work to be completed by L, and had the benefit of the contract, he could not refuse payment to L for the work done, on the ground of the non-performance of the agreements made by him with H. Held further, that by the law of Jersey, an Acte of the Royal Court, calling in the aid of experts, or sworn appraisers, to view the work done, was the proper course. *Ibid.*

JEWES.

[The Act of the 21 & 22 Vict. c. 49, to provide for the Relief of Her Majesty's Subjects professing the Jewish Religion amended by 23 & 24 Vict. c. 68.]

JUDGMENT.

[Amendment of the 13 & 14 Vict. c. 29, to amend the Laws concerning Judgments in Ireland, by 21 & 22 Vict. c. 105.—Further amendment of the Law of Property by 23 & 24 Vict. c. 38.]

- (A) FOR NOT PROCEEDING TO TRIAL.
- (B) SIGNING.
- (C) NUNC PRO TUNC.
- (D) SETTING ASIDE.
- (E) SATISFACTION.
- (F) PLEA IN BAR TO ACTION ON.
- (G) SETTING OFF JUDGMENTS.
- (H) CHARGE ON LANDS, UNDER 1 & 2 VICT. c. 110.
 - (a) *Upon what Property charged.*
 - (b) *Registration of.*
 - (c) *Priority of.*
- (I) CHARGE ON STOCK, UNDER 1 & 2 VICT. c. 110.

- (K) PROCEEDINGS UPON, IN EQUITY.
- (L) DOCKETING.
- (M) RIGHTS OF JUDGMENT CREDITORS.

(A) FOR NOT PROCEEDING TO TRIAL.

Where no proceedings have been taken in a cause for a year, the defendant must before signing judgment give a month's notice of intention to proceed, under rule 176. of the Rules of Hil. T. 1853, although he had given twenty days' notice to the plaintiff to proceed to trial. *Metcalf v. Hatherington*, 28 Law J. Rep. (n.s.) Exch. 155; 3 Hurl. & N. 755.

(B) SIGNING.

A judgment signed on an unstamped warrant of attorney is not available against subsequent judgments, and will be set aside on the application of a judgment creditor. The Court will not permit the warrant of attorney to be taken off the file for the purpose of being stamped on payment of the penalty, until the judgment signed on it is first set aside. *Semple v. Nicholson*, 28 Law J. Rep. (n.s.) Exch. 217; 4 Hurl. & N. 298.

Signing judgment against an order of *Nisi Prius* made by consent, is an irregularity: although it was also a breach of faith. The Judge's note is conclusive evidence of an arrangement at *Nisi Prius*. In an action of ejectment, a verdict having passed for the plaintiff, the Judge stayed proceedings until the fifth day of the ensuing term. During the first four days of term a cross-action of trespass came on to be tried; the defendant therein, finding himself not in a position to produce the judgment in ejectment as an estoppel, obtained an adjournment, on the condition that the action of ejectment should abide the result of the action of trespass. The latter action came on again to be tried, and it turned out that not either of the parties, but one C, was entitled to the premises. Thereupon, by consent, an arrangement was entered into, and made an order of *Nisi Prius*, to the effect that the actions should be abandoned, and the premises given up to C. The plaintiff in ejectment applied, with C, to be put in possession, and, possession being refused, signed judgment and issued execution. The Court set aside these proceedings as irregular. *Bikker v. Beeston*, 29 Law J. Rep. (n.s.) Exch. 121; *nom. Doe d. Beeston v. Bikker*, 5 Hurl. & N. 253.

(C) NUNC PRO TUNC.

The statute 17 Car. 2, which requires a judgment to be entered up two terms after verdict, gives an executor two terms during which it is practicable to enter judgment. The verdict referred to in the statute is the complete verdict on which judgment may be signed. Therefore, where at the Spring Assizes in 1854, a verdict was taken by the plaintiff subject to a reference, and in Easter vacation, before award, the plaintiff died, and on the last day in Michaelmas Term the arbitrator made his award, directing the verdict entered for the plaintiff to stand,—Held, that a rule obtained in Easter Term, 1855, to enter judgment as of Easter Term, 1854, *nunc pro tunc*, was in time. *Heathcote v. Wing*, 25 Law J. Rep. (n.s.) Exch. 23; 11 Exch. 355.

Where the plaintiff died between the granting of a rule in Michaelmas Term to enter judgment of nonsuit, and the argument in Hilary Term when the rule was made absolute, and judgment was signed in ignorance of his death, the Court gave the defendant leave to enter judgment *nunc pro tunc* as of the last day of Michaelmas Term. *Moor v. Roberts*, 27 Law J. Rep. (N.S.) C.P. 161; 3 Com. B. Rep. N.S. 844.

The plaintiff having died soon after verdict, the judgment was "signed" within two terms after trial, but the costs were not taxed within that time:—Held, that the judgment was good, and the *allocatur* regular. *Freeman or Fewins v. Leithbridge*, 28 Law J. Rep. (N.S.) Exch. 243; 4 Hurl. & N. 418.

(D) SETTING ASIDE.

The Court will in furtherance of justice set aside a judgment in an action, at the instance of the plaintiff, on the ground of a mistake having been made in the amount claimed and recovered, although the amount of the debt and costs in the action has been paid: but the application must be made within a reasonable time after the discovery of the mistake. *Cannan v. Reynolds*, 26 Law J. Rep. (N.S.) Q.B. 62; 5 E. & B. 301.

(E) SATISFACTION.

If a judgment creditor after taking his debtor on a *ca. sa.* consent to his discharge on a condition which the debtor afterwards breaks, still, unless the discharge was procured by the debtor's fraud, the debt and judgment are satisfied by it; and it is compulsory on the Court to order satisfaction to be entered up on the judgment-roll. *Cutlin v. Kernott*, 27 Law J. Rep. (N.S.) C.P. 186; 3 Com. B. Rep. N.S. 796.

(F) PLEA IN BAR TO ACTION ON.

Matter which affords ground for a writ of error cannot be pleaded in bar to an action on a judgment. Therefore, where to an action against husband and wife, on a judgment against the wife, the defendant pleaded that she was covert when the action in which the judgment was recovered was commenced and thence until the judgment, and that her husband was not a party to the judgment or a defendant in the action,—Held, that the plea was bad. *Dick v. Tolhausen*, 4 Hurl. & N. 695.

(G) SETTING OFF JUDGMENTS.

Although, where one of the parties in two cross-actions has assigned his interest to a third party, there may be no right to set off the judgments, yet, where the assignee, being the real plaintiff in one action, is also the real defendant in the other, there is such right of set-off. *Standeven v. Murgatroyd*.—*Murgatroyd v. Standeven*, 27 Law J. Rep. (N.S.) Exch. 425; 3 Hurl. & N. 570.

(H) CHARGE ON LANDS UNDER 1 & 2 VICT. C. 110.

(a) Upon what Property charged.

If a mortgagor sells the mortgaged estate, and pays off the mortgagee, the estate in the hands of the purchaser ceases to be affected by a judgment which had been registered against the mortgagee. *Greaves v. Wilson*, 28 Law J. Rep. (N.S.) Chanc. 103; 25 Beav. 434.

(b) Registration of.

A decree for payment of money gives no right as against the land before registration. *Lee v. Green*, 25 Law J. Rep. (N.S.) Chanc. 269; 6 De Gex, M. & G. 155.

A vesting order under the Insolvent Acts, though not registered, is valid, except as against purchasers without notice. *Ibid*.

A conveyance by a debtor, who afterwards becomes insolvent, for the benefit of his creditors, is only void as against the assignees, and is not fraudulent, though made with the object of defeating or postponing persons claiming under a decree. *Ibid*.

In April 1853, A and B obtained a decree, for payment of a sum of money, against C, the owner of the equity of redemption in premises situate in a register county. In June, C conveyed all his property to two trustees for the benefit of his creditors, of which A and B had immediate notice. In July, C became insolvent, and the usual vesting order was made. In August, the decree was registered both in the Common Pleas and in the county register. Neither the conveyance nor the vesting order was ever registered:—Held, upon appeal, reversing a decision of *Stewart, V.C.*, that until registration the decree did not affect the land, and at the time of registration there already existed a valid conveyance of the property. Held, also, that A and B had no remedy in this court against the mortgagees, though the latter had entered into an undertaking to pay the balance of the purchase-money of the premises, which they had sold under a power contained in their mortgage-deed, to A and B, towards satisfaction of their claims under the decree, and that, not having misled A and B as to the species of relief sought, they were entitled to their costs. *Ibid*.

A, B, and C were judgment creditors of D, A and B having priority to C. A and B subsequently omitted to re-register their judgments within five years from their previous registration. C duly registered within the five years:—Held, that A and B did not thereby lose their priority to C. *Beavan v. the Earl of Oxford*, 6 De Gex, M. & G. 492.

The effect of the provisions of the 4th section of the 2 & 3 Vict. c. 11. is to deprive the judgment creditor who omits to re-register within five years of protection against subsequent purchasers, mortgagees and creditors, but not to alter his position as to previous purchasers, mortgagees and creditors. *Ibid*.

The circumstance that a re-registration is not within five years from the previous registration does not make it ineffectual as against subsequent purchasers, mortgagees and creditors. *Ibid*.

The decision in *Shaw v. Neale* (24 Law J. Rep. (N.S.) Chanc. 563; 20 Beav. 157) as to the effect of omitting to re-register within five years, observed upon and in substance overruled. *Ibid*.

The provision of the 2 & 3 Vict. c. 11. s. 4, that all judgments shall, after the expiration of five years from the entry thereof, be null and void against lands, tenements and other hereditaments as to creditors, unless re-registered within five years before the right of such creditors accrued, refers only to creditors who have some right or interest in such lands, tenements or hereditaments; as for example, by virtue of a creditors' decree, directing a sale or such property. *Simpson v. Morley*, 2 Kay & J. 71.

Creditors of a deceased debtor have not, on his death, a right against his leasehold property in the hands of his executor or administrator within the meaning of this act. *Quare*—if they have even after a creditors' decree any such right in the specific chattels of the deceased debtor, unless the decree directs them to be sold for the benefit of the creditors. *Ibid.*

Under the 1 & 2 Vict. c. 110, a judgment has no retrospective operation as against purchasers, &c. upon a minute being left with the Master of the Common Pleas. *Hargrave v. Hargrave*, 23 Beav. 484.

Under the 1 & 2 Vict. c. 110. an order for payment of costs operates only as against purchasers, &c. from the registration of the certificate of taxation. *Ibid.*

(c) *Priority of.*

Judgment creditors are not purchasers within 27 Eliz. c. 4, nor do they become so by the united operation of that statute and 1 & 2 Vict. c. 110. *Beavan v. Lord Oxford, ex parte Lady Oxford*, 25 Law J. Rep. (N.S.) Chanc. 299; 6 De Gex, M. & G. 507.

Judgment creditors are not for all purposes equitable mortgagees, under the 13th section of 1 & 2 Vict. c. 110. *Ibid.*

The power of defeating a voluntary settlement by a subsequent sale is not a "disposing power" upon which a judgment entered up against the settlor might operate, under the 13th section of the 1 & 2 Vict. c. 110. *Ibid.*

In 1836 T recovered a judgment against Lord O, which was duly docketed. In 1838 (before the 1 & 2 Vict. c. 110. came into operation) Lord O. executed a voluntary settlement in favour of his wife. After that statute had passed other creditors recovered judgments against Lord O, which were duly registered under the 2 & 3 Vict. c. 11. T omitted to register his judgment till 1849, and thereby lost his priority as against the subsequent judgment creditors:—Held, that this did not entitle the latter to stand in his place as against the voluntary settlement. *Ibid.*

Watts v. Porter observed upon. *Ibid.*

A judgment creditor will be postponed to a subsequent mortgagee of an equitable interest in stock, notwithstanding such creditor has, since the mortgage but before notice thereof to the trustee of the fund, obtained, under the 1 & 2 Vict. c. 110. s. 14, an order charging the fund. In such a case the rule in *Dearle v. Hall* (3 Russ. 1) does not apply in favour of the judgment creditor. Observations on *Watts v. Porter* (3 El. & B. 743; 23 Law J. Rep. (N.S.) Q.B. 345). *Scott v. Lord Hastings*, 4 Kay & J. 633.

In March 1814 G B granted life annuities of 500*l.*, 400*l.*, and 388*l.* to A D, in consideration of sums of 3,000*l.*, 2,760*l.*, and 1,998*l.*, and as a collateral security gave judgments for double those sums. In June 1814 G B granted six annuities to six other persons, and appointed a receiver of the rents of his real estate for securing them. The receiver took possession. A D issued *elegits* on his judgments, and extended one half of the estate under the first, and the other half under the second, but there was a return of *nil* upon the third. He did not take possession of the estate, but an agreement was, in 1817, entered into between

him and the six annuitants that he should allow the receiver to continue in possession and should be paid out of the rents 385*l.* a year, being interest at 5*l.* per cent. on what he had paid for the annuities. In 1819 A D purchased part of the estate, and so extinguished his first two judgments. He continued to receive the 385*l.* a year till 1846, a suit having been instituted by subsequent incumbrancers to enforce their charges:—Held, that apart from the agreement of 1817, as A D had never taken possession, he could not be considered to have received the 385*l.* a year in respect of his third judgment, and therefore was not bound to apply what he received in satisfaction of that judgment. *Knight v. Bowyer*, 4 De Gex & J. 619.

Held, that under the agreement A D did not receive the 385*l.* a year in respect of his judgments, but in respect of his annuities, and that he was at liberty to apply it in discharge of the first two annuities, though the judgments for securing them had been extinguished. *Ibid.*

Held, that a judgment given for securing an annuity carries interest, under 1 & 2 Vict. c. 110. s. 17.

(I) CHARGE ON STOCK, UNDER 1 & 2 VICT. c. 110.

A judgment debtor was entitled, as sole executor and legatee under the will of D, to the arrears of a government annuity granted for the life of D. He was also entitled as such executor and legatee to a government annuity in the name of D, but granted for his own life:—Held, that neither the arrears nor the annuity were chargeable under the 1 & 2 Vict. c. 110. c. 14. *Taylor v. Turnbull*, 4 Hurl. & N. 495.

(K) PROCEEDINGS UPON, IN EQUITY.

A bill to charge land, under the statute 1 & 2 Vict. c. 110. ss. 13. and 18, with sums payable by virtue of a rule of a Court of common law, was held demurrable, on the ground that the party filing the bill was not the person to whom the money was payable under the rule, but only the person for whose benefit such money was to be paid. *Crowther v. Crowther*, 25 Law J. Rep. (N.S.) Chanc. 511.

Debts contracted by an heir-at-law in the lifetime of his father, and also after his decease, though secured by judgments, some of which were entered up in the lifetime of the father, who died intestate, and others after his decease, held not to be charged upon descended estates so as to give them priority to the simple contract creditors of the father. *Kinderley v. Jervis*, 25 Law J. Rep. (N.S.) Chanc. 538; 22 Beav. 1.

Where a party obtains a decree for payment of what shall be found due to him upon an account directed by the decree to be taken, he is not able, pending the account, to obtain a charging order under the 18th section of the above-mentioned statute, the decree not being for the "payment of money" within the meaning of that section. *Chadwick v. Holt*, 26 Law J. Rep. (N.S.) Chanc. 76.

A decree in a Court of equity, registered in the Court of Common Pleas, under the statute 1 & 2 Vict. c. 110, declared that the executor of a testator was liable to make good to the testator's estate a certain sum of money, and that the executor should be charged with the amount in his account of the personal estate:—Held, that this decree did not

constitute a judgment debt. *Garner v. Briggs*, 27 Law J. Rep. (N.S.) Chanc. 483.

In a suit to administer the estate of the deceased executor, a decree, registered under the above act, directed that an account should be taken of what was due to the testator's estate, and that the plaintiff should go in and prove as a creditor for the amount certified to be so due:—Held, that the plaintiff could not claim as a judgment creditor, and was not entitled to any priority over specialty and simple contract creditors. *Ibid*.

The 1 & 2 Vict. c. 110. declares that a judgment at law shall not be enforced for a given period, but a Court of equity will in the mean time restrain trustees from paying to the debtor, a tenant for life, the income arising from the property affected until the charge can be enforced. *Yescombe v. Landor*, 28 Law J. Rep. (N.S.) Chanc. 876; 28 Beav. 80.

A judgment creditor of a tenant for life of real estate sued out an *elegit*, but was unable to obtain payment of his demand, as the estates were vested in trustees. Upon a bill by the judgment creditor, asking for the aid of this Court to obtain satisfaction of his demand,—Held, that he was entitled to an injunction to restrain the trustees from paying the rents and profits of the estates to the tenant for life until the plaintiffs were in a position to obtain the benefit of the judgment. *Ibid*.

A judgment creditor who had obtained judgment against the executor before decree:—Held, entitled to enforce his judgment, under 17 & 18 Vict. c. 125. s. 61. against a debtor to the estate, who in the statute is called the garnishee. *Fowler v. Roberts*, 2 Giff. 226.

A judgment at law being given to be dealt with by this Court:—Held, that a charging order ought not to be obtained on such judgment without the leave of the Court. *Spence v. Briscoe*, 26 Beav. 599.

A judgment creditor cannot (without leave of this Court) attach monies in the hands of its receiver, which have been directed to be paid by him to the judgment debtor. *De Winton v. the Mayor of Brecon*, 28 Beav. 200.

A judgment creditor who had recovered monies of the judgment debtor in the hands of a receiver, under an order of a Court of law, was ordered to repay it, and he was directed, together with the receiver (who had not resisted the payment to him), to pay the costs of the application. *Ibid*.

(L) DOCKETING.

A judgment was docketed, under section 2. of the 4 & 5 W. & M. c. 20, but the number-roll of the entry was omitted. In another part of the docket-book where the issue was entered, the number-roll of the entry was inserted:—Held (affirming a decision of one of the Vice Chancellors, but Lord Justice Knight Bruce not assenting), that the provisions of the statute were imperative, and that the judgment had no validity against subsequent purchasers and mortgagees. *Brandling v. Plummer*, 26 Law J. Rep. (N.S.) Chanc. 326.

(M) RIGHTS OF JUDGMENT CREDITORS.

An order to tax costs, and a Master's allocatur thereon, cannot be registered as judgments under the 1 & 2 Vict. c. 110; but the rule absolute for payment of what has been found due on the Master's allocatur

may be so registered. *Shaw v. Neale*, 27 Law J. Rep. (N.S.) Chanc. 444; 6 H.L. Cas. 581; 24 Law J. Rep. (N.S.) Chanc. 563; 20 Beav. 157.

Where such a rule has been registered, it takes priority over all mortgages and purchases of a date subsequent to the registration, and within five years from the date of registration, and will retain such priority over them, though not re-registered within five years, under the 2 & 3 Vict. c. 11. But any mortgage or purchase occurring between the end of the five years and the re-registration, will have priority over it. *Ibid*.

A creditor, who had obtained a judgment against a railway company, the tolls of which were wholly inadequate to meet the debts of the company, was held entitled to a charge on the tolls. He was also appointed receiver. A sale of the lands was refused, but inquiries were directed as to the best means of making the undertaking profitable. *Furness v. the Caterham Rail. Co.*, 27 Law J. Rep. (N.S.) Chanc. 771; 25 Beav. 614.

JURISDICTION.

[Of Supreme Court of Madras, see LAW OF NATIONS; and see BASTARDY—JUSTICE OF THE PEACE.]

- (A) OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.
- (B) OF THE COURT OF CHANCERY.
 - (a) *In general.*
 - (b) *Remedy at Law or in Equity.*
 - (c) *Courts General and Local.*
 - (d) *Proceedings in England and Scotland.*
 - (e) *Foreign Courts, Companies and Trusts.*
- (C) OF COURTS OF ADMIRALTY.
- (D) OF COURTS OF CRIMINAL JUDICATURE.
- (E) OF COURTS OF QUARTER SESSIONS.
- (F) OF THE SUPREME COURT OF BOMBAY.
- (G) OF THE COURT OF EXCHEQUER, ISLE OF MAN.
- (H) IN OTHER CASES.
 - (1) OF JUDGES.

(A) OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Quære—if the Judicial Committee has any jurisdiction over an appeal before the petition of appeal is lodged and referred to them? *Hov v. Kirchner*, 11 Moore's P.C. 21.

A petition to the Queen in Council, praying for an order upon the bailiff of an island to admit the petitioner to take the oaths and practise as an Advocate in the Royal Court, was referred to the Judicial Committee. The bailiff put in an answer, stating, that by the law of the island, the number of Advocates entitled to practise in the Royal Court was limited to six, and that that number was complete. Their Lordships held, that, sitting as the Judicial Committee, they had no power to make the order. *D'Allain v. Le Breton*, 11 Moore's P.C. 64.

The Judicial Committee have no jurisdiction to take into consideration the propriety of the dismissal of a public servant by a Governor-General of a colony from an office held during his pleasure, unless the matter is expressly referred to them by the

Crown. *Ex parte Robertson, in re the Governor General and Council of New South Wales*, 11 Moore's P.C. 288.

(B) OF THE COURT OF CHANCERY.

[*Waltham v. Goodier*, 7 Law J. Dig. 373; 7 De Gex, M. & G. 76.]

(a) *In general.*

A legal devisee may maintain a suit to establish a will though such will is unaffected by equitable trusts. *Coldlough v. Boyse*, 26 Law J. Rep. (N.S.) Chanc. 256; 6 H.L. Cas. 1.

It is a well-settled rule that the Court will not interfere to appoint a receiver at the instance of a person alleging a mere legal title in himself against other persons who are in possession of the estate. *Earl Talbot v. Hope Scott*, 27 Law J. Rep. (N.S.) Chanc. 273; 4 Kay & J. 96, 139.

Whether the Court will in such a case interfere to prevent destructive waste—*quere*. *Ibid*.

The case of *Courthope v. Mappleiden* (10 Ves. 390), in which the Court granted an injunction against a trespasser cutting timber by collusion with the tenant, is the strongest case in which it has interfered to restrain waste: there is no case in which it has interfered to restrain the acts of a mere trespasser; but if the acts complained of are such flagrant acts of malicious waste as to indicate fraud—*semble*, that would be a case for interference. *Ibid*.

A B, who had contracted to buy a ship, agreed with C D that he should make engines of a stated speed, at a stated price, and if the speed were not attained C D should remove them. This contract was not binding under the Ship Registry Acts. A B and Messrs. G F & S Y arranged with the owner of the ship that it should be sold to the Messrs. Y, and that A B should be entitled to buy it on certain terms. The ship was transferred to S Y absolutely. C D made the engines, and put them into the ship, with the knowledge of S Y, the registered owner, but they would not attain the required speed. C D offered to remove the engines, but S Y would not allow it, nor would he pay for them. C D then filed a bill against A B and the Messrs. Y for payment of the cost of the engines or for sale of the ship and payment of the cost of the engines out of the proceeds, and for other purposes. The Master of the Rolls gave the plaintiff liberty to bring an action, for which he imposed certain terms; but, upon appeal,—Held, overruling that decision, that the plaintiff's remedy, if any, against S Y was at law, and not in equity. *Rennie v. Young*, 27 Law J. Rep. (N.S.) Chanc. 753; 2 De Gex & J. 136.

A, desiring to borrow money, represented to B's solicitor that he was entitled under an agreement to a lease of certain property in Middlesex, and the lessor, on A's application, wrote a letter, in December 1856, to B's solicitor, stating that he would grant such lease to A. The lessor accordingly, in January 1857, granted a lease of such property to A at a peppercorn rent, and A mortgaged the same to B by way of under-lease. B afterwards found that the lessor had, on the 6th of August 1856, granted a lease of the same property to A, and that A had, before his mortgage to B, mortgaged the same property to D. The lease granted on the 6th

of August 1856 was registered on the 23rd of that month:—Held, that B was entitled to a decree for repayment by the lessor of the sum advanced by B to A, the lessor alleging only that he had forgotten the grant of the prior lease to A when he executed the lease of January 1857. *Slim v. Croucher*, 29 Law J. Rep. (N.S.) Chanc. 273; 1 De Gex, F. & J. 518; 2 Giff. 37.

(b) *Remedy at Law or in Equity.*

An Englishman having died intestate in Belgium, possessed of real and personal property there, his brother went over from England and obtained representation to him *pur et simple*, which by the Belgian law imposed upon him a personal obligation to pay all the debts of the intestate independently of the amount of the assets. The intestate's brother afterwards returned to this country, but did not take possession of any property in England belonging to the intestate; a creditor of the intestate obtained letters of administration to him in England:—Held, that he could not sue the intestate's brother in equity in respect of the personal liability which he had so incurred, but that his remedy to recover his debt was at law. Held, also, that the intestate's brother, as he had not taken possession of any of the English property of the intestate, was not an executor *de son tort*. *Beavan v. Lord Hastings*, 2 Kay & J. 724.

The Common Law Procedure Act, 1854, has not taken away the jurisdiction of the Court to restrain actions involving complicated questions of account, when the accounts can be more conveniently taken in equity. *Croskey v. the European and American Steam Shipping Co.*; *Oakford v. Same*, 1 Jo. & H. 108.

(c) *Courts General and Local.*

The Master of the Rolls having decided that parties to a suit in a local court of limited jurisdiction could not apply to stay proceedings in a court of general jurisdiction, when part of the property in question was situate out of the limits of the local court, on appeal, the Lords Justices ordered all the proceedings in this suit to be stayed, the plaintiffs here to have the conduct of the suit in the Court of limited jurisdiction, they appearing in that court for that purpose. *Wynne v. Hughes*, 28 Law J. Rep. (N.S.) Chanc. 283, 485; 26 Beav. 377.

(d) *Proceedings in England and Scotland.*

R, a merchant, in London, effected a policy of insurance upon his own life with an insurance society, carrying on business in Edinburgh and London. Being indebted to V, who was in business in London, R, in 1851, assigned the policy to him as a security. R had formerly carried on business in Scotland, and his estate was, in 1854, sequestered, according to the law of Scotland; and C was appointed trustee of the sequestered estate. In August 1857 R died, and C raised an action of count and reckoning, in Scotland, against V for an account of R's estate vested in him; and in September of that year he laid an arrestment on the monies secured by the policy, until security should be given to answer the claim. V appeared in that suit, and put in his answer thereto; but before putting in his answer, he filed a bill against the trustees of the society and C, praying payment of the money assured. No

decree or sentence was pronounced in the Scotch suit. C appeared to the bill; and by an order made on a motion, on which C appeared, the money was ordered to be paid into court, without prejudice to the Scotch arrestment. C put in his answer, contending that the Court of Session was competent to try the question between the parties, and had attached the fund before the bill was filed. A decree was then made directing an account. C appeared before the chief clerk, but afterwards withdrew. V's vouchers had been lodged in the Court of Session; and an interdict to prevent these being taken out of Scotland was obtained by C. By an order, in 1859, on further consideration, the monies in court were ordered to be paid to V. The trustees of the insurance society and C appealed against these several orders; but their appeal was dismissed, with costs, the Lord Chancellor being of opinion that, by the appearance of C, he must be considered to have acquiesced in the inquiry before the chief clerk; and the Lords Justices being of opinion that the Court of Chancery had full jurisdiction in the case. *Venning v. Lloyd*, 29 Law J. Rep. (n.s.) Chanc. 152; 1 De Gex, F. & J. 193.

A Scotchman died in London possessing large real and personal estates in Scotland, and a comparatively very small personal estate in England. The plaintiff, resident in Scotland, filed a bill against the four trustees, three of whom resided in Scotland, to administer the real and personal estate, and obtained an order under the 33rd Order of May 1845, to serve the three trustees in Scotland. A motion to discharge that order was refused, it not being the proper time to raise the question, and there being a case for the exercise of the jurisdiction of the Court. *Meiklan v. Campbell*, 24 Beav. 100.

The plaintiffs, who were nominated executors to a Scotch will, obtained *ex parte* in Scotland a confirmation of the nomination, and afterwards procured, as of course, the seal of the Probate Court in England thereto. They then sued some debtors of the testator in this Court:—Held, that the pendency of proceedings in Scotland for a reduction of the confirmation was no defence, and the defendants were ordered to pay to the plaintiffs the amount due to the testator's estate. *Cumming v. Fraser*, 28 Beav. 614.

(c) Foreign Courts, Companies and Trusts.

The House of Lords had dissolved an injunction, granted by the Master of the Rolls, to restrain a Scotch company, having agents and property within the jurisdiction, from proceeding in the Court of Session in Scotland to recover a debt against the estate of a testator, who had died, domiciled in England, but leaving assets in England and Scotland, which were being administered in a suit in this country, to which the company was not made a party. The executors afterwards instituted another suit in this country, against the company, for an account of all dealings between the company and the testator, and then applied for a similar injunction in both suits, which was refused, with costs, on the ground that the question was concluded by the judgment of the House of Lords. *Maclaren v. Stainton; Maclaren v. the Carron Co.*, 26 Law J. Rep. (n.s.) Chanc. 332.

Semble—there must be a very strong case to in-

duce the Court to restrain a foreigner, domiciled in another country, from proceeding to obtain payment of debts according to the law of the country in which he is domiciled. *Ibid.*

A Scotch company, having agents and offices in England, brought an action in Scotland against the representatives of a testator, formerly their agent in England, to recover a debt claimed by them, and to obtain a security upon the real and personal estate of the deceased in Scotland. A decree for the administration of the testator's estate having been made in England, the Court granted an injunction to restrain the company from continuing the action in Scotland, but upon appeal the order was discharged. The company then brought another action in Scotland, and another suit having been instituted against the company in England, to which they appeared, the plaintiffs, alleging that the company had acquiesced in the English proceedings, asked for an injunction to restrain the action in Scotland; but it was refused. *Stainton v. the Carron Co.*, 25 Law J. Rep. (n.s.) Chanc. 577; 21 Beav. 152.

By a charter, dated in 1550, His Majesty Edward the Sixth granted a building to the German and French Protestants, and directed that there should be a superintendent and four ministers, who should be a body corporate with perpetual succession. The office of superintendent was dropped after the first appointment. The churches divided; and the French church had since been governed by its ministers and the elders and deacons. The income of the church arose from two funds, the one in the hands of the elders and the other of the deacons, and these had been accumulated since the foundation of the church, and were wholly unconnected with the charter. The elders' fund was appropriated to the use of the church, and it was out of this that the pastors' stipends were paid. The deacons' fund was more especially for the poor and the maintenance of schools. The elders and deacons, at a Consistory, dismissed one of these pastors. Upon a bill by the pastor, —Held, if a pastor of a church is deposed and the relation of trustee and *cestui que trust* has been created by an agreement to pay out of trust funds the salary of the pastor, that the Court has jurisdiction to inquire into the performance of the trust, and whether the elders and deacons are justified in destroying the relation of trustee and *cestui que trust* and in removing the pastor; and that though the bill does not pray a performance of the trust or any account or payment. *Daugars v. Rivaz*, 29 Law J. Rep. (n.s.) Chanc. 685; 28 Beav. 238.

The Consistory of a church thus constituted will be restrained from the summary dismissal of a pastor; but upon proper and adequate cause the Consistory may remove a pastor, though no minister was present at the meeting. *Ibid.*

The Court will enter into questions relating to the removal of a pastor, and it will look into the discipline and regulations of the church. *Ibid.*

What will and what will not fall within the cognizance of the Consistory. *Ibid.*

The visitatorial power of the Crown does not remove the jurisdiction of the Court, or prevent it from exercising its functions in respect of an existing trust. *Ibid.*

If a corporation cannot be made a party to a record in consequence of the non-appointment of officers,

the governing body for the time being will sufficiently represent the existing interests. *Ibid.*

(C) OF COURTS OF ADMIRALTY.

The Vice Admiralty Court at Hong Kong has only the ordinary Admiralty jurisdiction possessed by Admiralty Courts previous to the passing of stat. 3 & 4 Vict. c. 65. It has no jurisdiction to entertain a suit for possession, for the purpose of trying the title to a ship. *Lapraik v. Burrows*, 13 Moore's P.C. 132.

Upon the arrest of a ship within the High Court of Admiralty's jurisdiction, the power of that Court extends to acts done on the high seas, and to places within the British dominions abroad. *Prowse v. the European and American Steam Shipping Co.*, 13 Moore's P.C. 484.

(D) OF COURTS OF CRIMINAL JUDICATURE.

If one foreigner inflicts a blow on another foreigner in a foreign vessel on the high seas, and the person so struck in a few days afterwards lands in England and dies there, the homicide is not cognizable by the Courts of this country by virtue of the statute 9 Geo. 4. c. 31. s. 8. *The Queen v. Lewis*, 26 Law J. Rep. (n.s.) M.C. 104; Dears. & B. 182.

A foreigner on board an English ship on the high seas is subject to the law of England, and, therefore, if he there does an act which is a criminal offence by the law of England, he may be punished for it by that law, and may, by virtue of the statute 18 & 19 Vict. c. 91. s. 21, be tried for the offence before any Court of justice in the Queen's dominions having cognizance of such crimes when committed within its limits, within whose jurisdiction he may be brought; for when so brought, he is, within the language of the act, "found within its jurisdiction." Nor is it material, as to the liability of the foreigner to punishment or to the jurisdiction of the Court to try him, that he was illegally and by force taken on board the English ship and there detained in custody at the time of the committal of the offence, the act alleged to be a crime not being committed for the purpose of releasing himself from the illegal duress. *The Queen v. Lopez*, and *The Queen v. Sattler*, 27 Law J. Rep. (n.s.) M.C. 48; Dears. & B. 525.

Therefore, where a foreigner who, being illegally arrested in a foreign town and taken and kept in custody on board an English ship on the high seas, shot dead the officer who arrested him, out of malice prepense, and not with a view to escape, his conviction for the murder by the Central Criminal Court, within whose jurisdiction he was brought for trial, was held good. *Ibid.*

Preparatory to a trial for murder, the name of A, a juror on the panel, was called; B, another juror on the same panel, appeared, and by mistake answered to the name of A, and was sworn as a juror. The prisoner was convicted. The circumstance that B had answered for A was not discovered till the next day, when the Judge being informed of it reserved the question as to the effect of the mistake on the trial for the consideration of the Court for Crown Cases Reserved:—Held, by a majority of the Court, that the conviction ought not to be set aside; *per Erle, J., Crompton, J., Crowder, J., Willes, J., Channell, B. and Byles, J.*, on the ground that there had been no mis-trial, and that the Court for Crown

Cases Reserved had no jurisdiction over the case; *per Pollock, C.B. and Williams, J.*, on the ground of the want of jurisdiction only. Held, by Lord Campbell, C.J., Cockburn, C.J., Coleridge, J., Wightman, J., Martin, B. and Watson, B., that there had been a mis-trial, that the Court had jurisdiction, and that a new trial ought to be directed. *The Queen v. Mellor*, 27 Law J. Rep. (n.s.) M.C. 121; Dears. & B. 468.

(E) OF COURTS OF QUARTER SESSIONS.

Where an appeal is determined, at Quarter Sessions, by magistrates some of whom are interested in the matter, the proceeding is null; and the proper course is to quash it on *certiorari*. *Re Hopkins*, E. B. & E. 100.

(F) OF THE SUPREME COURT OF BOMBAY.

The Bombay Charter of Justice (December 1823) gives the Supreme Court "full power and authority to administer and execute, within and throughout the Town and Island of Bombay, and the limits thereof, and the factories subordinate thereto, &c., upon all persons so described and distinguished by the appellation of British subjects, as aforesaid, there residing, the ecclesiastical law, as the same is now used and exercised in the diocese of London, in Great Britain, so far as the circumstances and occasion of the said town, island, territories, and people shall admit and require." Suit on the ecclesiastical side of the Supreme Court at Bombay by wife against husband for restitution of conjugal rights and for maintenance. Protest by the husband, that the parties were Parsees professing the religion of that sect, and that the Court had no jurisdiction to administer towards them the ecclesiastical law as at the date of the Charter was used and exercised in the diocese of London. Upon appeal,—Held, (reversing the judgment of the Court below, and maintaining the protest) that the Supreme Court of Bombay, on its ecclesiastical side, had no jurisdiction to entertain such a suit, as there existed such a difference between the duties and obligations of a matrimonial union among Parsees from that of Christians, that the Court, if it made a decree, had no means of enforcing it, except according to the principles governing the matrimonial law in Doctors' Commons, which were in such a case incompatible with the laws and customs of Parsees. *Ardaseer Cursetjee v. Peroyeboyee*, 10 Moore's P.C. 375.

Quære—whether, in such circumstances, the Supreme Court can, on its civil side, give relief to the wife? *Ibid.*

(G) OF THE COURT OF EXCHEQUER, ISLE OF MAN.

The Court of Exchequer in the Isle of Man has power to summon a jury to decide a question of fact. This power extends to an information for intrusion and trespass by the Attorney General of the island on behalf of the Crown. Such right is not affected by the Act of Tynwald of 1777, for the better regulation of juries, which is confined in its operation to the Common Law Courts, and does not extend to the Exchequer Court. Where a Court lawfully possesses a jurisdiction for the benefit of the subject in the administration of justice, mere non-user does not take it away. *The Attorney General of the Isle of Man v. Cowley*, 12 Moore's P.C. 27.

(H) IN OTHER CASES.

L, F & Co., merchants at Trieste, in the Austrian dominions, had extensive mercantile dealings with R, I & Co., merchants in London, and in the result, R, I & Co. were found largely indebted to L, F & Co. R, I & Co. became embarrassed, and stopped payment. No commission of bankruptcy issued against them, and they were permitted to wind up their affairs under a deed of inspection, which provided for a distribution of their estate in the same manner as if a commission of bankruptcy had issued, and adjudication had been made thereon. R, I & Co. had real estate in the Island of Mauritius, and, before the deed of inspection was executed, they had sent C as their agent to Mauritius, with a power of attorney, authorizing him to look after their property, and "to demand and sue for debts" due to them in the island. A similar power was afterwards given to B, as substitute of C. L, F & Co. brought a suit in the Court of First Instance in the Island of Mauritius to recover the balance on the account between them and R, I & Co. Neither L, F & Co. nor R, I & Co., or any member of either firm, was resident, or domiciled, in the island. Process was served on B, as agent for R, I & Co., and he appeared and protested against the jurisdiction of the Court, as he had no authority from R, I & Co., under the power of attorney, to defend any suit:—Held, that, as R, I & Co. were not domiciled in Mauritius, the Court had no jurisdiction, as the power of attorney was restricted to suing for debts of R, I & Co., and conferred no power upon B to accept service of process, or to elect the acceptance of a domicile for R, I & Co. in the island, as provided for by the French law prevailing in Mauritius. *Lang v. Reid*, 12 Moore's P.C. 72.

Semble—the rule of the French law, in order to give jurisdiction to a Court of justice over a defendant in a civil action, is, that the suit must follow the person of the debtor, and that the action must be brought against him in his *domicile réel*. This rule is, however, subject to the qualification, that a person may elect a special domicile for the purpose of his trade, or for other purposes, and that such elected or conventional domicile is for those purposes equivalent to his *domicile réel*. But, inasmuch as the election of such domicile draws after it most grave and extensive liabilities, it is settled, not only that the appointment of an agent in a colony with the largest powers, by a domiciled Frenchman, does not amount to an election of domicile in the place where such power is to be executed, but that no agent, with powers however extensive, can make such election on the part of his principal, unless his power contains express authority to do so. *Ibid*.

The plaintiffs contracted with the defendants, a railway company, to complete a part of the line of a railroad in New Brunswick, ten miles of which was stated to have been made. The line was to be completed within three years, and the work to be done to the satisfaction of the company's engineer; and it was by the article of contract provided, that the contract should be put an end to, if the plaintiffs failed to use proper expedition in carrying on the works. It was also stipulated, that the plaintiffs should be paid monthly according to the average amount of work done, the manner in which it was to be estimated being set forth in a schedule to the articles of

the contract. Contemporaneously with this contract, a deed of arrangement was entered into between the parties, by which it was agreed that with respect to a sum of 10,000*l.*, the plaintiffs might require that certain Crown lands conveyed to the company should be conveyed to the plaintiffs at the rate of 1*l.* per acre. The plaintiffs were aware at the time when they entered into the contract, that the ten miles part of the line stated to have been made was in an unfinished state. The plaintiffs worked over different parts of the line at the same time, so that no one mile was completely finished during any month in which the work was going on. The certificates of the company's engineer were not made upon the principle of the work done during the month, and of the value and amount according to the contract price; but he ascertained the amounts due to the plaintiffs upon an average obtained by taking into account the month's actual work with that which had been previously done and adjusted, as the amount to be paid upon the footing of such average. Disputes arose between the parties respecting the advances, and, plaintiffs not proceeding with the work to the satisfaction of the engineer, notice was given to complete the railway within the stipulated time. Such requisition not having been complied with, the company entered into possession of the works, whereupon a bill was filed by the plaintiffs in the Supreme Court of New Zealand, for specific performance of the contract, and for an account. The company in defence, insisted that the remedy was at law and not in equity:—Held, that as it was admitted by the company (after giving credit for advances made upon a general account, and also to the amount of 10,000*l.*, in respect of the Crown lands), that there was still a balance in the company's hands arising out of the contract; such fact was sufficient to give a Court of equity jurisdiction and a right to direct an account.—Held, further, that as the plaintiffs had failed in performing the contract, there ought to be an inquiry whether any loss or damage arose from the non-performance of it. *The St. Andrew and Quebec Rail. Co. v. Brookfield*, 18 Moore's P.C. 510.

(J) OF JUDGES.

[To try issues of fact by consent. See *Andrews v. Elliott*, title PRACTICE—TRIAL.]

An order was made in a suit in one of the Vice Chancellors' Courts, declaring H K, a party to the suit, entitled to money. An order was made in a suit at the Rolls directing the said H K, a party to that suit, to pay money. Sequestrators were appointed in the suit at the Rolls against H K's estate. The plaintiffs in the suit at the Rolls were also defendants in the suit before the Vice Chancellor. They and the sequestrators presented a petition in the suit before the Vice Chancellor, praying payment to them of H K's money in that suit, or the transfer of it to the credit of the other cause:—Held, that the petition must be amended by being entitled in both suits, and must then be presented to the Lords Justices; but that H K must in the mean time be enjoined from receiving the money which had been ordered to be paid to her. *Knight v. Knight*, 25 Law J. Rep. (N.S.) Chanc. 848.

JURY.

[Interested Juror and Admissibility of Affidavit of Juror, see PRACTICE, AT LAW; New Trial.]

[The acts relating to Grand Juries in Ireland amended by the 19 & 20 Vict. c. 63.—The 17 & 18 Vict. c. 59, for allowing Verdicts on Trials by Jury in Civil Causes in Scotland to be received, although the Jury may not be unanimous, amended by 22 & 23 Vict. c. 7.]

On the trial of an indictment for murder, the names of all the jurors on the panel were called in their order, omitting only the names of twelve, occurring in various parts of the panel, who formed the jury on another charge of felony, and who were out of court, in the custody of the sheriff, considering their verdict during all the time the panel was being gone through. On going through the panel, A, a jurymen, having been called and appeared, the counsel for the Crown prayed that he might be ordered to stand by. The prisoner objected, that if this was a challenge, cause of challenge ought to be shewn forthwith, and that A ought not to be ordered to stand by. The Court, nevertheless, ordered A to stand by. When the panel had been called through, owing to challenges by the prisoner and the Crown, there were not jurymen enough to serve. The panel was again begun to be called over in the same order, and A, the first person who had been challenged by the Crown, was again called. The counsel for the Crown again prayed that he might be ordered to stand by. The prisoner repeated his objection to that course. Before the Judge decided on this question, the remaining twelve jurymen came into court, delivered their verdict, and were discharged. The counsel for the Crown then prayed that A might be ordered to stand by until those twelve had been called. The prisoner objected that A ought to be sworn as a jurymen unless good cause of challenge were immediately shewn. The Court, however, ordered him to stand by. B, the juror next on the list below A, was one who had been challenged by the Crown without cause shewn on the first going through the list. The prisoner objected that B ought to have been called next after A, but the Court allowed the twelve, who had come in, to be called first, and after some of them had been called, a full jury was formed. But before they were sworn, one of them, C, stated that he had conscientious scruples against capital punishments. The counsel for the Crown thereupon prayed that he might be ordered to stand by. The Judge said, "If you feel you cannot do your duty, you had better withdraw," and C was then ordered to stand by, notwithstanding objection made by the counsel for the prisoner. The jury were then sworn, and a verdict of guilty found:—Held, that the panel had not been gone through, so as to compel the Crown to shew cause of challenge forthwith at the time the twelve jurors came into court; consequently that the Judge was justified in ordering A to stand by the second time, though no cause of challenge had been proved against him.—That a statement on the record that A was ordered to stand by was good in law, as it amounted to a statement that the Crown was allowed time to shew cause of challenge against A until the panel had been gone through.—That where an irregularity in practice occurs in calling

the jurors out of the accustomed order of the Court, it is no ground of error; but that the course pursued of calling the twelve jurymen before any who had been already called once, was quite proper and regular.—That the Judge was right in ordering C to stand by at the demand of the prosecution. *Mansell v. the Queen* (Ex. Ch.), 27 Law J. Rep. (n.s.) M.C. 4; *Dears. & B.* 375: affirming the judgment below, 26 Law J. Rep. (n.s.) M.C. 137; 8 E. & B. 54.

Quere—whether a Judge has not the right to set aside a jurymen before he is sworn, though no objection be made by either party, if the Judge finds that the juror is morally incompetent to serve. *Ibid.*

The *venire* to the sheriff directed him to return good and lawful men of the county of Kent to try the case. The record, after setting out the *venire*, stated that the sheriff returned "the persons following," and then set out the names of the jurors in the panel:—Held, that it was not error that the record did not shew that the persons returned were good and lawful men of the county; but that it would be presumed that they were so. *Ibid.*

When error is brought by a person convicted of felony from the Court of Queen's Bench to the Exchequer Chamber, the general rules for governing the proceedings in error in civil cases under the Common Law Procedure Act, or the previous General Rules of Hil. T. 4 Will. 4. do not apply; but the prisoner must be brought up to the Court to pray oyer of the record, and to assign errors, by delivering them in writing to the officer of the Court, and must be present during the argument and the giving judgment. The counsel representing the Attorney General for the Crown may, if he pleases, orally join in error immediately on the assignment of errors being delivered in. *Ibid.*

JUSTICE OF THE PEACE.

[Orders, see *Egginton v. the Mayor of Lichfield*, 5 E. & B. 100; 6 Law J. Dig. 381. And see titles BASTARDY—NUISANCE—PARISH CONSTABLES—SESSIONS.]

[The Procedure before Magistrates and Justices of Peace in Scotland amended by 19 & 20 Vict. c. 48.—The Criminal Justice Act, 18 & 19 Vict. c. 126, amended by 19 & 20 Vict. c. 118.—The Administration of the Law as to summary Proceedings before Justices of the Peace improved by 20 & 21 Vict. c. 43.—Amendment of the Law concerning the Powers of Stipendiary Magistrates and Justices of the Peace in certain Cases by 21 & 22 Vict. c. 73.]

(A) JURISDICTION AND POWER.

- (a) *In general.*
- (b) *To remand.*
- (c) *Excess of, or Irregularity.*
- (d) *Ouster.*

(B) MANDAMUS AND RULE TO HEAR AND DETERMINE.

(C) LIABILITY: ACTION.

(D) APPEAL FROM JUSTICES, UNDER 20 & 21 VICT. c. 43.

- (a) *When it lies.*
- (b) *Application for Case: Computation of Time.*

- (c) *Order of Judge to state a Case.*
- (d) *Recognizance.*
- (e) *Notice and Copy of Case to Respondent.*
- (f) *Lodging Case for Hearing.*
- (g) *Practice on the Hearing.*
- (h) *Costs.*

(A) JURISDICTION AND POWER.

(a) *In general.*

If a woman goes to and lodges at a place for the purpose of applying to the Magistrates there for an order of affiliation, intending to leave the place as soon as she has got the order, she having at the time no other residence, and not having gone there for any fraudulent or improper purpose, she is resident at the place within the meaning of the statute 7 & 8 Vict. c. 101, which, by section 2, requires that application for such an order must be made to Justices acting for the petty sessional division within which the woman resides. *The Queen v. Hughes*, 26 Law J. Rep. (N.S.) M.C. 133; *Deane & B.* 188.

In appointing overseers of the poor, the Justices of the Peace are not bound to pay any attention to the nomination or recommendation of the vestry of the parish. *The Queen v. the Justices of Lancashire*, 29 Law J. Rep. (N.S.) M.C. 244.

(b) *To remand.*

By a Railway Act, penalties for breach of by-laws were recoverable before a Justice of the Peace, and officers of the railway company were empowered to seize offenders under certain circumstances, and to convey them before a Justice without any warrant, such Justice being "empowered and required to proceed immediately to the conviction or acquittal of such offender":—Held, that, although the act constituting the offence gave no power to the Justice to remand the accused, yet that by Jervis's Act, 11 & 12 Vict. c. 43. s. 16, the Justice had power to adjourn the hearing and to issue a warrant for committal of the accused to the house of correction. *Gelan v. Hall*, 27 Law J. Rep. (N.S.) M.C. 78.

(c) *Excess of, or Irregularity.*

The defendants, Justices of the Peace, convicted the plaintiff in a penalty of 2l. and costs, or two months' imprisonment. Against this decision, which was given orally, the plaintiff gave notice of appeal, and immediately left the court. A conviction and warrant of commitment were afterwards drawn up, in which blanks were left for the amount of costs to be inserted, and so signed by the defendants. The blanks were afterwards filled up by the Magistrates' clerk, and the plaintiff was arrested on the warrant, when he, for the first time, became aware of the amount of costs:—Held, that the signing in blank by the defendants was a mere irregularity and not an excess of jurisdiction; and that the plaintiff having brought an action for false imprisonment was rightly nonsuited, under the 11 & 12 Vict. c. 44. s. 1. *Bott v. Ackroyd*, 28 Law J. Rep. (N.S.) M.C. 207.

(d) *Ouster.*

The jurisdiction of Justices to enforce payment of

a rate made for the repayment of money borrowed under the statute 5 Geo. 4. c. 36, is the same as with respect to a church-rate; they, therefore, have no power to order payment, when the party assessed and refusing to pay takes *bona fide* objections before them to the validity and legality of the rate. *In re Batkin and the Justices of Staffordshire*, 25 Law J. Rep. (N.S.) M.C. 126.

Upon an application (under the 1 & 2 Vict. c. 74) by a landlord to Justices in petty sessions, to recover possession of premises held over by his tenant after the expiration of the term, the tenancy having been proved to the satisfaction of the Justices, and its legal determination, and the tenant's refusal to quit:—Held, that the jurisdiction of the Justices to give the landlord possession, was not ousted by the tenant's setting up the title of a third person. *Rees v. Davies*, 4 Com. B. Rep. 56.

(B) MANDAMUS AND RULE TO HEAR AND DETERMINE.

Mandamus, tested the 14th of May 1857, to Justices, to hear and determine the merits of an information, under the 18 & 19 Vict. c. 108, which they had dismissed without hearing and determining the merits on the 20th of January. Return, that the Justices in obedience to the writ, on the 22nd of December 1857, heard and determined the information (which was for penalties incurred by a contravention of the act), and dismissed it on the ground that, the offence having been committed on the 17th of December 1856, more than three months had elapsed, and the defendant was, therefore, protected and could not be convicted. The 14th section of the act enacts, that all penalties imposed by the act may be recovered within three months of the commission of the offence:—Held, on demurrer to the return, that, whether the Justices were right or wrong in their construction of the act, the return shewed that they had obeyed the writ, and was, therefore, good. *The Queen v. Mainwaring*, 27 Law J. Rep. (N.S.) M.C. 278; *E. B. & E.* 474.

A magistrate, upon a complaint regularly heard before him, gave his opinion against the complainant, but at the request of the complainant he refused to adjudicate for the purpose of enabling the complainant to take the opinion of the Court. The defendant objected, and wished the magistrate to adjudicate and dismiss the complaint:—Held, that there was no such refusal to adjudicate as to entitle the complainant to a rule, under 11 & 12 Vict. c. 44. s. 5. *The Queen v. Paynter*, 26 Law J. Rep. (N.S.) Q.B. 102; *7 E. & B.* 328.

By the 18 & 19 Vict. c. 120. the vestry of a parish may pave any new street, and the owners of the houses forming the street shall, on demand, pay to the vestry the amount of the estimated expenses; such amount to be recovered before two Justices, on summons, who are to hear and determine the matter, and to make such order as to costs or otherwise as to them seems just. The owner of houses in a street having been summoned before a police magistrate to shew cause why an order for the payment of his share of the estimated expense of paving the street should not be made upon him, the magistrate, after hearing the evidence, dismissed the complaint, on the ground that the street having

been dedicated to the public as a highway, before the passing of the act, was not "a new street," within the meaning of it. On a motion, under the 11 & 12 Vict. c. 44. s. 5, calling on the magistrate to shew cause why he should not hear and adjudicate, —Held (*Erle, J.* dissenting), that he had done so, and that this Court could not interfere. Held, by *Erle, J.*, that the decision by the magistrate was of a fact going to his jurisdiction, and that this Court could, therefore, review his decision. *The Queen v. Dayman*, 26 Law J. Rep. (N.S.) Q.B. 128; 7 E. & B. 672.

In November 1853 a meeting of the ratepayers of the parish of H was duly convened and held under the 3 & 4 Will. 4. c. 90, at which it was determined not to adopt that act for the parish. In December 1853 a meeting was duly convened and held of the ratepayers of a part of the parish of H, at which it was determined by a requisite majority that the provisions of the act should be adopted for that part of the parish, and inspectors were accordingly appointed and other proceedings taken for carrying the act into execution. In 1854 a rate was made under the act, by which S was assessed in respect of a dwelling-house in the part of the parish for which the act was adopted. S paid this rate without objection. In 1855 and 1856 similar rates were made upon S in respect of the same house, which he refused to pay; and summonses being taken out to enforce payment of these rates, it was objected by S, before the Justices, that these rates were void, on the ground of the meeting of December 1853 being illegal under section 16. of the 3 & 4 Will. 4. c. 90, by reason of having been held within a year after the first meeting; and it was agreed by the parties that the question for the Justices was, whether the persons convened to the two meetings were substantially the same body. The Justices decided that the two meetings were substantially the same, and dismissed the summons:—Held, that even supposing the decision to be erroneous, and to have proceeded upon a mistaken notion of the question submitted to the Justices, it was upon a fact within their jurisdiction, and, therefore, this Court could not interfere and oblige them to enforce payment of the rate. Held, also, that the fact of S having paid the former rate without objection, did not prevent him from objecting to the validity of the proceedings for the adoption of the act. *The Queen v. Dunn and another, Justices of Sussex*, 26 Law J. Rep. (N.S.) M.C. 74; 7 E. & B. 221.

(C) LIABILITY: ACTION.

Quære—whether an action is maintainable against a Justice of the Peace for wilfully and maliciously, and without reasonable and probable cause, convicting a person in a penalty in a matter in which the Justice has jurisdiction, and which penalty is paid, but the conviction has been subsequently quashed. *Gelan v. Hall*, 27 Law J. Rep. (N.S.) M.C. 78.

(D) APPEAL FROM JUSTICES, UNDER 20 & 21 VICT. c. 43.

(a) When it lies.

The statute 20 & 21 Vict. c. 43. gives a right of appeal as well against the dismissal of a complaint as against a conviction. *Davey v. Douglas*, 28 Law J. Rep. (N.S.) M.C. 193.

A was assessed to a sewers-rate, made under a local act, incorporating the Public Health Act, 11 & 12 Vict. c. 63. He refused to pay the sum at which he was assessed; and upon the hearing of a complaint against him for such refusal, he objected that he was improperly rated, inasmuch as he derived no benefit from the sewers made under the local act. The Justices ordered him to pay the rate; whereupon he required them to state a case, under 20 & 21 Vict. c. 43:—Held, that they had no jurisdiction to do so; for that the proper course to be pursued by A, if he objected to the validity of the rate, was to appeal to the Sessions. *The Queen v. Newman and others, Justices of Gloucestershire*, 29 Law J. Rep. (N.S.) M.C. 117.

A refusal of Justices to order payment of money under an order of the poor-law guardians for a contribution from the overseers of a parish to the common fund of the union, is ground of appeal, under the 20 & 21 Vict. c. 43. *The Guardians of the London Union v. Acocks*, 8 Com. B. Rep. 760.

(b) Application for Case: Computation of Time.

Sunday is not to be excluded in computing the three days within which application must be made to Justices to state a case, under 20 & 21 Vict. c. 43. s. 2. *Peacock v. the Queen*, 27 Law J. Rep. (N.S.) C.P. 224; 4 Com. B. Rep. N.S. 264.

(c) Order of Judge to state a Case.

Semble—that a Judge at chambers can grant an order upon Justices to state a case under 20 & 21 Vict. c. 43. *Ex parte or In re Smith*, 27 Law J. Rep. (N.S.) M.C. 186; 3 Hurl. & N. 227.

(d) Recognizance.

On an appeal from a decision of Justices, under 20 & 21 Vict. c. 43. ss. 2, 3, the appellant may enter into the required recognizance at any time during the three days allowed for applying for a case, and he need not enter into it simultaneously with making the application. *Chapman v. Robinson*, 28 Law J. Rep. (N.S.) M.C. 30; 1 E. & E. 25.

(e) Notice and Copy of Case to Respondent.

The respondent not being to be found, notice of appeal and copy of the case were served on her attorney within three days after the appellant received the case, and they afterwards and before hearing came to her hand:—Held, a sufficient compliance with the above section. *Syred v. Carruthers*, 27 Law J. Rep. (N.S.) M.C. 273; E. B. & E. 469.

By 20 & 21 Vict. c. 43. s. 2, which gives power to Justices to state a case for the opinion of the superior Courts, it is enacted that the appellant "shall within three days after receiving such case, transmit the same to the Court named in his application, first giving notice in writing of such appeal, with a copy of the case, so stated and signed," to the respondent:—Held, that the giving such notice with a copy of the case to the respondent, is a condition precedent to his right to have the case heard by the Court. *Woodhouse v. Woods*, 29 Law J. Rep. (N.S.) M.C. 149.

(f) Lodging Case for Hearing.

The provision in the 20 & 21 Vict. c. 43. s. 2, "that the appellant shall, within three days after

receiving the case, transmit the same to the Court named," is a condition precedent to the jurisdiction of the Court to hear the appeal, and it cannot be waived; and, therefore, where it had not been complied with, the Court, notwithstanding strong circumstances shewing waiver, struck out the case. *Morgan v. Edwards*, 29 Law J. Rep. (N.S.) M.C. 108.

(g) *Practice on the Hearing.*

On the hearing of an appeal, under 20 & 21 Vict. c. 43, s. 2, the respondent not appearing, the appellant, in order to entitle him to the judgment of the Court, must shew that the decision of the Justices was wrong. *Syred v. Carruthers*, 27 Law J. Rep. (N.S.) M.C. 273; E. B. & E. 469.

Upon the argument of a case stated by Justices, under the 20 & 21 Vict. c. 43, the appellant will not be allowed to take objections which were not raised before the Justices. Where the appellant was charged with knowingly permitting persons of bad character to meet in his house, and the only defence suggested before the Justices was, that the persons were there only for the purpose of obtaining refreshment, and therefore that the appellant could not be convicted, this Court refused to hear an objection, that there was no evidence that the appellant knew that the persons in his house were bad characters. *Purkis v. Hustable*, 28 Law J. Rep. (N.S.) M.C. 221.

(h) *Costs.*

In all cases of appeal under the 20 & 21 Vict. c. 43, from the summary decision of Justices, on informations, the Court has power, under section 6, to award costs to the successful party, including cases in which the Crown is, directly or indirectly, a party to the information. Therefore, on appeal against a conviction on an information by an Excise officer, prosecuting on behalf of the Crown by order of the Commissioners of Inland Revenue, for an offence under the 4 & 5 Will. 4. c. 85, s. 17, the Court, on confirming the conviction, can award costs to the respondent, the Excise officer. *Moore v. Smith*, 28 Law J. Rep. (N.S.) M.C. 126; 1 E. & E. 597.

In cases stated for the opinion of the Court of Queen's Bench, by Justices of the Peace, under the 20 & 21 Vict. c. 43, the general rule is, that the costs follow the judgment; but when no one appears on behalf of the respondent, that rule will not be applied. *Lee v. Strain*, 28 Law J. Rep. (N.S.) M.C. 221.

JUVENILE OFFENDERS.

[Reformatory Schools for Juvenile Offenders in Ireland promoted and regulated by 21 & 22 Vict. c. 103.]

LAND AND LANDS IMPROVEMENT ACTS.

[The Acts relating to the Advance of Public Money to promote the Improvement of Land amended by 19 & 20 Vict. c. 9.—The Sale and Transfer of Land in Ireland facilitated by 21 & 22 Vict. c. 72.—The Forms simplified and the expense diminished of completing Titles to Land in Scotland

by 21 & 22 Vict. c. 76.—Further provision made for the Purchase of Common and other Rights by Her Majesty's Principal Secretary of State for the War Department, and in relation to Land vested in or taken by such Secretary of State, by 22 Vict. c. 12.—Certain Provisions of the Titles to Land (Scotland) Act, 1858, extended to Titles to Land held by Burgage Tenure, and the said Act amended by 23 & 24 Vict. c. 143.—The Law relating to the Tenure and Improvement of Land in Ireland amended by 23 & 24 Vict. c. 153.]

Under the Lands Improvement Company's Acts of 1853 and 1855, if part of the land charged with the money advanced for improvement be subject to a mortgage or other incumbrance, the charge has priority over the mortgage or other incumbrance in respect of the whole amount, until apportionment is made by the Inclosure Commissioners under the 70th section of the act of 1853, when the priority applies only in respect of the amount apportioned. *The Lands Improvement Co. v. Richmond*, 25 Law J. Rep. (N.S.) C.P. 78; 17 Com. B. Rep. 145.

LANDLORD AND TENANT.

[See LEASE—RATE—USE AND OCCUPATION.]

[The providing of improved Dwellings for the Labouring Classes in Ireland encouraged by 19 & 20 Vict. c. 65.—The Law of Landlord and Tenant in Ireland consolidated and amended by 23 & 24 Vict. c. 154.]

(A) THE TENANCY.

- (a) *Tenancy from Year to Year.*
- (b) *Tenancy at Will or on Sufferance.*
- (c) *Eviction.*
- (d) *Notice to quit.*

(B) CONTRACTS.

- (a) *For Repairs.*
- (b) *Relative to Husbandry.*
- (c) *Relative to Trade.*

(C) RENT.

- (a) *Double Value.*
- (b) *Distress for.*
- (c) *Landlord's Claim for on Goods in Execution.*

(D) ATTORNMENT.

(E) HOLDING OVER.

(F) SMALL TENEMENTS ACT.

(G) LANDLORD'S TITLE.

(H) TITHE RENTCHARGE.

(I) FIXTURES.

(A) THE TENANCY.

(a) *Tenancy from Year to Year.*

By indenture, in 1853, the plaintiff covenanted with E that when E should have erected one or two houses on a certain parcel of land that he, the plaintiff, would demise to E or his assigns or nominees leases of that part of the parcel of land on which the several houses should be built, to hold the said parcel to E for ninety-eight years, from the 29th of September 1852, yielding and paying a specified rent or sum each year. There was a proviso that if the rents reserved by any leases to be granted should

amount to the whole rent to be paid under the indenture, leases should be granted of the rest of the parcel of land when houses were built thereon, reserving only a peppercorn rent. E covenanted to pay the whole rent or sum reserved in the indenture and to build many houses. There was a power of re-entry in the plaintiff for default of payment. Under this indenture E entered on the parcel of land, built some houses and had leases granted to him of them by the plaintiff, and he paid the rent or sums due under the building indenture till the 4th of February 1854, on which day he by deed assigned all his interest in the building indenture to the defendant. The defendant entered upon the parcel of land and also built some houses and had leases granted to him of them by the plaintiff under the terms of the building indenture. The defendant paid the rent or sums due under the building indenture till the 25th of March 1857, at which time he assigned over all his interest in the building undertaking to one W. The defendant had nothing to do with the land afterwards. The plaintiff sued the defendant for use and occupation, claiming the amount of a year's rent under the building indenture for the year subsequent to the assignment to W:—Held, that the defendant did not by entering on the land and paying the sums due under the building indenture become tenant from year to year to the plaintiff; consequently that the defendant was not liable for the rent claimed. *Camden v. Batterbury* (Ex. Ch.), 28 Law J. Rep. (n.s.) C.P. 335; 7 Com. B. Rep. N.S. 864.

A mortgage deed gave a power of entry on default; and to the intent that the mortgagees might have for the recovery of interest the same powers of entry and distress as are by law given to landlords for the recovery of rent, the mortgagor, the defendant, thereby attorned tenant from year to year to the mortgagees. The defendant continued in possession for more than a year. The mortgagees, after default, assigned to the plaintiffs, and gave notice to the defendant to wait:—Held, that there was no tenancy from year to year, and that immediately upon the notice the plaintiffs might maintain ejectment. *The Metropolitan Counties Assur. Soc. v. Brown*, 28 Law J. Rep. (n.s.) Exch. 340; 4 Hurl. & N. 428.

(b) *Tenancy at Will, or on Sufferance.*

The defendant occupied land, under parish officers, and had paid rent; they gave an invalid notice to quit at the end of the first year, and by a lease, signed only by two of them, demised to the plaintiff for a term of years, to commence from the end of the defendant's tenancy. Under this lease the plaintiff entered; but the defendant refused to give up certain plants he had himself planted, and subsequently entered and took them away:—Held, that he was liable in trespass; that, though the lease was invalid, there was evidence that the plaintiff entered under the authority of all the parish officers; and that, therefore, the defendant's tenancy, being either a tenancy at will or on sufferance, was lawfully determined, and his entry wrongful. *Wallis v. Delmar*, 29 Law J. Rep. (n.s.) Exch. 276.

(c) *Eviction.*

To constitute an eviction of a tenant by his landlord, which will operate as a suspension of rent, it is

not necessary that there should be an actual physical expulsion from any part of the premises; but any act of a permanent character, done by the landlord, or by his procurement, with the intention of depriving the tenant of the enjoyment of the premises as demised, or any part of them, will operate as an eviction. The existence of the intention is a question for the jury. Where, after a fire on premises, let to two different tenants by A, who was entitled to have the premises restored by the superior landlord, out of certain insurance monies, A approved of a new plan submitted to him by the superior landlord, without the consent of the tenants, and the premises, when rebuilt on that plan, were, in the one case a little smaller, and in the other a little larger than before, and there was evidence of an intention to oust the tenants,—Held, in actions by A for use and occupation, for rent accruing after the premises were so far advanced in rebuilding as to be permanently altered, that there was an eviction, to which A was a party, and that, therefore, the rent was suspended. *Upton v. Townsend*; and *Upton v. Greenless*, 25 Law Rep. (n.s.) C.P. 44; 17 Com. B. Rep. 30.

The defendant, being tenant of apartments belonging to the plaintiff, left them and put K into possession, for the purpose of taking care of and letting them. The plaintiff turned K out by force, and afterwards brought an action for rent. The defendant, at the trial, contended that there had been an eviction; but the plaintiff alleged that he had turned K out because he was not a proper person to be in the rooms, and because he had misconducted himself. The Judge told the jury that the question was, whether the trespass upon K was committed merely for the purpose of expelling him from the house, or whether it was for the purpose of depriving the defendant of his possession:—Held, that this was the right question, and that there was no misdirection. *Henderson v. Meara*, 28 Law J. Rep. (n.s.) Q.B. 305.

(d) *Notice to quit.*

In an action for rent, and use and occupation of premises up to Lady-day, 1859, there was evidence that a notice to quit at the previous Michaelmas was written and posted on the 25th of March 1858, in time to be delivered at the office of the landlord's agent (an attorney), in business hours, on the same day, and the jury found, in effect, that it was so delivered:—Held, sufficient, in the absence of any positive evidence that it was not delivered before business hours closed. *Papillon v. Brunton*, 29 Law J. Rep. (n.s.) Exch. 265; 5 Hurl. & N. 518.

A held premises of B, as tenant for a year, and so on from year to year so long as C should live, the tenancy commencing at Christmas. After the death of A (C being also dead), A's widow, by agreement with the landlord, continued to occupy the premises at the same rent, nothing being said about the commencement of her tenancy:—Held, that there was evidence enough to warrant the jury in assuming that the widow's tenancy was a mere continuation of the original tenancy of A, and therefore properly determined by a notice to expire at Christmas. *Humphreys v. Franks*, 18 Com. B. Rep. 323.

(B) *CONTRACTS.*

(a) *For Repairs.*

A tenant, under a lease which contained a cove-

nant to repair, and leave in good repair, all buildings and erections then standing or to be erected during the term, built a farm-house, partly on the land demised and partly on the waste adjoining belonging to the lessor. On the decease of the tenant, upon a claim by the landlord for dilapidations,—Held, that his acquiescence in the act of the tenant prevented his dispossessing him of the premises built on the waste, and that it must be assumed by implication that the covenant to repair extended to the whole building, and that the landlord was entitled in a suit for the administration of the tenant's estate to establish a claim for dilapidations. *In re Newbery; White v. Wakley*, 28 Law J. Rep. (N.S.) Chanc. 77; 26 Beav. 17.

(b) *Relative to Husbandry.*

The plaintiff covenanted with the defendant, his landlord, to deliver up possession of a certain farm and land on a day named, and that in the mean time he would cultivate the land according to the custom of the country, and that upon the delivery up of the land he would surrender and yield up a certain agreement to be cancelled, and all his unexpired term and interest in the farm, and would afterwards, on request, execute any further deed for effectually surrendering the term; and the defendant covenanted that if the plaintiff did on the day named deliver up possession, and did and should in the mean time cultivate the land according to the custom of the country, *and also did and should well and truly observe, perform and keep all and singular other the covenants and agreements thereinbefore contained, and on his part to be performed*, he, the defendant, would upon the delivery up of possession of the said land on the day specified, so cultivated as aforesaid, *and on such performance of such other covenants as aforesaid*, pay the plaintiff for the manure, tillages, hay, clover, and all other things then upon the land as were usually paid for between an outgoing and incoming tenant:—Held, that the delivery up of the agreement was not a condition precedent to the payment for the manure, &c. *Newson v. Smythies*, 28 Law J. Rep. (N.S.) Exch. 97; 3 Hurl. & N. 840.

A held a farm as tenant from year to year, upon a written agreement by which it was stipulated, amongst other things, that he should cultivate the farm "in the same way and manner, or as near thereto as circumstances would admit of, as H. Parsons (the outgoing tenant) had used and cultivated the same during his occupation thereof, and in all events according to the rules of good husbandry used and accustomed in the neighbourhood." In an action against A, alleging for breach, amongst others, the cutting and carrying away of ash-poles,—such user not being as near to the way and manner in which Parsons used and cultivated the farm as circumstances admitted, and being contrary to the rules of good husbandry used and accustomed in the neighbourhood,—it appeared that the poles in question consisted of shoots growing from old stools, which were seasonable and fit for cutting about every seventeen or eighteen years; that, by invariable custom, they belonged to the landlord, in the absence of a special agreement to the contrary; that, whilst Parsons held the farm, these poles had never been in a fit state for cutting; that two tenants who

had preceded Parsons in the occupation of the farm had cut and sold them as crops; and that A had, whilst he occupied, paid the rates for the whole farm, including the wood or spinney in which the poles grew. The Judge having omitted to leave to the jury upon what terms Parsons had held the farm,—the Court granted a new trial. *Hood v. Kendall*, 17 Com. B. Rep. 260.

(b) *Relative to Trade.*

The Court will not, at the instance of a person having a mere reversionary interest in the freehold, interfere to restrain the breach of a covenant entered into by the tenant with the lessor against carrying on a business upon the demised premises, unless special damage is shown. *Johnstone v. Hall*, 25 Law J. Rep. (N.S.) Chanc. 462; 2 Kay & J. 414.

(C) RENT.

(a) *Double Value.*

It is only the lessor or the person who stands in the situation of landlord, and not any one who derives title from the lessor, who can, under the statute 4 Geo. 2. c. 28. s. 1, sue a tenant for double value when there has been a holding over after the determination of the tenancy. Where, therefore, A B, who had let certain premises to the defendant under a letting which expired on the 25th of March 1858, and had required the defendant, by notice in writing, to deliver up possession on that day, afterwards, but before the end of such tenancy, demised the premises to the plaintiff from such 25th of March 1858, and the defendant held over without paying rent to or otherwise recognizing the plaintiff as landlord, it was held, that the plaintiff was not the proper person to sue the defendant for double value under the statute 4 Geo. 2. c. 28. s. 1. *Blatchford v. Cole*, 28 Law J. Rep. (N.S.) C.P. 140; 5 Com. B. Rep. N.S. 514.

(b) *Distress for.*

[See post (H).]

Where a broker has distrained for rent the right goods of the tenant, the landlord, having authorized the distress, is liable for any irregularity committed by the broker in conducting such distress to a sale, although done by him without the knowledge or sanction of the landlord. *Haseler v. Lemoyne*, 28 Law J. Rep. (N.S.) C.P. 103; 5 Com. B. Rep. N.S. 530.

On distraining for rent, the man left in possession on the premises (being other than the person holding the warrant from the landlord to distress) has no authority in law to receive the rent. *Boulton v. Reynolds*, 29 Law J. Rep. (N.S.) Q.B. 11.

Where, therefore, W executed a warrant of distress, directed to him by the landlord, and left R on the premises in possession, and the tenant tendered the rent to R, who refused to receive it, the tenant knowing that R had not authority in fact to receive the rent, and that W had, and that he was within a reasonable and convenient distance of the premises,—Held, that the tender was invalid. *Ibid.*

A authorized B, a broker, to distress for rent due to him from C. B having entered for the purpose of executing the warrant, took away, amongst other things, certain books and papers (which were assumed not to be distrainable) and omitted to insert

them in the inventory:—Held, that A was liable, jointly with B, in trespass. *Gauntlett v. King*, 3 Com. B. Rep. N.S. 59.

(c) *Landlord's Claim for on Goods in Execution.*

Under 19 & 20 Vict. c. 108. s. 75, when goods in a tenement for which rent is due, are taken in execution, under the warrant of a county court, the landlord may claim the rent due to him by delivering a notice to the bailiff making the levy, and such bailiff shall, in making the levy, in addition thereto, distrain for the rent so claimed:—Held, that this does not authorize the bailiff to distrain and sell the goods of a stranger which were upon the premises. *Beard v. Knight*, 27 Law J. Rep. (n.s.) Q.B. 359; 8 E. & B. 865.

(D) ATTORNMENr.

An attornment by a tenant of land to a receiver appointed by the Court of Chancery to collect the rents, and payment of rent to such receiver, create a tenancy by estoppel between the tenant and the receiver, but do not enure to enable the person who is found ultimately to have the legal title to the land to treat the tenant as his tenant, and to distrain for rent. *Evans v. Matthias*, 26 Law J. Rep. (n.s.) Q.B. 309; 7 E. & B. 590.

The sheriff on a levy under a *fi. fa.* is liable to the landlord's claim for rent under 8 Ann. c. 14. while the goods remain in his hands, even after sale. And the claim may be made by a mortgagee to whom the mortgagor has attorned tenant for rent payable in advance, although no interest has become due. *Yates v. Radcliffe*, 29 Law J. Rep. (n.s.) Exch. 117; 5 Hurl. & N. 249.

On the 22nd of October 1859 the judgment debtors executed a mortgage to S and W, with covenant and proviso for redemption on payment of the principal on the 17th of December next, and interest to be paid on the 22nd of December, and the debtors thereby attorned tenants to the mortgagees at a rent to be paid yearly in advance, the first payment to be on the day of the date. On the 9th of December S and W deposited the deed by way of equitable security. On the 20th of December the sheriff seized and sold, and on the 26th had notice of the claim of S and W. An order having been made on the sheriff on their application for payment of a year's rent out of the proceeds of the execution, the Court refused to set it aside. *Ibid.*

(E) HOLDING OVER.

The rule that a tenant holding over after the expiration of his lease, without entering into a new contract, continues to hold upon the terms of the lease so far as they are applicable to a tenancy from year to year, applies to a proviso for re-entry in case of non-payment of the rent. *Thomas v. Packer*, 26 Law J. Rep. (n.s.) Exch. 207; 1 Hurl. & N. 669.

If a landlord, after giving a yearly tenant notice to quit at the end of his year, afterwards agrees to let the premises to A from the end of the year, and informs the tenant that he has done so, but the tenant nevertheless holds the premises over for another quarter, and, after being ejected, pays the landlord a quarter's rent for the extra quarter, the landlord is not prevented by the receipt of the rent from bring-

ing an action against the tenant for the damages occasioned by his holding over, and in that action the landlord may recover as damages the amount of the ordinary damages which he has had to pay in an action brought against him by A for not giving him possession at the time agreed on, and also the costs of such action. *Bramley v. Chesterton*, 27 Law J. Rep. (n.s.) C.P. 23; 2 Com. B. Rep. N.S. 592.

(F) SMALL TENEMENTS ACT.

[See JUSTICES OF THE PEACE (A) (d).]

By the 6th section of the Small Tenements Act, 1 & 2 Vict. c. 74, a landlord who has proceeded to turn out a tenant under the provisions of the act, is liable for informality in the proceedings, in an action on the case shewing special damage caused by such informality. Per *Crowder, J.*, the notice to be given under the 1st section, in the form in the schedule, will be bad if it do not state the place at which the application is to be made to the Justices for a warrant. *Delany v. Fox*, 26 Law J. Rep. (n.s.) C.P. 5; 1 Com. B. Rep. N.S. 166.

A landlord is not liable in trespass for ejecting a tenant where the tenancy has expired, although he may have taken proceedings against him under the 1 & 2 Vict. c. 74. *Ibid.*

(G) LANDLORD'S TITLE.

Payment of rent under a distress is not a conclusive admission of title in the distrainer, but may be rebutted by shewing that he never had any title. *Knight v. Cox*, 18 Com. B. Rep. 645.

The doctrine of estoppel between landlord and the tenant is founded upon the principle that a lessee, having accepted a lease, may not plead to the action of his lessor *nil habuit in tenementis*. *Langford v. Selmes*, 3 Kay & J. 220.

But the lessee may plead to such an action that the lessor had an interest at the date of the lease, but that such interest had determined before the alleged cause of action arose. *Ibid.*

Therefore if a termor affect to grant a lease for a term exceeding his own term in duration, and to reserve an annual rent, that would operate as an assignment of his term, and there would be no estoppel between him and the person to whom he made such assignment; and accordingly it would be doubtful whether the assignor would have any remedies for recovering the rent. The statute 4 Geo. 4. c. 28. does not give power to distrain for such a rent. *Ibid.*

(H) TITHE-RENTCHARGE.

A declaration alleged that, after the termination of the plaintiff's lease of a farm, a sum of money for tithe-rentcharge became due in respect of the farm, which the defendant, as owner of the farm, was liable to pay; that the farm was liable to the payment; that the defendant refused to pay it, and that the Ecclesiastical Commissioners distrained for it a stack of wheat of the plaintiff then lawfully being on the farm, and that the defendant refused to indemnify him. The jury found that the defendant was not liable to pay, on a traverse to the allegation to that effect in the declaration:—Held, that, striking out the allegation respecting the defendant's liability to pay (which was construed to aver a personal liability), the declaration did not allege a sufficient

privity between the plaintiff and the defendant to entitle the plaintiff to recover for the loss occasioned to him by the distress. *Griffenhoofe v. Daubus* (in error), 25 Law J. Rep. (n.s.) Q.B. 237; 5 E. & B. 746.

(I) FIXTURES.

The right of a tenant to sever tenants' fixtures from the freehold cannot be exercised after the landlord has re-entered, and all tenancy of any kind has been put an end to, and it makes no difference that the tenant has not evinced an intention to abandon his right to such fixtures. *Leader v. Homewood*, 27 Law J. Rep. (n.s.) C.P. 316; 5 Com. B. Rep. N.S. 546.

Quare—whether a tenant, who with his own materials partly erects a cattle-shed, which is not completed at the expiration of his tenancy, can remove it, the shed being completed so far as relates to its actual annexation to the land. *Smith v. Rinder*, 27 Law J. Rep. (n.s.) Exch. 83.

The mere annexation of a chattel by its owner to the freehold of another does not necessarily make it the property of the freeholder; but in each case it may be a question on the evidence, whether the owner of the chattel has lost his property in it. *Lancaster v. Eve*, 28 Law J. Rep. (n.s.) C.P. 236; 5 Com. B. Rep. N.S. 717.

Where the owner of the inheritance annexes thereto fixtures (which would, in the ordinary case of landlord and tenant, be removable by the latter during his term), for a permanent purpose, and for the better enjoyment of his estate, they become part of the freehold. *Walmesley v. Milne*, 7 Com. B. Rep. N.S. 115.

Upon a question arising between landlord and tenant as to trade fixtures, the Court held, that buildings built of brick, with brick foundations let into the soil, although erected for the sole purpose of trade, could not be removed by the tenant, although machinery, engines, vats and utensils, with their accessories, might be removed. *Whithead v. Bennett*, 27 Law J. Rep. (n.s.) Chanc. 474.

LANDS CLAUSES CONSOLIDATION ACT.

[See ARBITRATION—(E) Award—(b) When final. And see the 23 & 24 Vict. c. 106, an Act to amend the Lands Clauses Consolidation Act (1845) in regard to Sales and Compensation for Land by way of a Rentcharge, Annual Feu Duty or Ground Annual, and to enable Her Majesty's principal Secretary of State for the War Department to avail himself of the Powers and Provisions contained in the same Act.]

- (A) PURCHASE BY AGREEMENT.
- (B) COMPULSORY POWERS OF PURCHASE.
 - (a) When Contract complete.
 - (b) Severed Land built on.
 - (c) Part of a House.
- (C) ASSESSMENT OF COMPENSATION.
 - (a) By an Arbitrator.
 - (1) In what Cases.
 - (2) Appointment of Arbitrator.
 - (3) Costs of the Arbitration.
 - (b) By a Jury.
 - (1) Warrant to summon Jury.
 - (2) Finding: when conclusive.

(c) When and for what.

(d) Collateral Matters.

(e) Excess of Jurisdiction.

(D) APPLICATION OF COMPENSATION.

(a) Purchase of other Lands.

(b) Where Land is in Lease.

(c) Tenant for Life.

(d) Buildings.

(e) Costs of Deposit and Investment of Compensation.

(E) SUPERFLUOUS LANDS.

(F) CONVEYANCE UNDER.

(A) PURCHASE BY AGREEMENT.

A railway company takes possession of land under a contract for a sixty years' title. The vendor fails to shew more than a possessory title for thirty-six years:—Held, that the company cannot compel the company to deposit the purchase-money in the bank under the 76th section of the Lands Clauses Consolidation Act, 1845. *Douglass v. the London and North-Western Rail. Co.*, 8 Kay & J. 173.

By the term "owner" in that section the legislature meant a person having some title; and in providing for the event of an owner "failing to make out a title to the satisfaction of the promoters of the undertaking," they had in contemplation the possibility of the land being subject to dower or jointure, or some other independent estate or interest outstanding in a third party who is under no legal or equitable obligation to concur in the sale, but who does not displace the owner's title. *Ibid.*

A surviving partner, selling partnership lands in discharge of his duty, as survivor, to wind up the partnership, is an owner within the 76th section; and by virtue of that and the 77th section the promoters of the undertaking depositing the purchase-money in the bank to the credit of the vendor and of the representative of his deceased partner, would acquire all the estate and interest of both. *Ibid.*

A person in possession, but shewing a bad title, is not the "owner" within the meaning of the 76th section; and when the lands are in such possession, and the true owner cannot be found, the promoters must have recourse to the jury clauses of the act:—*obiter*. *Ibid.*

(B) COMPULSORY POWERS OF PURCHASE.

(a) When Contract complete.

A contract for the purchase of land by a company under the 8 & 9 Vict. c. 18. is complete when notice to take the land has been served and the value has been fixed by an arbitrator appointed by the owner and the company. *The Regent's Canal Co. v. Ware*, 26 Law J. Rep. (n.s.) Chanc. 566; 23 Beav. 575.

Such a contract will be enforced in equity, notwithstanding the special provisions contained in the act relating to compulsory purchases. *Ibid.*

If an owner of land, compelled to sell, delays the completion of the purchase, interest will stop, upon an appropriation of the purchase-money, with notice that it is unemployed. *Ibid.*

It is unusual to give costs to a company taking land compulsorily, if it proceeds to enforce the contract otherwise than by the means provided by the act. But costs will be given to a company proceed-

ing by bill for specific performance, instead of under the compulsory power in the Lands Clauses Consolidation Act, if the landowner, by his conduct, has rendered it doubtful whether the proceeding under the act could satisfy all the impediments interposed. *Ibid.*

(b) *Severed Land built on.*

If the works of a railway company divide the land of any person so as to leave on either side of the works a piece of land of less extent than half an acre, or of less value than the expense of making a bridge or other communication between the divided portions, and the owner requires the company to make such a communication for his benefit under section 68. of the Railways Clauses Consolidation Act, 1845, the railway company is not entitled under section 94. of the Lands Clauses Consolidation Act, 1845, to compel the owner to sell the small severed portion when such land is situate in a town or built upon, but must make the communication required. *Marriage v. the Eastern Counties Rail. Co. and the London and Blackwall Rail. Co.* (Ex. Ch.), 27 Law J. Rep. (n.s.) Exch. 185; 2 Hurl. & N. 625.

(c) *Part of a House.*

Trustees of intended almshouses contracted to buy an acre of land, and to build almshouses on a particular plan, and wings thereto (when they had funds for the latter purpose). Before they built any part a railway company gave them notice of an intention to apply to Parliament for an act. The centre was built, and then the company gave notice of an intention to take part of the land on which one of the wings would be erected according to the plan. The trustees had at present no funds to erect the wings. The trustees filed a bill against the company, and moved for an injunction to restrain them from taking the land unless they took the whole. The line of railway would not come within some few inches of the building already erected. One of the Vice Chancellors refused the injunction, on the ground that under the 92nd section of the Lands Clauses Consolidation Act, the land was not part of a building, and that the company could not be compelled to take the whole; but upon appeal,—Held, that although the company did not propose to touch the actual building, they would be taking part of a house, and must be restrained; and that the word "house" in the 92nd section must be interpreted as used in the general, if not universal, sense in which the law understood it. *Grosvenor v. the Hampstead Junction Rail. Co.*, 26 Law J. Rep. (n.s.) Chanc. 781; 1 De Gex & J. 446.

Three houses were built upon a plot of land, a portion of which was laid out in gardens for each house; a summer-house and other detached outhouses were also built. A railway company, under the Lands Clauses Consolidation Act, required a portion of the gardens for the purpose of their undertaking, but they refused to purchase the whole premises:—Held, upon a bill by the freeholder, that the gardens were part of the houses to which they were attached, and that the company were bound to purchase the two houses and premises from which parts of the gardens were taken, and to make compensation for any injury sustained in respect of the third house. *Cole v. the West London and Crystal*

Palace Rail. Co., 28 Law J. Rep. (n.s.) Chanc. 767; 27 Beav. 242.

A railway company under the compulsory powers of the Lands Clauses Consolidation Act, cannot take a portion of a garden and orchard essential to the enjoyment of a mansion and premises; they must take the entire house and curtilage. *King v. the Wycombe Rail. Co.*, 29 Law J. Rep. (n.s.) Chanc. 462; 28 Beav. 104.

Where, therefore, a mansion and premises were surrounded by a brick wall, and a railway company took a portion of the garden and orchard, and divided one part of the premises from another and destroyed all internal communication,—Held, that the company were bound to take the whole estate. *Ibid.*

A company may abandon a notice given with the intention of taking lands under the compulsory powers conferred upon them. Such notice, without some act to obtain possession, is not a contract binding on the company. *Ibid.*

(C) ASSESSMENT OF COMPENSATION.

(a) *By an Arbitrator.*

(1) *In what Cases.*

The award of an arbitrator finding a damage done by a nuisance, is to be treated as a verdict at law establishing a legal right, so as to entitle the party in whose favour it is made to an injunction. *The Directors, &c. of the Imperial Gaslight and Coke Co. v. Broadbent*, 29 Law J. Rep. (n.s.) Chanc. 377; 7 H.L. Cas. 600: affirming 26 Law J. Rep. (n.s.) Chanc. 276; 7 De Gex, M. & G. 436.

The 68th section of the Lands Clauses Consolidation Act, 1845, only gives compensation in cases where the incorporated company is doing what is authorized by its own private act, but which may nevertheless, cause damage to an individual. *Ibid.*

(2) *Appointment of Arbitrator.*

Where the amount claimed for compensation under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18.) is not paid or agreed to be paid within twenty-one days, as provided by section 68, it is the duty of the claimant before nominating an arbitrator on his behalf, to attempt to procure the appointment of a single arbitrator. *Yates v. the Mayor, &c. of Blackburn*, 29 Law J. Rep. (n.s.) Exch. 447.

(3) *Costs of the Arbitration.*

Under section 34. of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, which enacts, that the costs of arbitration under the act "shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking," the claimant is entitled on a reference under section 25. to the costs, although no sum was offered in consequence of the claimant not having given any notice under section 68. of the amount claimed. *Martin v. the Leicester Waterworks Co.*, 27 Law J. Rep. (n.s.) Exch. 432; 3 Hurl. & N. 463.

A waterworks company's act, the 10 & 11 Vict. c. cclxxxi, incorporated the 8 & 9 Vict. c. 18, and provided that persons interested in certain water-mills should be entitled to compensation, and that the amount of such compensation should, in case of disagreement, be settled by arbitration, in manner

provided by the Lands Clauses Consolidation Act in cases of disputed compensation. By agreement between the plaintiff (a person entitled to compensation) and the company, reciting that a disagreement existed between them as to the amount of compensation, and that the parties had agreed to appoint as sole arbitrator a person to be nominated by A and B, who had nominated C, the company and the plaintiff, in performance of their agreement, and in pursuance of the provisions of the Lands Clauses Consolidation Act, and of the act above referred to, appointed C to act as sole arbitrator. The arbitrator awarded 440*l.*, and afterwards, by writing, at the request of the plaintiff, settled the costs at 107*l.*:—Held, that the costs were recoverable, under section 34, by action from the company, although the plaintiff had not given any notice to the company of the amount of compensation claimed, and the company, in consequence, had not offered any sum to the plaintiff. *Ibid.*

A claimant having immediately on the expiration of twenty-one days from the service of his notice of claim, nominated an arbitrator on his behalf, the promoters subsequently, and before nominating their arbitrators, and before the claimant delivered his nomination to his arbitrator, tendered a sum for damages and costs, which was refused, and the umpire afterwards awarded a less sum for compensation:—Held, that the claimant was not entitled to the costs of the arbitration. *Yates v. the Mayor, &c. of Blackburn*, 29 Law J. Rep. (n.s.) Exch. 447.

(b) *By a Jury.*

(1) *Warrant to summon Jury.*

The owner of land taken by a railway company gave notice under the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), s. 68, of his desire to have the question of compensation settled by a jury; but before the expiration of the twenty-one days limited by that section for the company to issue their warrant to the sheriff to summon a jury, the owner gave a second notice of his desire to have the question settled by a special jury, under section 24, which fixes no time within which the company are to issue their warrant:—Held, that the second notice did not operate as a waiver of the first; but that the company were bound to issue a warrant within twenty-one days after the receipt of the first notice, and in default thereof to pay the compensation claimed. *Glyn v. the Aberdare Rail. Co.*, 28 Law J. Rep. (n.s.) C.P. 271; 6 Com. B. Rep. N.S. 359.

(2) *Finding: when conclusive.*

The finding of the sheriff's jury on an inquisition, under section 68. of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18.) is not conclusive; and therefore, in an action brought on such an inquisition, it is competent to the defendant, on a traverse that the plaintiff's property was damaged or injuriously affected within the meaning of the act, and that the plaintiff was not entitled to compensation under the provisions thereof, in respect of the same having been so damaged or seriously affected, to prove that the subject-matters of the claim are not such as are contemplated by the 68th section. *Chapman v. the Monmouthshire Rail. and Canal Co.*, 27 Law J. Rep. (n.s.) Exch. 97; 2 Hurl. & N. 267.

The plaintiff made a claim against the defendants (a railway company) for compensation in respect of his lands being injuriously affected by the execution of the works of the railway; and by the verdict of a jury summoned before the sheriff, a sum of money was awarded to him. An action having been brought upon the judgment to recover the money so awarded, it was held that, it being proved that the lands were injuriously affected to some extent, the defendants could not dispute the quantum of damages awarded by the sheriff's jury. *Mortimer v. the South Wales Rail. Co.*, 28 Law J. Rep. (n.s.) Q.B. 129; 1 E. & E. 375.

(c) *When and for what.*

Compensation cannot be claimed under the 68th section of the 8 & 9 Vict. c. 18. for an annoyance caused by persons standing on the bank of a railway and overlooking the claimant's premises; such annoyance being an injury to the amenities of the claimant's residence and not injuriously affecting his property so that an action would lie. *In re Penny and the South-Eastern Rail. Co.*, 26 Law J. Rep. (n.s.) Q.B. 225; 7 E. & B. 660.

The provisional committee of a water-works company agreed with the plaintiff, on his withdrawing his opposition to their bill in parliament, to purchase lands for the works at a fixed sum per acre, including damage for severance, and in addition to pay for any damage the plaintiff should sustain from the water of the company being near his house or buildings, and also to make good to the plaintiff or his tenants all loss or damage which the erections of the intended works might cause to any property belonging to or in the occupation of him or them which the company might not purchase (except damage occasioned by severance), whether caused by the order or neglect of the company; the damage in all these cases to be assessed by certain persons named as arbitrators. The local act was obtained, and it incorporated the Lands Clauses Consolidation Act, 1845, and the purchase-money was paid, and the compensation money under the above heads was ascertained by the arbitrators and paid to the plaintiff. The plaintiff subsequently brought an action against the company claiming damages for taking so little care of a reservoir that the water oozed out over the plaintiff's land, causing offensive smells and vapours, and rendering his buildings damp and unwholesome, and permanently injuring their value, and for obstructing a drain and thereby penning back the sewerage of the plaintiff's house so that it could not flow away by means of the drain as it ought; and further, that by reason of the making of the defendants' reservoir and works authorized to be made by their act, a drain whereby the plaintiff's adjoining house and lands were drained, was interrupted and rendered useless, and the defendants neglected to substitute another drain according to their duty, whereby the plaintiff's house and lands were insufficiently drained; and also for cutting a channel across, and thereby, and also by means of the defendants' reservoir and works, depriving the plaintiff of the use of an agricultural road forming a communication between lands of the plaintiff, and for not substituting another road in lieu of it; and also by the reservoir and works obstructing a public footpath and depriving the plaintiff of the use of it, and thereby causing him

particular damage and inconvenience:—Held, first, that the action was maintainable, the damages claimed not being those directed by act of parliament to be settled by arbitration, or such as were contemplated by or within the scope of the previous agreement between the parties. Secondly, that with respect to the right of action for the damage occasioned by the interruption of the plaintiff's drain and the non-substitution of another, it was immaterial that the defendants had no notice that the interrupted drain was for the drainage of the plaintiff's house, or that the plaintiff required any substituted drain; and so also with respect to the interruption and non-substitution of the occupation road, that it was no answer that the plaintiff had not required any way to be substituted. Thirdly, that a claim against the company for wrongfully and maliciously raising the level of the water of a stream so as to prevent its flowing at its accustomed speed at the place where it arrived at the plaintiff's lands, might be a loss or damage caused by the erection of the defendant's works, which by the agreement was to be assessed by arbitration. Fourthly, that a plea setting up the agreement and the award of a sum to the plaintiff under it in respect of the last-mentioned kind of damage was good in part, although it professed to cover some of the other claims in the declaration to which it was no answer. *Blagrove v. the Bristol Waterworks Co.*, 26 Law J. Rep. (n.s.) Exch. 57; 1 Hurl. & N. 269.

A count of the declaration alleged that the plaintiff was possessed of a field called H and another field called F, and that there was a public footpath through H to F and back again; and that the defendants wrongfully constructed, on the part of the footpath lying between H and F, a large reservoir, and thereby entirely obstructed the footpath and rendered it impassable, by reason whereof the plaintiff was deprived of the use of the footpath as a means of passing from H to F and back; and by reason of the premises the plaintiff and his servants, when employed in the management of the said lands and in tending and feeding his cattle, were compelled to go by another and longer route, whereby the valuable time and work and labour of the plaintiff and his servants had been spent and performed to a greater extent than if they had not been deprived of the footpath; and thereby the plaintiff was prevented from employing his servants during such excess of time as he otherwise would have done, and the management of the said lands and the tending and feeding of the cattle were more laborious and expensive to the plaintiff:—Held, that the count disclosed a good cause of action, and that it was no answer that the defendants did the acts complained of under the authority of the act. *Ibid.*

Another count alleged that during part of the time mentioned in the count the plaintiff was possessed of the close F, and during the residue of the time another person was possessed thereof, as tenant to the plaintiff, at a rack-rent, the reversion belonging to the plaintiff; and that there was a public footpath into and along one side of F to a public highway, and the defendants, by making and keeping a reservoir upon the land adjoining, obstructed the footpath, and thereby caused persons who were desirous of passing along it to deviate out of it, and to trespass upon F in parts where there was no footpath, and by the

user thereof to form a beaten track across F, and to wear off in a permanent manner the grass from the beaten track, and rendered it impossible for the plaintiff and his tenant to prevent such trespasses from being committed, and rendered it much more difficult than it otherwise would have been for the plaintiff to prove that there was not a public footpath where the trespasses were committed, whereby the plaintiff, while he was possessed, was disturbed and injured in F; and while the plaintiff's tenant was possessed the plaintiff was injured in his reversionary estate, and the tenant would not continue tenant as he otherwise would have done, and the close F was so deteriorated in value as not to be worth being hired at so high a rent as it otherwise would have been. Another count alleged that the plaintiff and defendants referred to arbitration the amount of compensation to be paid by the defendants to compensate the plaintiff for the damage which he would sustain by the construction of a reservoir near the plaintiff's house and lands, for which damage the defendants would have been bound to compensate the plaintiff, and that the amount of compensation depended in part upon the height to which the reservoir would be constructed; and that the defendants wrongfully, maliciously and fraudulently caused it to be represented to the arbitrators that they intended to construct the reservoir to the height of thirty feet, whereas they either had not determined on the height, or intended to construct it to a greater height, and did afterwards so construct it, by reason of which representation the arbitrators awarded to the plaintiff much less compensation than they otherwise would have done:—Held, that neither of these two counts disclosed any cause of action. *Ibid.*

A railway company which has taken lands for the purposes of their railway under the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), and the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20), and had them conveyed to them by the owner, by a conveyance in the usual statutable form, are not entitled to prevent such owner from working the mines beneath without paying him compensation under section 78, of the latter statute, even though the mines could not ever have been worked without injury to the surface soil. *Fletcher v. the Great Western Railway Company* (Ex. Ch.), 29 Law J. Rep. (n.s.) Exch. 253; affirming the judgment below, 28 Law J. Rep. (n.s.) Exch. 147; 4 Hurl. & N. 242.

If at the time of the purchase of land by a railway company, the surface belongs to one person and the minerals below to another, who is bound by the common law obligation to leave a sufficient support below to prevent the surface sinking,—*quære*, whether such mine-owner can claim compensation from the company (if they forbid the working under the railway) for all the minerals beneath, or only for so much as could have been worked without damage to the surface. *Ibid.*

A company established by a private act of parliament for the erection of an hotel, having in the course of their works obstructed certain ancient lights of the plaintiff, the latter gave them notice under the 68th section of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), requiring them to summon a jury to assess the amount of compensation due to him for the injury to his property; and, on their

failure to do so, sued them for the penalty:—Held that the action was not maintainable, the Lands Clauses Consolidation Act, 1845, not being incorporated either expressly or by implication into the private act. *Wade v. the Westminster Palace Hotel Company (Limited)*, 8 Com. B. Rep. (N.S.) 276.

(d) *Collateral Matters.*

The 68th section of the Lands Clauses Consolidation Act, which provides that if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction, such party may have the compensation either settled by arbitration or by the verdict of a jury, does not give the arbitrator or a jury jurisdiction to determine whether the promoters are excused from the obligation to pay by any collateral matter, such as whether an agreement between the promoters and the claimant, whereby the promoters undertook to build a good and substantial wall, has been broken, or whether the breach of such agreement was the cause of the land being injuriously affected. *In re Byles and the Ipswich Dock Commissioners*, 25 Law J. Rep. (N.S.) Exch. 53; 11 Exch. Rep. 464.

(e) *Excess of Jurisdiction.*

The Court will grant a *certiorari* where a jury, summoned under the 68th section of the 8 & 9 Vict. c. 18, to determine by their verdict whether lands have been injuriously affected by the execution of the works of a railway company, have awarded compensation for one of several claims, over which one they have no jurisdiction, although such excess of jurisdiction does not appear on the face of the proceedings. Such excess of jurisdiction may be shewn by extrinsic evidence by affidavit. *In re Penny and the South-Eastern Rail. Co.*, 26 Law J. Rep. (N.S.) Q.B. 225; 7 E. & B. 660.

(D) APPLICATION OF COMPENSATION.

(a) *Purchase of other Lands.*

Upon a petition that certain money paid into court by a railway company upon the purchase of land might be applied for the purpose of enfranchising other property belonging to the vendor, it was held that, under the Lands Clauses Act, enfranchisement of copyholds was equivalent to re-investment in other lands, and the Court had power to direct such an application of the money, and the railway company must pay the costs incurred thereby. *Dixon v. Jackson*, 25 Law J. Rep. (N.S.) Chanc. 588.

(b) *Where Land is in Lease.*

The purchase-money of lands taken under the Lands Clauses Consolidation Act may be applied in obtaining the surrender of a lease existing on the lands of the vendors. *Ex parte the Corporation of Sheffield, in re the Manchester, Sheffield and Lincolnshire Rail. Co.*, 25 Law J. Rep. (N.S.) Chanc. 587; 21 Beav. 162.

A railway company, under the compulsory powers of the Lands Clauses Consolidation Act, took lands belonging to a corporation, which were then let on lease. The value of the reversion was alone assessed,

it being understood that rents were to be paid to the corporation during the existence of the leases. Upon a petition by the corporation, asking for the investment of the purchase-money.—Held, that the purchase was made as of property in possession, and that the dividends were payable to the corporation, and ought not to be accumulated up to the falling in of the reversion. *In re the Hampstead Junction Rail. Co., ex parte the Dean and Chapter of Westminster*, 28 Law J. Rep. (N.S.) Chanc. 144; 26 Beav. 214.

(c) *Tenant for Life.*

Upon a petition for payment to the petitioner of the income of a fund arising from the sale of land to a railway company, the petitioner being in possession at the time of the sale as tenant for life, subject to mortgages created by himself, the Court will make an order, without requiring the mortgages to be served with the petition. But, *semble*, such service could not have been dispensed with, in case the tenant for life had been out of possession at the date of the sale. *In re Hungerford's Trust*, 3 Kay & J. 455.

(d) *Buildings.*

A railway company took lands settled to uses, and paid the purchase-money into court under the Lands Clauses Consolidation Act. Certain houses, which were settled to the same uses, were condemned by the Commissioners acting under the Metropolitan Buildings Act (18 & 19 Vict. c. 122. s. 74), and the houses were rebuilt by the tenant for life, more money being expended than the money paid in by the company. A petition was presented by the tenant for life, under the 69th section of the Lands Clauses Act, for payment of the money paid in, in part payment of the expenses for rebuilding:—Held, on appeal from a refusal of the Master of the Rolls to make any order, that the case came within the spirit of the 69th section, and the Lords Justices made the order. *In re Davies's Estate, and in re the Crystal Palace and West-End Rail. Co.*, 27 Law J. Rep. (N.S.) Chanc. 712; 3 De Gex & J. 144.

A railway passed through a farm, and divided it so that the buildings could not be conveniently used for one part of the farm:—Held, that it was an injury within the meaning of the 8 & 9 Vict. c. 18. s. 69, which required the substitution of other buildings, and that the compensation paid for the damage might be applied in the erection of new buildings upon that part of the farm which required them. *In re the Oxford, Worcester and Wolverhampton Rail. Co., ex parte the Devisees of Milward*, 29 Law J. Rep. (N.S.) Chanc. 245; 27 Beav. 571.

Held, also, that the application for the sanction of the Court was not within the 8 & 9 Vict. c. 18. s. 80, and that the railway company was not liable to pay the costs; but that the costs, exclusive of those of the railway company, must be paid out of the fund in court. *Ibid.*

(e) *Costs of Deposit and Investment of Compensation.*

To a petition by a tenant for life of settled estates for the investment of the purchase-money of part of the estates which had been purchased by a railway company under their act, and for payment of the dividends to the petitioner, or if the incumbrancers upon his life interest should not consent thereto, then to a receiver who had been appointed to receive the

rents of the estates for the benefit of the incumbrancers, the incumbrancers and their receiver were made respondents, and, having been served with the petition, appeared at the hearing thereof:—Held, that the costs of the incumbrancers and of the receiver were to be borne by the company. *In re Nash, and In re the London, Tilbury and Southend Rail. Act, 1852*, 25 Law J. Rep. (n.s.) Chanc. 20.

Lands which were settled, and under the trusts of which several persons were entitled absolutely, were taken by a railway company for the purposes of their line, and the money was paid into court under the provisions of the special act. That act provided that the company should pay the costs of a re-investment in land, but provided for nothing more. This company was amalgamated with two other companies, and the three were constituted one company; and it was provided that any sums which were paid into court by any of the three companies should be applied and disposed of according to their respective special acts, which special acts were declared to remain in force for such purposes; and the Lands Clauses Consolidation Act was incorporated with the amalgamation act, subject to such provisions as to costs. The parties entitled to the money representing the land sold, petitioned for payment of the same out of court, and that the amalgamated company might pay the costs, and the same was ordered by one of the Vice Chancellors; and, upon appeal, the decision was affirmed, and the appeal dismissed, with costs. *In re Ellison's Estate*, 25 Law J. Rep. (n.s.) Chanc. 379; 8 De Gex, M. & G. 62.

Where a railway company's special act contains certain provisions, and by an act amalgamating the railway with another the special act is repealed, but its provisions are adopted in the amalgamation act, the latter act is not an act incorporated with the special act within the meaning of the 80th section of the Lands Clauses Consolidation Act. *Ibid.*

A railway company having taken copyhold lands, and paid the purchase-money into court, an order was made for reinvestment of the money upon other copyholds, and for payment by the company of the costs, charges and expenses incurred of or relating to the purchase, and the costs of the conveyances, and of the application for reinvestment and consequent thereon:—Held, that the company was not liable to pay the fine upon the admission to the copyholds. *In re the Eastern Counties Rail. Co., ex parte the Vicar of Sawston*, 27 Law J. Rep. (n.s.) Chanc. 755.

Upon a petition by a tenant for life for the reinvestment of purchase-money for lands taken by a railway company,—Held, that the costs of the appearance of the reversioner and of the trustees of a deed of separation between the tenant for life and her husband, ought to be paid out of the fund, and not by the railway company. *Wilson v. Foster, in re the Lancashire and Yorkshire Rail. Co.*, 28 Law J. Rep. (n.s.) Chanc. 410; 26 Beav. 398.

A testator by his will, stated a price at which C C should be entitled to purchase certain land, part of his estate. Before C C had exercised his right of purchase, a railway company took the land under its compulsory powers, and paid the money into court under the provisions of the Lands Clauses Consolidation Act. The purchase-money exceeded the price fixed by the testator. The executors petitioned for the payment of the money out of court, and

served the petition upon all the parties interested, and the Court decided that C C was entitled to the money, subject to his paying the price fixed by the testator. The other parties interested appeared by separate counsel supporting the prayer of the petition. One of the Vice Chancellors considered that the contest was not "a litigation between adverse claimants" within the 80th section of the 8 & 9 Vict. c. 18, and directed the taxation of costs, and ordered the company to pay them without making the usual exception of "the costs, if any, occasioned by litigation between adverse claimants":—Held, on appeal, that those words should have been inserted, and that the order must be varied by their insertion. *In re Cant's Estate*, 29 Law J. Rep. (n.s.) Chanc. 119; 1 De Gex, F. & J. 153.

Certain local Commissioners gave notice, under their act, that they would require a particular piece of land. The owner took counsel's opinion as to the right of the Commissioners. The opinion was, that the question was doubtful, and that a Court of law would probably decide against the right; the owner thereupon refused to give up the land. The purchase-money was then paid into court, under the Lands Clauses Act, but, subsequently, the owner of the land executed the conveyance:—Held, upon petition for payment of the money out of court, that this was not such a case of "wilful refusal," under the 80th section of the act, as that the owner of the land could be required to pay the costs occasioned by his refusal. *In re the Commissioners of Ryde, ex parte Dashwood*, 26 Law J. Rep. (n.s.) Chanc. 299.

The Bishop of London having sold property to divers corporate bodies, they paid the purchase-money into court. The Bishop, being desirous of reinvesting the money in the purchase of leasehold interests granted out of other lands of the see, petitioned for payment of the money out of court, praying that the costs of reinvestment and the costs of obtaining the sanction of the Commissioners acting under the 14 & 15 Vict. c. 104, might be paid by the several corporate bodies, the purchasers:—Held, that the costs of the reinvestment must be paid by them in equal shares, and not rateably, but the costs of obtaining such consent could not be allowed. *Ex parte the Bishop of London, in re the Lands Clauses Consolidation Act, 1845, and other acts*, 29 Law J. Rep. (n.s.) Chanc. 575; 2 De Gex, F. & J. 14.

On a petition praying the investment of money (paid into court by a railway company as the purchase-money of land taken by them) in lands to be settled to other uses than those to which the purchased lands stood limited when the company purchased, one of the Vice Chancellors refused to make the company pay the costs of the reinvestment; but, upon appeal, the Lords Justices varied the order as to costs, but gave no costs of the appeal, they being of opinion that the accident of the failure of limitations by death could make no difference in the case. *In re De Beauvoir's Trusts*, 29 Law J. Rep. (n.s.) Chanc. 567; 2 De Gex, F. & J. 5.

A railway company took, compulsorily, land which was the subject of an administration suit. Several proceedings were taken and applications made in the suit with reference to the sale to the company, to which the company were not parties. On an application to transfer the purchase-money to the credit of the cause,—Held, that the company was bound

to pay the costs of all parties of obtaining the several orders in the suit, including all reasonable charges and expenses incident thereto, and of the application to transfer the fund into the suit. *Henniker v. Chafy, re the Manchester and Leeds Rail. Co.*, 28 Beav. 621.

An order made under the Lands Clauses Consolidation Act directed the dividends of stock arising from the investment of the purchase-money of land taken by a railway company to be paid to the incumbent of a parish for the time being, but only provided for the payment of the costs of the then incumbent of the application on which the order was made. A subsequent incumbent executed a power authorizing an attorney to receive the dividends for him under the order, and filed affidavits shewing himself to be the incumbent. On the company declining to pay his costs thus incurred, he applied in chambers for an order for their taxation and payment, which was ordered accordingly:—Held, on the appeal of the company, that the order was rightly made. *Ex parte the Incumbent of Guilden Sutton*, 8 De Gex, M. & G. 380.

The Lands Clauses Consolidation Act, section 80, contemplates not one application in respect of several reinvestments, but several applications; and where it was shewn to be "for the benefit of the parties," the Court ordered a company to pay the costs of a third reinvestment in a very small purchase. *Re the Trustees of St. Bartholomew's Hospital*, 4 Drew. 425.

The trustees of two charities, being identical, purchased one estate on behalf of the two charities, out of two sums of money paid into court by two distinct railway companies for parts of the charity lands taken separately by them. The proceedings to complete and apportion the estate were consolidated:—Held, that the costs of the joint proceedings were payable by the railway companies equally, and not in proportion to the values. *The London and Brighton Rail. Co. v. the Shropshire Union Rail. &c. Co.*, 23 Beav. 605.

A railway company agreed with trustees for the purchase of land. The trustees' title depended on the construction of a will, and the company objected thereto, and paid the purchase-money into court. The question of construction having been argued by the parties interested on a petition for investment and payment of dividends,—Held, that the company was bound to pay only one set of costs. *Re Mid-Kent Rail. Act*, 1856, *ex parte Styant*, Johns. 387.

(E) SUPERFLUOUS LANDS.

Land belonging to A B was taken by a railway company, under the compulsory powers of their act, to form a branch line. In 1850 the scheme was abandoned. The company, in 1857, brought a bill into parliament to enable them to make another line, which would pass over the land taken from A B. A B filed a bill charging that the company could not use for any other purpose than that of the branch line the lands which had been taken under their compulsory powers to enable them to form that line, and praying that as the project had been abandoned, the company might be ordered to reconvey the land to him upon payment of the present value. To this bill the company demurred, for want of equity, and the demurrer was allowed by one of the Vice Chancellors, and on appeal. *Astley v. the Manchester, Sheffield and Lincolnshire Rail. Co.*, 27 Law J.

Rep. (N.S.) Chanc. 478; 2 De Gex & J. 453: 27 Law J. Rep. (N.S.) Chanc. 299.

A landowner cannot, under the 127th and 128th sections of the Lands Clauses Consolidation Act, require a reconveyance to him of the land taken from him for an undertaking which had been abandoned, before the expiration of the ten years limited by those sections. *Ibid.*

By "disposing of" lands within the 127th and 128th sections, the transfer of them to other persons is contemplated, and not the application of them to a different purpose from that for which they were originally obtained. *Ibid.*

(F) CONVEYANCE UNDER.

An equitable tenant for life is not empowered, under the 7th section of the Lands Clauses Act, to execute a conveyance of land, but the trustees who have the legal estate are necessary parties to the conveyance. *Lippincott v. Smyth*, 29 Law J. Rep. (N.S.) Chanc. 520.

LAND-TAX.

[Evidence of its Redemption, see VENDOR AND PURCHASER, *Buchanan v. Poppleton*.]

A fee-farm rent belonging to the Crown was, in pursuance of the 22 Car. 2. c. 6. and the 22 & 23 Car. 2. c. 24, vested in trustees for sale, under whom the plaintiffs claimed it. The defendants, the owners of the land out of which it was payable, redeemed the land-tax chargeable on it:—Held, that the defendants were notwithstanding entitled to deduct 4s. in the pound out of the rent, under the 38 Geo. 3. c. 6. ss. 30, 31, which enacts, that all receivers of fee-farm rents due to any person claiming by any grant or purchase from or under the Crown, by virtue of the 22 & 23 Car. 2, shall allow 4s. for every pound of the said rents to the party paying the same; the effect of the 38 Geo. 3. c. 60. and the 42 Geo. 3. c. 116. being to perpetuate those sections. *Moody v. the Dean and Chapter of Wells*, 25 Law J. Rep. (N.S.) Exch. 273; 1 Hurl. & N. 40.

The Land-Tax Act, 38 Geo. 3. c. 5. s. 57, (subsequently made perpetual) enacts, that persons having shares in the New River shall pay 4s. in the pound for the same, and shall be assessed by the Commissioners for the city of London, and that the tax shall be paid by the treasurer, &c. of the river to the collector appointed by the said Commissioners, and be deducted out of the next dividends:—Held, that the entire tax for the New River, as it existed at the time of the act, is payable in the city of London, and that the corporation of the New River Company is not taxable (under the general provisions of the act) in Hertfordshire, through which county the river flows, in respect of land there possessed by the company, and covered with water; but that the company is liable to be so assessed to the land-tax in respect of after-acquired land, if such tax is unredeemed.—Held, also, that where the tax on such after-acquired property had been redeemed, the company was not liable to be assessed in Hertfordshire in respect of wells issuing from such land, the water of which was sold to inhabitants of Hertfordshire; the redemption relieving the natural productions and profits of the land, as well as the land itself. *The Governor and*

Company of the New River v. the Commissioners of Land-tax for the County of Hertford, 26 Law J. Rep. (N.S.) Exch. 281; 2 Hurl. & N. 129.

By a local act a bridge and its approaches were not chargeable with any parochial rates or assessments in respect of the tolls:—Held, that this did not exempt the tolls from the land-tax, which is not a parochial assessment; and that the previous redemption of the land-tax as to part of the property on which the bridge, &c. were built, did not affect the tolls, which are a separate tenement. *The Company of Proprietors of Waterloo Bridge v. Cull*, 28 Law J. Rep. (N.S.) Q.B. 70; 1 E. & E. 213: affirmed by the Exchequer Chamber, 29 Law J. Rep. (N.S.) Q.B. 10; 1 E. & E. 213.

Under the Land-Tax Acts a land-tax division was made, called the Duchy of Lancaster division, comprising (amongst others) the Savoy ward, and such parts of the parish of St. Clement Danes and of other parishes as were not situate within the city and liberty of Westminster. The northern half of the bridge was built on the bed of the river, and no part of the land, when the act, under which the bridge was built, was passed, was within the parish of St. Clement Danes, nor was any part of it in the Savoy ward. By a section of the bridge act, "in order to remove doubts where and before whom offences committed on the bridge shall be cognizable," it was enacted, that "the half of the bridge (the northern) next adjoining the county of Middlesex should be deemed in that county, and part of and in the parish of St. Clement Danes." Half of the tolls for passing over the bridge, having been assessed to the land-tax in the Duchy of Lancaster division, the bridge being described in the assessment as in the Savoy ward,—Held, that the above section made the northern half of the bridge in the county of Middlesex and parish of St. Clement for all purposes; and that the half of the tolls were therefore properly assessed in the Lancaster division, and that the mis-description of the bridge as in the Savoy ward was immaterial. *Ibid*.

The Land-Tax Acts require the assessors and collectors to be inhabitants of the respective parishes, &c. for which they are to act:—Held, that the acts of a person duly appointed as assessor and collector were valid, although he were not duly qualified by inhabitancy. *Ibid*.

LARCENY.

[See EMBEZZLEMENT—INDICTMENT (A).]

(A) SIMPLE LARCENY.

- (a) *Conviction for, on Indictment for Larceny as Servant.*
- (b) *Bank Notes not in Circulation described as Money.*
- (c) *Cases of Husband and Wife.*
- (d) *Cases of Finding and Lawful Possession.*
- (e) *Goods or Monies obtained by Fraud.*
- (f) *Goods Pledged with Intent to Redeem them.*
- (g) *Pawnbroker's Duplicate.*
- (h) *By Trustee of Friendly Society.*
- (i) *By Baillee.*

(B) OF FIXTURES.

- (a) *Lead from a Shed on a Wharf.*

DIGEST, 1855—60,

- (b) *Copper Sun-dial from a Post in the Ground.*

(C) VALUABLE SECURITIES.

(D) WARRANT FOR DELIVERY OF GOODS.

(E) BY CLERKS AND SERVANTS.

- (a) *When Property in Master's Possession.*
- (b) *Of the Post Office.*

(F) INDICTMENT, EVIDENCE AND VERDICT.

- (a) *Ownership of Property and Election.*
- (b) *Conviction for Larceny on Evidence of Embezzlement.*
- (c) *Disproving Prisoner's Statement.*
- (d) *Verdict of Guilty and Receiving.*

(A) SIMPLE LARCENY.

- (a) *Conviction for, on Indictment for Larceny as Servant.*

[See post (E) (b).]

An indictment charged that the prisoner whilst servant of A stole the money of A. It appeared that the prisoner was not the servant of A, but the servant of B, and that the money which he stole was the money of B, but in the possession of A as the agent of B:—Held, that the allegation in the indictment as to the prisoner being servant might be rejected as surplusage, and the prisoner convicted of simple larceny, the money being properly alleged to belong to A, who had a special property therein. *Regina v. Jennings*, Dears. & B. 447.

- (b) *Bank Notes not in Circulation described as Money.*

The prisoner, a clerk in the W. County Bank, intercepted and stole a packet of bank notes of the W. bank to the amount of 95*l.*, which had been paid into a branch bank, and by the manager of that bank had been sent by post to the W. bank to be re-issued or otherwise disposed of:—Held, that the notes, though they were not in circulation at the time they were stolen, were still bank notes within the meaning of the statute 14 & 15 Vict. c. 110. s. 18, which allows bank notes to be described as money in an indictment, and that consequently the prisoner might properly be indicted and convicted of stealing 95*l.* in money. *The Queen v. West*, 25 Law J. Rep. (N.S.) M.C. 6; 1 Dears. & B. 109.

(c) Cases of Husband and Wife.

The prisoner agreed with the wife of a man, in whose house he lodged, that she should leave her husband and live in adultery with him. He then left the house, leaving the husband and wife in it. The husband afterwards went out, and the wife then went after the prisoner. They were followed, and found in company on the road, and the prisoner was carrying a bandbox, containing wearing apparel of the woman:—Held, that a conviction could not be supported on an indictment charging the prisoner with stealing the wearing apparel, laying it as the property of the husband. *The Queen v. Fitch*, 26 Law J. Rep. (N.S.) M.C. 169; Dears. & B. 187.

The prisoner, watching his opportunity when the prosecutor was absent, took away the prosecutor's wife, and with her several boxes filled with the prosecutor's property. The prisoner and the wife were found living together in adultery. The property was all in their lodgings:—Held, that the prisoner was indictable for stealing the property of the prosecutor,

as he took the property under such circumstances that the assent of the husband to the taking could not be presumed. *The Queen v. Berry*, 28 Law J. Rep. (n.s.) M.C. 70; Bell's C.C. 95.

If a person merely assist a married woman, who has not committed or intended to commit adultery, in carrying away the goods of her husband without the knowledge and consent of the latter, though with intent to deprive the latter of his property, he cannot be convicted of stealing the goods. *The Queen v. Avery*, 28 Law J. Rep. (n.s.) M.C. 185; Bell's C.C. 150.

(d) *Cases of Finding and Lawful Possession.*

If a man find lost property and keep it, and at the time of finding it have no means of discovering the owner, he is not guilty of larceny because he afterwards has means of finding him, and nevertheless retains the property to his own use. *The Queen v. Dixon*, 25 Law J. Rep. (n.s.) M.C. 89; Dears. C.C. 580.

Semble—if a man find property which has been lost, and appropriate it to himself, he is not guilty of larceny for failing to take steps to discover the owner, unless he saw the article drop from the owner, or unless it had the owner's name upon it, or some circumstances of the sort occurred which afforded the finder an immediate means of knowing who the owner was at the moment when he picked it up and examined it. *Ibid.*

J D by mistake received from the post-office a letter addressed to and intended for another person of the same name. The letter contained a post-office order for money. Not being able to read, J D took the letter to W D, who read it to him. After reading it, both were aware that the letter and its contents were not intended for J D, but notwithstanding they got the post-office order cashed, and appropriated the proceeds. On an indictment against J D and W D for stealing the post-office order, it was held that the prisoners could not properly be convicted, as it did not appear that they had any *animus furandi* when they first received the letter containing the order. *The Queen v. Davis or Davies*, 25 Law J. Rep. (n.s.) M.C. 91; Dears. C.C. 640.

Where a person finds a purse of money on the high road and appropriates it to his own use, the question for the jury is, whether he does it at the time of finding with a felonious intent, and that depends on whether at that time he knows who the owner is, or has the means of knowing him by reason of the marks on the article indicating the owner. But the finder is not guilty of felony merely because, when afterwards learning who the owner is, he fails to make restitution, and fraudulently retains the property. *The Queen v. Christopher*, 28 Law J. Rep. (n.s.) M.C. 85; Bell's C.C. 27.

(e) *Goods or Monies obtained by Fraud.*

A watchmaker, induced by a fraudulent letter from the prisoner, sent down a customer's watch, which he had had to regulate, by post, to a place named in the letter, addressed to the customer. The prisoner, representing himself to be the customer, went to the place and obtained the watch from the postmaster:—Held, that he was guilty of larceny, as the special property of the watchmaker (if he had had any), had ceased when he had delivered the watch to the post-

master, and the postmaster had no special property in it, but was only a servant of the true owner, from whose possession, therefore, it was taken. *The Queen v. Kay*, 26 Law J. Rep. (n.s.) M.C. 119; Dears. & B. 231.

Where a servant by a false pretence induces his master to give him a cheque, as agent of a creditor of his master, with the view of its being handed over to that creditor, and the servant appropriates the cheque to his own use, he cannot be indicted for stealing it. *The Queen v. Essex*, 27 Law J. Rep. (n.s.) M.C. 20; Dears. & B. 371.

The prisoners, glove-finishers, took a quantity of gloves out of their master's store, and placed them on a table with others they had finished for him, fraudulently claiming payment as having finished them all:—Held, that they were not guilty of larceny. *The Queen v. Pool*, 27 Law J. Rep. (n.s.) M.C. 53; Dears. & B. 345.

(f) *Goods Pledged with Intent to redeem them.*

The prisoner, with whom a plate-chest, full of plate, and securely fastened, was deposited for safe custody, broke it open, took out the plate and pledged it for a sum, which he was unable to repay. The jury found him guilty of stealing the plate, but recommended him to mercy, on the ground that they believed he intended ultimately to return the property:—Held, that the conviction was perfectly good, as the recommendation was not inconsistent with the verdict of guilty. *The Queen v. Trebilcock*, 27 Law J. Rep. (n.s.) M.C. 103; Dears. & B. 453.

(g) *Pawnbroker's Duplicate.*

[See post (D).]

(h) *By Trustees of Friendly Society.*

By the Friendly Societies Act, 18 & 19 Vict. c. 63, the property and monies of the society are vested in the trustees. A resolution of a meeting of one of those societies directed that 40*l.* should be sent to a bank, and that the prisoner, one of the trustees, should take it. The money was handed by the treasurer's clerk to the prisoner, who misappropriated it:—Held, that he could not be convicted as a bailee, or under a common count for larceny, of stealing the 40*l.* laid as the money of the treasurer. *The Queen v. Loose*, 29 Law J. Rep. (n.s.) M.C. 132; Bell's C.C. 259.

(i) *By Bailee.*

[See ante (h).]

(B) OF FIXTURES.

(a) *Lead from a Shed on a Wharf.*

The prisoners stole the lead gutters of some brick and timber and tile-made sheds built on a wharf. The indictment charged them with stealing lead fixed to a wharf:—Held, that the conviction was good, as the evidence shewed that the sheds on the wharf were part of the wharf, and that the wharf was a building within the meaning of the statute 7 & 8 Geo. 4. c. 29, s. 44. *The Queen v. Rice*, 28 Law J. Rep. (n.s.) M.C. 64; Bell's C.C. 87.

(b) *Copper Sun-dial from a Post in the Ground.*

To steal a copper sun-dial attached by screws to the top of a wooden post fixed in a churchyard is an

offence within the statute 7 & 8 Geo. 4. c. 29. s. 44. *The Queen v. Jones*, 27 Law J. Rep. (n.s.) M.C. 171; Dears. & B. 555.

(C) VALUABLE SECURITIES.

A person may be convicted, under the statute 7 & 8 Geo. 4. c. 29. s. 5. if he steal scrip certificates of a foreign railway company, as the statute extends to valuable securities for the shares in the funds of a foreign as well as of a British company. *The Queen v. Smith*, 25 Law J. Rep. (n.s.) M.C. 31; Dears. C.C. 561.

(D) WARRANT FOR DELIVERY OF GOODS.

Stealing a pawnbroker's duplicate is larceny. It may be described, in an indictment for larceny, as a warrant for the delivery of goods; since the Pawnbroker's Act, 39 & 40 Geo. 3. c. 99, authorizes and requires the pawnbroker to deliver the goods to the person producing the ticket. It may also be alleged to be a pawnbroker's ticket, or a piece of paper; for it is evidence of title to a specific personal chattel, the property in possession of the pawner, and consequently does not come within the common law rule, that larceny cannot be committed of documents concerning title to land or mere choses in action. *The Queen v. Morrison*, 28 Law J. Rep. (n.s.) M.C. 210; Bell's C.C. 158.

(E) BY CLERKS AND SERVANTS.

(a) When Property in Master's Possession.

The prisoner was employed by bankers at A to manage a branch for them at the town of B. He provided an office for the bank in his own house. The office was furnished by the bankers, and an iron safe provided there by them. There were duplicate keys, the bankers kept one and the prisoner another. It was the duty of the prisoner to receive money from customers of the bank, to place it at night in the safe, to pay away from time to time such portions of it as were required for the business of the bank, to pay cheques, to pay over weekly any balance not required for the business at B, and to send in weekly accounts to the bankers at A. He carried on the business, receiving and paying money and sending in weekly accounts. In auditing his accounts a deficiency of 3,000*l.* was discovered. The prisoner admitted that he had taken that amount of money. There was no other evidence, except that in the day-time money was sometimes kept in a drawer in the office. The jury found the prisoner guilty of larceny as a clerk in having stolen some money received from customers, which, before such stealing, had been placed in the safe, and made the subject of a weekly account:—Held, that there was evidence to support the conviction. *The Queen v. Wright*, 27 Law J. Rep. (n.s.) M.C. 65; Dears. & B. 431.

(b) Of the Post Office.

The Post Office authorities having suspicions of the honesty of the prisoner, who was a sub-sorter of letters at the General Post Office, London, caused a letter containing marked money to be prepared, directed, sealed and stamped. This letter one inspector delivered in at the window of the outer hall of the General Post Office to another inspector, who handed it over to a third, who kept it locked up all night, and on the following morning gave it to a

sorter to put in among the letters which the prisoner had to sort. This was done. The prisoner secreted the letter, opened it, and the marked money was found on him. The ordinary mode of posting letters at the General Post Office is by putting them into the letter-boxes there. It did not appear that either the inspector who received the letter in at the window, or the inspector who kept it all night, were authorized by the course of their official duty so to receive or keep letters:—Held, that this letter was not a "post letter" within the meaning of the statute 1 Vict. c. 36, and that the prisoner could only be found guilty of the simple larceny of stealing the money. *The Queen v. Shepherd*, 25 Law J. Rep. (n.s.) M.C. 52; Dears. C.C. 606.

(F) INDICTMENT, EVIDENCE AND VERDICT.

(a) Ownership of Property, and Election.

When circumstances indicate no peculiarly likely place of deposit, searching in the drawers and boxes of a deceased person for a will, and finding none, is sufficient *prima facie* evidence that there is no will. *The Queen v. Johnson*, 27 Law J. Rep. (n.s.) M.C. 52; Dears. & B. 340.

Semble—if articles are stolen after the death of the owner, and he has made a will, the property may be laid in the Ordinary until the will has been proved. *Ibid.*

When many articles are charged as having been stolen, and there is direct evidence fixing the time when some were stolen, but the evidence as to the time when the residue were taken is of an indefinite character, the prisoner cannot compel the prosecutor to elect upon which articles he will proceed. *Ibid.*

(b) Conviction for Larceny on Evidence of Embezzlement.

A person indicted for stealing cannot be convicted of stealing on evidence shewing him guilty of embezzlement, though he might on such evidence on the same indictment have been convicted of embezzlement. *The Queen v. Gorbutt*, 26 Law J. Rep. (n.s.) M.C. 47; Dears. & B. 166.

(c) Disproving Prisoner's Statements.

Where a prisoner was convicted of stealing some articles of dress, and the evidence against him consisted of proof that he was in possession of the property recently after it had been stolen, that he had sold it openly in a public-house; and on his arrest stated to the constable that C and D brought the things to his house, and that W, who was at his house, would say that that was true; that C, D and W were persons known to the constable, and might have been produced as witnesses, but were not called; and inquiry was made of W, but the result of the inquiry was not given in evidence:—Held, that the conviction was good; and that it was not incumbent on the prosecution to call the persons, to whom the prisoner had referred, to disprove his statement. *The Queen v. Wilson*, 26 Law J. Rep. (n.s.) M.C. 45; Dears. & B. 157.

(d) Verdict of Guilty and Receiving.

The statute 11 & 12 Vict. c. 46. has made the crime of an accessory before the fact to a felony a substantive felony, and such accessory may be indicted, tried, convicted and punished, though the

principal felon has not been tried or has been acquitted. There is no inconsistency in finding a person indicted guilty both on the count for stealing goods, and also for receiving them knowing them to have been stolen; for the same person may well be an accessory before the fact to the larceny and also a receiver. *The Queen v. Hughes*, 29 Law J. Rep. (n.s.) M.C. 71; Bell's C.C. 242.

LEASE.

[Liability of Assignees of Insolvent Lessee under the Lease, see NEGLIGENCE—Effect of Surrender of Term on Mortgage of Fixtures, see MORTGAGE. And see MINE.—The Registration of Long Leases in Scotland, and Assignations thereof, provided for by 20 & 21 Vict. c. 26.]

(A) PROOF OF DEMISE AND DECLARATION OF TRUST.

- (B) AGREEMENTS FOR: CONSTRUCTION OF.
- (C) FOR LIVES.
- (D) ECCLESIASTICAL LEASES.
- (E) BUILDING LEASES.
- (F) RENEWAL OF.
- (G) ASSIGNMENTS.
- (H) CANCELLATION AFTER ENTRY.
- (I) FORFEITURE.

- (a) Breach of Covenants.
- (b) Waiver.
- (c) Re-entry.
- (d) Relief against.

(K) COVENANTS IN: CONSTRUCTION OF.

- (a) Quiet Enjoyment.
- (b) Rent.
- (c) Fixtures.
- (d) Repairs.
- (e) Custom.
- (f) Determination of Demise.
- (g) Parties to Sue on.

(A) PROOF OF DEMISE AND DECLARATION OF TRUST.

The first count of the declaration claimed rent due from the defendant to the plaintiff, on a demise under seal. The second count was for use and occupation, and the third for money due on accounts stated. The defendant pleaded, first, a traverse of the demise. Thirdly, that before the action the plaintiff became bankrupt, that assignees were appointed, and that the debts in the declaration mentioned became due to the plaintiff before bankruptcy. Replication, that the plaintiff, as trustee of J S demised, and, as trustee, permitted the defendant to use the premises, and that the accounts were stated and the monies due to the plaintiff as such trustee, and that before bankruptcy he had no beneficial interest therein, and now sued as such trustee:—Held, first, that the demise was proved by production of the counterpart lease executed by the defendant. Secondly, that the plaintiff was not bound by his replication to prove a declaration of trust from J S, under the 7th section of the Statute of Frauds; but that it was sufficient for him to negative the title of his assignees by any other proof that he was not beneficially interested in the subject-matter of the action. *Houghton v. Kanig*,

25 Law J. Rep. (n.s.) C.P. 218; 18 Com. B. Rep. 235.

(B) AGREEMENT FOR: CONSTRUCTION OF.

By an agreement in writing plaintiff agreed to take of defendant a farm at a yearly rent, the plaintiff paying all rates and taxes, &c., and agreeing to keep the buildings in repair, the defendant agreeing to find bricks, &c. for such repairs, and to lay out a sum of money in repairs; "the tenancy to commence from the 29th of September next, for a term of eight years, subject to a lease," to be drawn up by the defendant's solicitor:—Held, no breach of this agreement, that defendant did not before or on the said 29th of September, or at any time subsequently, give to plaintiff possession of the said farm, or enable him to enter thereon. *Drury v. Macnamara*, 25 Law J. Rep. (ns) Q.B. 5; 5 E. & B. 612.

By memorandum of agreement between F, a receiver appointed by the Court of Chancery, and the defendant, F agreed to let and the defendant to take certain land with a mill and other buildings then upon it, as shewn in a plan indorsed, to hold for twenty-one years, at the rent of 42*l.*, payable quarterly. It was further agreed that, as soon as the agreement should be sanctioned by the Court, or it should be ascertained that the sanction was unnecessary, a lease of the mill and premises should be executed by F and the defendant, for the period above stipulated, and that the lease should contain covenants by the defendant to pay the rent in the manner before mentioned, damage by fire excepted; also during the term to keep the premises in repair, and to deliver up possession of them and all the present additions and improvements (but not including any buildings not shewn on the plan), in good repair, damage by fire excepted. The defendant occupied for some years after the agreement, and erected new buildings in addition to those existing at the date of the agreement, but no lease was ever executed. A fire having destroyed part of the old buildings,—Held, that the defendant occupied as tenant from year to year on such of the terms of the proposed lease as were applicable to a yearly tenancy, and that by these terms the entire rent was not suspended by the damage done by the fire, but that the defendant was entitled to an abatement proportionate to the part of the premises destroyed, until they were restored by the lessor. Held, also, (*Crompton, J.* doubting,) that the new buildings were to be excluded in calculating this proportionate abatement. *Bennett v. Ireland*, 28 Law J. Rep. (n.s.) Q.B. 48; E. B. & E. 326.

The plaintiff, by certain building articles under seal, covenanted with E that he would from time to time and so soon as E, his executors, &c., should have erected one or more of the messuages thereby agreed to be built by him, by indenture or indentures of lease, demise unto the said E, his executors, &c., the whole or such part of certain land therein described whereon one or more of the said messuages should be so built, from the 25th of September then last past, for the term of ninety-eight years thence ensuing, at certain rents which were to be so apportioned that the yearly rent on any lease to be so granted as aforesaid should not exceed one-sixth of the yearly value of the land and buildings to be demised, reckoning such value upon the said land and buildings when completely finished and fit for

habitation, with a proviso that if the yearly rent or rents to be reserved by the lease or leases to be granted of any part only of the piece of ground agreed to be demised should amount to the full yearly rents agreed to be reserved, then the remainder of the said piece of ground should, when and as the same should be built upon, be leased together with the buildings thereon, at a peppercorn rent only. The articles contained a covenant by E with the plaintiffs to pay the yearly rents so agreed to be reserved, to accept such leases, and also, until the said piece of ground and the buildings to be erected should be leased, to pay for the same the said yearly rents agreed to be reserved in the leases to be granted as aforesaid. There was also in the articles a proviso for re-entry by the plaintiff in case of non-payment of the yearly rents thereby or by the said leases to be granted as aforesaid to be reserved. E afterwards assigned his interest in the said building articles to the defendant, who erected certain messuages on part of the said land, and then assigned his interest in the said articles to W, having paid to the plaintiff all the rent due under the said articles up to the time of such last-mentioned assignment:—Held, that the said building articles did not amount to an actual demise. Held, that the defendant had not become a yearly tenant to the plaintiff, as no such tenancy could be implied by the payment he had made, and that therefore the defendant was not liable for the rent due under such building articles subsequently to the assignment to W. *Seem*—that the defendant after entry under the assignment from E became a tenant at will, but not on the terms of paying rent, but of only paying collaterally to such tenancy the sum which E had agreed by the building articles to pay. *The Marquis of Camden v. Butterbury*, 28 Law J. Rep. (N.S.) C.P. 187; 5 Com. B. Rep. N.S. 808.

An agreement for a lease contained a stipulation that the tenancy should continue until after two years' notice to quit had been given. The tenant occupied the farm, paid rent for some years, but no lease was executed:—Held, that it could not be implied that the stipulation as to the two years' notice to quit was one of the terms under which the tenant held. *Tooker v. Smith*, 1 Hurl. & N. 732.

An agreement to let a farm less a stated number of acres will be supported in equity, though the lands to be excepted were not specified. *Jenkins v. Green*, 28 Law J. Rep. (N.S.) Chanc. 817; 27 Beav. 437.

A rector agreed to let a farm, except 37 acres, with liberty to plant not more than 10 acres of land. The tenant took possession, but before the lease was executed disputes arose respecting the lands to be taken by the rector; and upon a bill filed by him against the tenant for a specific performance of the agreement,—Held, that the rector had a right to select the lands to be reserved as the lease had not been executed, but that had it been executed the rector could not have taken any lands without the concurrence of the tenant. *Ibid*.

Held, also, that the right of selection must be exercised so as not to prevent the useful and beneficial occupation of the rest of the farm; and with these declarations a decree was made for a specific performance of the agreement. *Ibid*.

Upon the construction of an agreement between landlord and tenant for the lease of a farm for a term

of years, at a yearly rent of 40*l.*, payable quarterly, free of all outgoing:—Held, reversing the decision of one of the Vice Chancellors, that the word "outgoings" included the land-tax and tithe commutation rentcharge. *Parish v. Sleeman*, 29 Law J. Rep. (N.S.) Chanc. 96, 53; 1 De Gex, F. & J. 326; 1 Giff. 238.

Where a lessee, by an agreement for a lease, stipulated that he would not assign other than to a responsible person, to be approved of by the lessor, and not to assign by way of mortgage or deposit for money to be lent, and declared that other provisions usually inserted in leases of similar property should be introduced into the lease,—it was held, that the agreement would sanction the extension of a proviso for re-entry by the lessor if the lessee should become bankrupt or insolvent, or make any assignment for the benefit of his creditors, or if any sale or assignment of the premises should be attempted under any execution against the lessee. *Haines v. Burnett*, 29 Law J. Rep. (N.S.) Chanc. 289; 27 Beav. 550.

An agreement was made between A and B, that A should grant to B a lease of a certain farm, upon the same terms as those contained in a lease already granted by A to C, and that B should be at liberty to repair and alter the farm buildings, and that A should find or pay for the requisite materials. B was let into possession, and paid rent for some years, but no lease was granted, and ultimately he filed a bill for specific performance, and an account of and payment for materials. A objected that B had committed breaches of covenant, which would have entitled A to determine the lease. The Court, being of opinion that it was doubtful whether A could, under the circumstances of the case, have determined the lease for breaches of covenant, decreed specific performance, but ordered the lease to be ante-dated so that the question might be tried at law. *Lillie v. Leigh*, 3 De Gex & J. 204.

Whether a covenant to insure in such an office as the lessor shall name is broken by non-insurance, where the lessor has not been asked to name and has not named any office—*quære*. *Ibid*.

Held, that though the claim for materials might be a mere money demand, yet as the Court decreed specific performance of the main part of the agreement, it had jurisdiction to give relief in respect of this claim also. *Ibid*.

The bill was dismissed with costs in the court below. On appeal, the defendant, whose harsh and unreasonable conduct had made the suit necessary, was ordered to pay the whole costs, including the costs of the appeal. *Ibid*.

A landlord had, in 1827, agreed to grant his tenant a lease, but none had been granted, though the tenant had been in possession. On a bill by the tenant for specific performance, the landlord set up by way of defence that the tenant had committed waste. The Court directed the lease to be executed as ante-dated, and the question of waste to be tried at law. *Poyntz v. Fortune*, 27 Beav. 393.

Under a contract for a lease of a mill, to contain "all usual and necessary covenants and provisos," and particularly a covenant on the part of the lessee to keep the mill in good tenantable repair:—Held, that the lessee was not entitled to have introduced into the covenant the words "damages by fire or tempest only excepted." *Sharp v. Milligan* (No. 2), 23 Beav. 419.

In 1843, tenants in possession agreed to take a lease of a mill, with the gashouse and apparatus, as the same were then occupied by them, for twenty-one years from 1841. In settling the lease in chambers, they insisted on having a schedule of landlord's fixtures, on the ground of their having placed tenants' fixtures on the premises, and they sought to exclude the gasworks set up by them. It did not appear when they were placed and set up. The Court refused to insert the schedule or the exception. *Ibid.*

The defendant agreed to grant the plaintiff a coal lease for twenty-one years; the only rent reserved was dependent on the quantity raised, and was made payable quarterly. The Court held, on the construction of the contract, that the plaintiff was bound to commence working immediately and to proceed continuously. *Sharp v. Wright*, 28 Beav. 150.

(C) FOR LIVES.

A lease for three lives contained a covenant that in case the lessee should, upon the decease of either of the *cestui que vie* (naming them), be desirous of taking a renewed lease for another life, and should nominate a person in the room of the deceased *cestui que vie*, the lessor or the person entitled in reversion would execute a further lease for the life of the person so to be nominated, and the lives of such of them, the original *cestui que vie*, as should be then living, and of the survivors and survivor of them, at and under the same yearly rent, and with and subject to such and the same covenants, provisions and agreements, "including this present covenant," as were therein contained:—Held, that this was a covenant for perpetual renewal, and must, *mutatis mutandis*, be entered into by the reversioner for the time being on every fresh renewal. *Hare v. Burges*, 27 Law J. Rep. (N.S.) Chanc. 86; 4 Kay & J. 45.

A devise was made to trustees and their heirs, upon trust for an illegitimate person and his heirs. Upon the death of the *cestui que trust* without heirs,—Held, under the 7 Will. 4. & 1 Vict. c. 26. s. 6, that a freehold lease for lives passed to the Crown under an administration taken out by the Solicitor of the Treasury; and that the trustees and their heirs took no interest as special occupants in the property. *Reynolds v. Wright*, 27 Law J. Rep. (N.S.) Chanc. 392; 25 Beav. 100.

(D) ECCLESIASTICAL LEASES.

Glebe lands which have been usually let on lease by incumbents are not within the 5 Vict. sess. 2. c. 27. *Jenkins v. Green*, 28 Law J. Rep. (N.S.) Chanc. 822.

The statute 5 Vict. sess. 2. c. 27, for better enabling incumbents of ecclesiastical benefices to demise the lands belonging to their benefices upon farming leases, does not abridge any right of leasing formerly enjoyed by the incumbents. *Green v. Jenkins*, 29 Law J. Rep. (N.S.) Chanc. 505; 1 De Gex, F. & J. 454; 28 Law J. Rep. (N.S.) Chanc. 817, 820, 822; 27 Beav. 437, 440; 28 Beav. 87.

If a farmer contracts with a rector for a lease of glebe lands, the Court will not assume that both parties had an enabling statute present in their minds, and modify the express terms of the agreement, to make it conform with the provisions of the statute.

Jenkins v. Green, 28 Law J. Rep. (N.S.) Chanc. 820; 27 Beav. 440.

Where an agreement had been made by a rector to grant a lease of glebe lands, at a rent to be paid half-yearly, the Court will not vary the agreement in accordance with the provisions of the 5 Vict. sess. 2. c. 27, and direct the rent to be paid quarterly. *Ibid.*

A decree was made for the specific performance of a lease of glebe lands. The decree was duly enrolled; it was, however, subsequently found, that the agreement and the statute enabling incumbents to grant leases of their glebe did not conform:—Held, notwithstanding the previous proceedings, that the bill must be dismissed, but without costs. *Ibid.*

(E) BUILDING LEASES.

Sir R S, in 1845, demise to W S three pieces of land, marked A, B and C, for a term of 999 years, W S covenanting not to build on the piece marked C, except in a certain manner. W S sold to the plaintiff a house built on part of the piece marked A, representing that by his lease he was prevented from building on C so as to interrupt the sea view from A. W S also granted an underlease of part of B to J H, making similar representations, and by the underlease W S covenanted to observe the lessee's covenants in the original lease, and effectually to indemnify J H, his executors, administrators and assigns, therefrom, &c. This underlease was afterwards assigned to the plaintiff. W S subsequently surrendered the original lease, and obtained another lease not containing the restrictive covenants. Upon W S proceeding to build on the piece C, not in accordance with the covenants in the original lease, the plaintiff filed a bill for an injunction, and it was held by Wood, V.C. that the plaintiff was entitled to an injunction on the equity arising from the parol representations of W S to J H and his subsequent conduct. Upon appeal, by W S, this decision was affirmed, not only on the equitable ground as to the representations of W S, but also because the covenants in the underlease to observe those in the original lease had the same effect as if those original covenants had been repeated in the underlease. *Piggott v. Stratton*, 29 Law J. Rep. (N.S.) Chanc. 3; Johns. 341; 1 De Gex, F. & J. 33.

A builder agreed to take some land on a building lease, and to erect houses within a specified period, the landowner making him certain advances. There was a clause of forfeiture in default of their being completed within the time. Relief against a forfeiture was refused to the builder, it appearing that the landowner had fully performed his part of the contract. *Oroft v. Goldsmid*, 24 Beav. 312.

(F) RENEWAL OF.

By an indenture, dated in 1539, lands were conveyed by J C to the corporation of G for charitable purposes, subject to a covenant by the corporation that whenever a certain term of ninety-nine years then vested in certain parties in respect of a particular farm should expire, then if any one of the heirs of the body of M W should make request to the corporation within one year after the farm should "fortune to be void," then and so often as any such chance should fall the corporation should grant a new lease of the farm to such heir for thirty-one years, reserving 20 marks rent and 20 marks fine, and

to continue from time to time for evermore if any such request within that time should be made at the end of every lease. In 1723 a decree of the Court of Chancery was made ordering the corporation to grant a new lease according to the covenant, and in 1731 another decree of the Court was made supplementary to the former, but in these suits no question of perpetuity was dealt with, the Attorney General was no party, and the corporation did not dispute the right of renewal. Successive leases were made by the corporation, the last being granted in 1815. Held, first, that the covenant did not create a title in the nature of an estate tail, either legal or equitable; secondly, that it was intended to confer a right on the persons who at the expiration of each successive lease should for the time being answer the description of heir of the body of M W, and was void as tending to a perpetuity; and, thirdly, that the decrees of 1723 and 1731 being made in suits not raising the question of perpetuity, and to which the Attorney General was not a party, did not establish the validity of the covenant. *Hope v. the Corporation of Gloucester*, 25 Law J. Rep. (N.S.) Chanc. 145; 7 De Gex, M. & G. 647.

In a lease for twenty-one years was contained a covenant, on the part of the lessor, upon the expiration of the term, provided all arrears of rent should then have been paid, and all the covenants performed, at the request in writing of the lessee, to grant a lease for a further term of twenty-one years, and so from time to time upon the expiration of every subsequent term of twenty-one years, provided such request in writing should be given. The lease contained covenants to repair and insure. At the expiration of the first term, a renewed lease was granted for twenty-one years, with a similar covenant for renewal. Upon the expiration of this second term, some buildings erected by the lessee were out of repair and required to be rebuilt; and during the term the property had been left for four days uninsured. All arrears of rent were paid; and a request was made to the lessor to grant a renewed lease, but this was refused. In a suit by the lessee for specific performance of the covenant for renewal, it was held (affirming the decision of one of the Vice Chancellors), that in consequence of the breach of the covenant to repair, the lessee was not entitled to a renewal of the lease. *Job v. Banister*, 26 Law J. Rep. (N.S.) Chanc. 125; 2 Kay & J. 374.

Where a person bound by a covenant to renew a lease if required "at the costs and charges in all things" of the lessee, subsequently devised the land in strict settlement, and died pending the arrangements for a renewal, leaving the person first entitled to an estate of inheritance under his will an infant, so that it was necessary to institute a suit in Chancery to obtain a renewal of the lease:—Held, that the costs of the suit must be paid out of the estate of the covenantor, because it had been rendered necessary by his own act done subsequently to entering into the covenant. *Wortham v. Lord Daore*, 2 Kay & J. 437.

Demise for seven years, with a proviso that, notwithstanding anything before contained, if notice should not be given to determine the lease at the end of the seven years, it should be considered a lease upon the same covenants from year to year until notice to determine it:—Held, that the demise

continued after the seven years until put an end to by notice, and that the covenants continued binding. *Brown v. Trumper*, 26 Beav. 11.

(G) ASSIGNMENT OF.

A mining lease contained a covenant by the lessee not to assign without the consent of the lessor. The lessee made an agreement with three other persons to give up his right in the lease to them, and to execute all necessary deeds to carry the arrangement into effect, and that in the mean time the agreement should have the same force as if such deeds had been executed. No consent of the lessor had been obtained, nor were any such deeds executed. The three entered into possession and worked the mines, and after a time the three assigned all their interest in the mines and other property comprised in the lease to a man of straw:—Held (overruling a decision of the Master of the Rolls), that the three being mere equitable assignees of the lease were not liable to the lessor for the rents and covenants in the original lease for the time they were in possession of the property demised. *Cox v. Bishop*, 26 Law J. Rep. (N.S.) Chanc. 389.

The relation between landlord and tenant is legal and not equitable. *Ibid.*

(H) CANCELLATION AFTER ENTRY.

An action of debt for rent may be maintained, notwithstanding the cancellation of the deed of demise by mutual consent after entry, and after the rent accrued due. *Ward v. Lumley*, 29 Law J. Rep. (N.S.) Exch. 322; 5 Hurl. & N. 87.

On an issue on the plea of *non demisit*, the deed in a cancelled state is admissible to prove the demise. *Ibid.*

(I) FORFEITURE.

(a) Breach of Covenants.

A lease for years of the Opera House in the Haymarket from C to L contained covenants by L that he would not convert the said Opera House, or any part thereof, to any other use than for acting or performing operas, plays, concerts, balls, masquerades, assemblies, and such theatrical and other public entertainments as had been usually given therein, but should and would use his utmost endeavours to improve the same for that use and purpose; and also that the said L should not nor would, at any time, without the licence and consent in writing of the said C, grant away, assign, or let, charge or dispose of the boxes or stalls (with certain exceptions) for any term or number of years, or for any longer period than one year or season, nor grant any seat or right or privilege of admission to the said Opera House to any person for a longer period than one year or season, nor charge or encumber the said Opera House, or the income thereof, or the term thereby granted, or either of them, or any part thereof respectively by mortgaging the same or granting any rentcharges, or any other incumbrance or incumbrances. The lease further contained a clause of re-entry for a forfeiture of the lease at any time for non-compliance with the above covenants. Since the season of 1852 the Opera House had not been opened for entertainments of any sort, but it had not been converted to any other uses than those contemplated by the lease; and it appeared that its

not having been opened was injurious to the property. By an indenture, dated the 1st of August 1852, L, to secure a debt of 2,500*l.* and interest, granted and demised sixteen boxes and certain stalls with admission at all seasonable times, to H, from the 1st of February then next ensuing, or from such subsequent day in 1853 from which the said Opera House should be first opened for operas or other theatrical entertainments, and thenceforth for the full term of one year, to be computed from that day: Provided, that if the Opera House should not be opened during 1853, then, in substitution for and not in addition to the said term, the same should commence on the first day for public performance in any ensuing year, and should continue for one year from that day. There was also a proviso for redemption on payment of the principal sum of 2,500*l.* and interest. In the same year, 1852, L gave several warrants of attorney to H to secure *bond fide* debts due, and amongst them, one of the 6th of October, the defeasance to which recited the above indenture of the 1st of August, and that it had been agreed that the warrant of attorney was given, and that the judgment thereby to be entered up immediately was entered, as a concurrent security for the better securing the payment of 290*l.*, part of the principal sum and interest, upon the said 1st of February as mentioned in the said indenture, and that execution was not to be taken out until default in payment of the said 290*l.* Judgment was signed on the 20th of October 1852, and afterwards duly registered. Between July and October 1854 a correspondence took place between M, the agent of C, and the solicitors of L, with reference to the payment and receipt of the rent due at Midsummer and Michaelmas of that year, the latter insisting upon the usual receipt, and the former refusing to receive the rent except as compensation for occupation, and upon condition that it was not to be taken as a waiver of L's right of re-entry for a forfeiture. On the 26th of October the half-year's rent was tendered to M as rent without any condition or reservation, and M took the money, saying that he took it as compensation for the occupation, and that he did not waive L's right of re-entry, the solicitor of L at the time saying that he assented to no such condition:—Held, in an action by C to recover possession of the premises on the ground of a forfeiture of the lease, first, that L had not been guilty of a breach of the covenant first above stated. Secondly, that the lease of the 1st of August 1852, being a lease only for one season though to commence at a future time, was not a breach of the second of the above covenants by L not to grant, assign, or let, charge or dispose without C's consent, of the boxes or stalls therein mentioned for any longer period than one year or season. Thirdly, that the warrant of attorney of the 6th of October had intentionally, as the defeasance shewed, been made to operate as a direct and actual charge and incumbrance upon L's interest under the lease, and therefore that there had been a breach of the latter part of the second covenant. But, Fourthly, that the receipt of the rent on the 27th of October by M. (he and the plaintiff being aware at the time of a breach of the above covenant against charges and incumbrances, though not the full extent of the breach) was a waiver of the forfeiture of the lease

thereby occasioned. *Croft v. Lumley*, 25 Law J. Rep. (N.S.) Q.B. 73; 5 E. & B. 648: affirmed (on error), 25 Law J. Rep. (N.S.) Q.B. 223; 5 E. & B. 648.

Quere—whether the assignee of the reversion can avail himself of a forfeiture arising out of a breach of a covenant to complete the premises demised (in carcase) within a given time,—a breach having been incurred before the assignment to him? *Bennett v. Herring*, 3 Com. B. Rep. N.S. 370.

A lease was granted of a piece of land with two messuages thereon in course of erection, with a covenant by the lessee to complete the messuages within two months, and also to keep "the said messuages or tenements and premises in repair during the term,"—with a proviso for forfeiture for breach of any of the covenants. The premises never were finished, and were much dilapidated:—Held, that a forfeiture was incurred by the breach of the covenant to repair, in respect of which forfeiture the assignee of the reversion might sue. *Ibid.*

A general covenant to repair, and, further, to repair within three months after notice from the lessor, are separate and independent covenants; and a right of re-entry attaches for a breach of the former, though no notice be given under the latter. *Baylis v. Le Gros*, 4 Com. B. Rep. N.S. 537.

The plaintiff being the mortgagee of the lessee of a house under a building lease, took possession of the property upon the original lessee neglecting to fulfil the covenants. The plaintiff was afterwards ejected in pursuance of a judgment in an action at law for breach of covenants, and filed a bill to be reinstated in the property, on the ground that there had been no breach of the covenants under the lease. The particular covenants as to which relief was prayed were—to make and provide a roadway in front of the house and to construct good and sufficient drains and sewers to carry off the foul water. The plaintiff excused himself from performing the first covenant on the ground that the owners of the adjoining houses refused to complete their portion of the road; and as to the second covenant, the plaintiff had caused drains to be made by competent workmen, but they were found to be insufficient for the purpose. The Court held, that there had been a breach of both covenants, and therefore refused to interfere to prevent the lessor from having the benefit of his ejectment. *Nokes v. Gibbon*, 26 Law J. Rep. (N.S.) Chanc. 433; 3 Drew. 681.

(b) Waiver.

A right of re-entry, for breach of covenant in a lease, is waived by the lessor bringing an action for rent due subsequent to the breach. *Dendy v. Nicholl*, 27 Law J. Rep. (N.S.) C.P. 220; 4 Com. B. Rep. N.S. 376.

In ejectment for forfeiture of a lease of a house by reason of there being no distrainable goods to countervail the rent, it is not sufficient to shew that there were no goods on the ground-floor, but the search must extend throughout the premises. A statement by a tenant under covenant to insure, that he had not insured, is some evidence that the premises continued uninsured throughout the same year of insurance, so as to support an ejectment for a forfeiture by reason of the breach of the covenant. The receipt by the superior landlord from an under-

tenant of rent due to the tenant is not a waiver of a forfeiture subsequent to the day the rent became due, and previous to the day of payment. *Price v. Worwood*, 28 Law J. Rep. (N.S.) Exch. 329; 4 Hurl. & N. 512.

Merely standing by, and seeing the lessee making alterations which are in breach of his covenant, does not operate as a waiver on the part of the lessor. *Perry v. Davis*, 3 Com. B. Rep. N.S. 769.

After twenty years' user of demised premises, converted into a shop without licence contrary to the covenants in the lease, an assignee of the reversion cannot take advantage of a condition of re-entry for such user subsequent to the assignment. *Gibson v. Doeg* or *Doeg*, 27 Law J. Rep. (N.S.) Exch. 87; 2 Hurl. & N. 615.

The jury may be directed to presume a licence: and even although they had not been so directed, nor have so found, yet if the facts would warrant the direction, the Court, after a verdict for defendant, will refuse to grant a new trial, merely on the ground that the breach was continuing, and was not waived. *Ibid*.

Whether the benefit of such a condition runs with the land, and can be taken advantage of by the assignees of the reversioner, depends on the nature and character of the covenant, and whether it affects the use and enjoyment of the demised premises, and not whether in fact it has deteriorated the value. *Ibid*.

Quære—whether, on the rule in *Dumport's case*, the lessor's licence to do one of several things covered by a condition for re-entry, dispenses with the whole condition, though it comprises separate covenants. *Ibid*.

In a crown lease the lessee covenanted not to convert the premises into a shop or place of sale of any kind, without consent of the Commissioners of Woods and Forests. The trade of an engraver had been carried on in them without consent or objection, but rent had afterwards been received:—Held, that the forfeiture had been waived and that the title was good. *Bridges v. Longman*, 24 Beav. 27.

(c) Re-entry.

A lessor finding the demised premises out of repair, intending to take advantage of a clause of forfeiture contained in the lease, entered into an agreement with an under-tenant whom he found there to let them to him as a yearly tenant, and subsequently received rent from him:—Held, a sufficient re-entry to avoid the lease. *Baylis v. Le Gros*, 4 Com. B. Rep. N.S. 537.

By a lease rent was reserved payable on the usual quarter-days, provided that if the rent should be in arrear for the space of twenty-eight days next after any of the days appointed for payment of the same had been lawfully demanded, it should be lawful for the lessor to re-enter and take possession of the premises without bringing an action of ejectment. The rent being unpaid,—Held, that a demand made on the premises at half-past ten o'clock on the morning of the last day was not sufficient to entitle the lessor to re-enter without action. *Acocks v. Phillips*, 5 Hurl. & N. 182.

(d) Relief against.

The Court has power, under the 4th section of the act, 'To further amend the Law of Property and to relieve Trustees' (22 & 23 Vict. c. 36), to grant

relief in respect of a forfeiture of a lease, dated prior to that act, for breach of the covenant to insure against damage by fire, where such breach has occurred subsequent to the passing of that act. *Page v. Bennett*, 29 Law J. Rep. (N.S.) Chanc. 398; 2 Giff. 117.

(K) COVENANTS IN: CONSTRUCTION OF.

(a) Quiet Enjoyment.

In 1842, the defendant and two trustees, under a power given to the trustees in the defendant's father's will, created a term in certain estates, which, by an indenture of 1843, the trustees assigned by way of mortgage for the purpose of raising money to pay the defendant's debts. By the deed of assignment, the defendant had power to lease with the consent and concurrence of the mortgagees. In 1846 the defendant made a lease, without the concurrence of the mortgagees, to the plaintiff, and covenanted for the plaintiff's quiet enjoyment, without let, suit, trouble, denial, eviction, molestation, or disturbance by the defendant, or any person claiming under him. In 1851, the plaintiff, who had not heard of the mortgage-deed before, received notice from the surviving mortgagee to pay over the rent to him, and on discovering that his lease was defective, he consented to, and did give up possession to the surviving mortgagee, who entered. The surviving mortgagee gave the plaintiff 75*l*. as compensation for money he had laid out, which he accepted, without prejudice to his right of action against the defendant:—Held, that, under these circumstances, the plaintiff was entitled to recover damages on the covenant for quiet enjoyment, and that there was an eviction, or, at least a molestation, or disturbance coming within its terms; and also, that the disturbance was by a person claiming under the defendant; and that the receipt of the 75*l*. did not affect the plaintiff's right to recover. *Carpenter v. Parker*, 27 Law J. Rep. (N.S.) C.P. 78; 3 Com. B. Rep. N.S. 206.

The Court amended the special case by directing (in delivering their judgment) certain alterations in the pleadings to meet the objections that had been taken by the defendant to the declaration. *Ibid*.

(b) Rent.

A leased to the defendant, reserving rent to A, his executors, administrators and assigns, and the defendant covenanted to yield up the premises at the end of the term to A, his executors, &c. A then assigned the reversion to B and his heirs, in trust for the defendant's wife, treating the reversion as a freehold interest. By the deed, the trustee was to have power to receive and retain his trust expenses. The defendant underleased, receiving the rent, and being allowed by B to hand over his own rent to his wife; and B never interfered with him, but told him he might keep the rent. Trust expenses were incurred, and B died; and the plaintiff sued as his administratrix for four years' rent, three of which had accrued in B's lifetime. The defendant pleaded that he had paid the rent to the *cestui que trust*, with consent of B and the plaintiff:—Held, that upon the facts above stated there was no evidence to support the plea, and that the plaintiff was entitled to recover the rent which accrued in B's lifetime. *Quære*—whether there was any evidence that the

reversion was chattel, so as to enable the plaintiff to recover the rent for the fourth year. *Per Cockburn, C.J. and Byles J.*, there was. *Per Williams, J.*, there was not. *Dollen v. Butt*, 27 Law J. Rep. (N.S.) C.P. 281; 4 Com. B. Rep. N.S. 760.

A lease of a manor, by a dean and chapter, not in conformity with an enabling statute, held to have been confirmed as against the chapter by the receipt of rent under it: at all events, for the life of the dean who received the rent; and a lease of the reversion, reserving the rent upon and "subject to" the former lease, and the holder of such lease held not entitled to recover. *Pennington v. Cardale*, 27 Law J. Rep. (N.S.) Exch. 438; 3 Hurl. & N. 656.

M W granted to J W a leasehold interest in certain premises, for the term of thirty years, to be computed from the 10th of March 1839. On the 10th of November 1846 J. W. demised to the defendant the same premises for the term of twenty-three years, reserving a rent, and afterwards assigned his interest to the plaintiff:—Held, in an action by the plaintiff to recover arrears of rent, first, that by the deed a rent had been created, and that it was assignable; secondly, that the plaintiff, who was the assignee of the party to whom the rent was reserved, could maintain an action for the recovery thereof; and, thirdly, that a privity was created between the plaintiff and the defendant, the same as if the defendant had actually attorned to the plaintiff, for, by the 4 Ann. c. 16. s. 9, attornment is unnecessary in such a case. *Williams v. Hayward*, 28 Law J. Rep. (N.S.) Q.B. 374.

By the deed entered into by the defendant and J W, licence and liberty was given to the defendant to use, during the continuance of the said demise, a certain railway, jointly with the said J W. The plaintiff had, after the assignment to him, and before the rent for which the action was brought became due, prevented the defendant from using the said railway:—Held, that this constituted no answer to the action, as the rent issued out of the thing demised, and not out of the easement to use the railway. *Ibid.*

(c) *Fixtures.*

In a lease of premises to W by the defendants W covenanted to erect within a certain time a steam-engine and other machinery for the purpose of carrying on the business of a shipwright, and that he would not remove, but would yield up such shipwright's machinery to the defendants at the expiration or determination of his term, without any payment, provided that such covenant was not to apply to any machinery erected by W for other purposes than that of carrying on the business of a shipwright. It was further covenanted that if W should become bankrupt the defendants might re-enter the premises, and take possession of the shipwright's machinery, as their own property. *Stansfeld or Stansfeld v. the Mayor, Aldermen and Burgesses of Portsmouth*, 27 Law J. Rep. (N.S.) C.P. 124; 4 Com. B. Rep. N.S. 120.

W entered and erected machinery for the purpose of carrying on the business of a shipwright, and also other machinery. He afterwards became bankrupt, and the plaintiff, his assignee, took possession of the premises, and of the last-mentioned machinery, and before the expiration of a reasonable time for

removing such machinery, the defendants prevented the plaintiff from removing it:—Held, that the plaintiff had a good cause of action; that, according to the terms of the covenants of the lease, the defendants were, on determination of the tenancy by bankruptcy, to become entitled to the shipwright's machinery only, and the other machinery belonged to the assignees of the bankrupt; and that the assignees must have a reasonable time after the expiration of the tenancy to remove such machinery. *Ibid.*

By indenture A demised to B messuage and premises for twenty-one years. The lease contained a covenant to repair and a covenant that B, his executors, administrators and assigns, should at the termination of the term yield up the premises to the plaintiff, his executors, &c. "together with all wainscots, windows, shutters, fastenings, &c. and other things which then were or at any time thereafter should be thereunto affixed or belonging, (looking-glasses and furniture excepted); and together also with all sheds and other erections, buildings and improvements which should be erected, built or made upon the demised premises, in good repair and condition." An assignee of the lease, during the term, removed an old shop-window, and put up in its place a plate-glass front, but without in any manner fastening it (except by means of wedges) to the premises:—Held, that, whether an "improvement" within the meaning of the covenant or not, this plate-glass front was at all events a "window" belonging to the demised premises, and therefore that it could not be removed. *Burt v. Haslett*, 18 Com. B. Rep. 162.

(d) *Repairs.*

Covenant by farm tenant "well and substantially" to repair and keep in "good substantial repair," and so "well and substantially repaired" to yield up at the end of the term:—Held, that the tenant was bound to give up the premises in as good a state of repair as when he took possession, and that they must be inferred to have been then in a tenantable state. The landlord having become changed during the term, and a claim for dilapidations being now made by the existing landlord, held that the tenant was entitled to an inquiry as to the state of repair when the present landlord's title accrued. *Brown v. Trumper*, 26 Beav. 11.

(e) *Custom of the Country.*

By the terms of a farm lease for seven years, expiring at Michaelmas, the tenant agreed to cultivate the land according to the custom of the country, and "during the term to consume with stock on the farm all the hay, straw and clover grown thereon, which manure shall be raised on the said farm"; and the landlord agreed to let the tenant occupy part of the homestead until Midsummer-day after the expiration of the term, if necessary, "to end the cropping of the tenant grown on the premises":—Held, that the lease did not exclude the custom of the country, by which the tenant, having paid for straw on his incoming, was entitled to be paid for straw on his quitting; and that an action was maintainable against the succeeding tenant for the straw left by the outgoing tenant on the farm at the expiration of the term. *Muncey v. Dennis*, 26 Law J. Rep. (N.S.) Exch. 66; 1 Hurl. & N. 216.

(f) *Determination of Demise.*

By indenture, dated and executed the 19th of July 1851, the plaintiff demised to the defendant premises then in his occupation, "to hold from the 25th of December 1849 for the term of fourteen years thence next ensuing," with a proviso, "that it shall be lawful for either party to determine this demise at the expiration of the first seven years thereof by six months' notice":—Held, that the seven years ran from the 25th of December 1849. *Bird v. Baker*, 28 Law J. Rep. (n.s.) Q.B. 7; 1 E. & E. 12.

A lease was granted for fourteen years, which contained a proviso that the lessor might determine the lease at the end of the first seven years, by giving six months' previous notice. The father of the lessee joined as surety in the lease, and jointly covenanted for payment of the rent and performance of the covenants. Six months before the expiration of the first seven years, the lessor gave notice to the lessee "that he should require him to deliver up possession of the premises held by him under a certain indenture, determinable as therein mentioned." The lessor subsequently agreed to permit the lessee to continue in possession, which he did until the expiration of the fourteen years:—Held, that the original term was effectually put an end to by the above notice, at the expiration of the first seven years; and that the surety was exempted from liability in respect of any subsequent breaches of covenant. *Giddins v. Dodd*, 25 Law J. Rep. (n.s.) Chanc. 451; 3 Drew. 485.

(g) *Parties to Sue on.*

Tenants in common, assignees of the reversion on a lease, may join in suing, and be jointly sued, on covenants therein. *Womersley v. Dally*, 26 Law J. Rep. (n.s.) Exch. 219.

Assignees of the reversion may be sued by an outgoing tenant on a contract or custom of the country by which he is entitled to receive, on the termination of his tenancy by notice from the landlord, reasonable allowance for the value of labour bestowed on the land, and the benefit of which he loses by such termination of his tenancy, although he has paid all the rent to the original landlord and received notice from him, the assignees having renewed the notice after the conveyance to them, and possession having been given to them. *Ibid.*

A stipulation in a contract of tenancy that the tenant shall keep a certain proportion of the land demised for grass, and pay so much per acre for any deficiency below such proportion, is extinguished by severance of the reversion. *Ibid.*

The rule of law as to importing into the terms of the tenancy the "custom of the country," does not admit of evidence of the usage of a particular estate or the property of a particular individual, however extensive it may be, it not being shewn that the tenant was aware of it. *Ibid.*

LEGACY.

[See DEVISE—WILL.]

(A) CONSTRUCTION OF.

- (a) *In general.*
- (b) *Gift by Implication.*
- (c) *Meaning of Words.*

(B) WHO TAKE AS LEGATEES.

- (a) *Description of Legatee.*
- (b) *Attesting Witness.*
- (c) *Gift to a Class.*
 - (1) *When and how ascertained.*
 - (2) *Distribution per Capita or per Stirpes.*
 - (3) *Children.*
 - (4) *Illegitimate Children.*

(C) WHAT PROPERTY PASSES.

- (a) *In general.*
- (b) *Monies.*
- (c) *Dividends.*

(D) WHAT INTEREST VESTS.

- (a) *Absolute.*
- (b) *For Life.*
- (c) *Joint Tenancy or Tenancy in Common.*
- (d) *Trust or Beneficial.*
- (e) *Separate Use.*

(E) ON WHAT PROPERTY CHARGEABLE.

(F) VESTED OR CONTINGENT.

- (a) *In general.*
- (b) *Period of Vesting.*

(G) SPECIFIC OR DEMONSTRATIVE.

(H) CUMULATIVE OR SUBSTITUTIONAL.

(I) CONDITIONAL.

(K) IN SATISFACTION OF DEBT.

(L) ABATEMENT.

(M) ADEMPMENT AND SATISFACTION.

(N) ASSENT OF EXECUTOR.

(O) FORFEITURE.

(P) VOID.

(Q) REMOTENESS.

(R) REVOKED.

(S) LAPSED.

(T) RESIDUE.

(U) INTEREST ON.

(V) ANNUITY.

(W) RIGHTS AND LIABILITIES OF THE LEGATEE.

(X) LEGACY DUTY.

(A) CONSTRUCTION OF.

(a) *In general.*

A legacy given "without power in any way of anticipation," and given over "in case the legatee should assign, mortgage or in any manner anticipate the same, or attempt or agree so to do, or otherwise anticipate the same," is not forfeited by an offer to make it a security, or by a subsequent bankruptcy, or by any act unless strictly within the clause of forfeiture. *Graham v. Lee*, 26 Law J. Rep. (n.s.) Chanc. 395; 23 Beav. 388.

A testatrix gave to her sister for life everything she died possessed of, and at her death she gave to her brother S P or his heirs 1,000L in the 4l. per cents. S P died in the lifetime of the testatrix:—Held, that the legacy to S P did not lapse, but took effect in his heirs by substitution. *In re Porter's Trusts*, 27 Law J. Rep. (n.s.) Chanc. 196; 4 Kay & J. 188.

A substitutional gift to the heirs of a legatee who dies in the testator's lifetime goes to the next-of-kin of the deceased legatee, and not to his personal representatives. *Ibid.*

Under a bequest to such of the testator's grandchildren as should be living at the death of a tenant

for life, and the executors or administrators of such of them as should be then dead leaving any child or children living at the death of the tenant for life, it was held that the share of a grandchild, who died in the lifetime of the tenant for life leaving a child, belonged to his estate, and was not given either to his executors beneficially, or to his next-of-kin. *In re Seymour's Trusts*, 28 Law J. Rep. (N.S.) Chanc. 765; Johns. 472.

A testator, who died in 1822, by his will, gave to his brother J B a legacy of 100*l.*, to be paid "as soon as conveniently may be after my decease." He then gave an annuity of 50*l.* to H H, to be payable out of his real estate until one of the testator's nephews should attain twenty-one, and on the happening of that event he directed his real estate to be exonerated from the annuity of 50*l.* and his real and personal estate to be sold, and the annuity paid out of the income of the produce. He declared that after the nephew attained twenty-one the annuity should be a charge only on his personal estate. In 1839 the nephew came of age and the real estate was sold, and the whole income paid to H H in part of her annuity until 1856, when she died. In 1858 J B, the legatee, filed a bill for payment out of the trust fund, alleging that the personalty was not sufficient, but no personal representative of the testator was made a party. The Master of the Rolls dismissed the bill on the grounds that the legacy was not charged on real estate, and that it was barred by the Statute of Limitations (3 & 4 Will. 4. c. 27). On appeal to the Lords Justices,—Held, that the personal estate was the primary fund, which there was no evidence was insufficient; that there was no personal representative of the testator before the Court, and that by lapse of time the bill came too late. The appeal was dismissed, and leave to amend refused. *Bright v. Larcher*, 28 Law J. Rep. (N.S.) Chanc. 837; 3 De Gex & J. 148; 4 De Gex & J. 608; 27 Beav. 180.

A direction by a testator that every legatee shall contribute 1*l.* per cent. out of their legacies to H W and her children will include legatees of money, of chattels, of annuities and of the residue; but a sum not exceeding 3,000*l.* given to trustees for the repair and refurnishing a mansion is not liable to contribute further than the persons enjoying the furniture as heirlooms for the time being are liable to contribute. *Ward v. Grey*, 29 Law J. Rep. (N.S.) Chanc. 74; 26 Beav. 485.

A bequest to H W and her children gives a life interest to H W and a power of appointment among her children, with remainder to her children equally. *Ibid.*

A testator gave the income of his residuary estate to his wife for life, and directed "that in case it should not be sufficient, she should be at liberty to go to the principal." He then gave the remainder equally between his brothers and sisters now living in Italy. The wife claimed the whole fund, but stated that 60*l.* a year was the least she required for her maintenance. She died before her claim was disposed of. Upon its being renewed by her administrator,—Held, that she was entitled to have 60*l.* a year made up to her out of the principal, and that if, in her ordinary expenditure, she left any debts, they must also be satisfied. *In re Pedrotti's Will*, 29 Law J. Rep. (N.S.) Chanc. 92; 27 Beav. 583.

A testator gave a legacy to his great-nephew and great-niece by the description of "my nephew and niece J and S;" he then gave real estates on certain events to be sold, and the proceeds to be equally divided between his surviving nephews and nieces:—Held, that this was not sufficient to include J and S among the nephews and nieces, though in the event which had happened they lost a legacy of 150*l.*, which the testator gave "to my nephew William's surviving children." *Thompson v. Robinson*, 29 Law J. Rep. (N.S.) Chanc. 280; 27 Beav. 486.

A retroactive effect will not be given to an order for the purchase of stock, so as to include stock purchased after the testator's death, in a bequest of all stock "I may be possessed of or entitled to at the time of my decease." *Thomas v. Thomas*, 29 Law J. Rep. (N.S.) Chanc. 281; 27 Beav. 587.

A testator directed that, in the event of his daughter marrying after his decease, the sum of 6,000*l.* should be settled upon her, which sum he directed his trustees to set apart and invest, upon trust, as to the income, for his daughter for life for her separate use, and upon her decease, leaving children, upon trust to divide the amount among her children upon their attaining twenty-one; and if no child should attain a vested interest in their mother's legacy, such legacy to fall into the residue, which was given to certain persons for life, with remainder to others absolutely. One of the daughters married after the testator's death, and died leaving a husband and one infant child surviving:—Held, that, whether the testator intended a deed of settlement to be executed or not, the Court had no power to introduce into such settlement a clause for maintenance and advancement which was not directed by the testator; that the infant child of the testator's daughter did not take a vested interest in the legacy until attaining twenty-one; and that the intermediate income would go, as income, to the tenant for life of the residue. *Fullerton v. Martin*, 29 Law J. Rep. (N.S.) Chanc. 469; 1 Dr. & Sm. 31.

A testator gave 5,000*l.* to trustees upon trust to pay and apply so much of the interest as they should in their uncontrolled discretion think necessary or expedient to be paid and applied yearly and every year from the time of his decease, until A L G should attain thirty-two, in aid of the allowance which A L G's father should or ought to make for that purpose in order to prepare A L G for his establishment in and to enable him to follow some profession, &c.; and, subject thereto, to accumulate the income of the 5,000*l.* by way of compound interest, and upon A L G attaining thirty-two to pay the interest of the 5,000*l.* and of the accumulated fund arising therefrom to A L G during his life, so long as he should not have been bankrupt, &c. And after the death of A L G the 5,000*l.* and the accumulated fund were to be held in trust for the children of A L G, &c. On the testator's death, in 1842, A L G was six years old, and his father died in 1849. The testator's estate was being administered in the Court of Chancery, and a considerable fund arose from the accumulation of the income of the 5,000*l.* legacy. A L G was married, and had one child; and having contracted debts which prevented his living in this country, he petitioned the Court that a sufficient sum for their payment might be raised out of the accumulated fund; and the Court of Appeal held, that

there was power to apply a portion of the accumulations for that purpose: and that as it was clearly, under the circumstances, for A L G's benefit, the Court would direct the necessary sum to be so raised, and applied in payment of the debts. *Edwards v. Grove*, 29 Law J. Rep. (N.S.) Chanc. 839.

A testator bequeathed manuscripts to trustees "for my grandson, that they may provide for the said books being published to the best advantage for the interests of the said child, so as to contribute towards raising a fund to assist him when he goes to college," and bequeathed 1,000*l.* towards the printing:—Held, that the grandson was entitled to elect to take the 1,000*l.*, it appearing to be impossible to publish the book at a profit. *Re Skinner's Trusts*, 1 Jo. & H. 102.

Bequest of interest to one for life, and after her decease, upon trust to transfer the principal among the children living at her decease, "or the children of any child who may be then dead." A grandchild who predeceased its parent,—Held, excluded from a share in the fund. *Crause v. Cooper*, 1 Jo. & H. 207.

A testator bequeathed 20,000*l.* consols upon trust to pay the dividends to his wife for life, and after her decease to B (the wife of A) for life, for her separate use, and after the death of B, upon trusts for the benefit of B's children. The testator's wife, who was his residuary legatee, survived him only two days, and by her will, after giving several legacies of 100*l.* each, bequeathed to A and B "the same amount and on the same trusts and conditions" as were "named" in her late husband's will. She directed her residuary estate to be divided into two moieties, whereof she gave one to A and B and their children "on the same trusts as before alluded to." There was no other part of the testator's will to which the bequest in the testatrix's will could be referred, except that above stated:—Held, that a legacy of 20,000*l.* consols passed by the wife's will on the same trusts as those above mentioned of the husband's will. *Stephens v. Powys*, 1 De Gex & J. 24.

A testator gave to his daughter all his books, plate, linen, china, wearing apparel, watches, jewels and money, (except money at the bankers, or in the funds, or placed on security,) and all other property not otherwise disposed of. And he directed, that unless indispensably necessary, his funded and other property should remain as it was until the decease of certain annuitants under the will, and on the decease of the annuitants he directed the whole of his personal estate to be invested in government securities, and one-fourth part to be transferred to the Royal Society, and the other three parts to other specified public institutions:—Held, that the daughter was not entitled to railway shares, foreign securities, or other investments forming parts of the testator's personal estate, but that these descriptions of property passed under the residuary bequest. *Ludlow v. Stevenson*, 1 De Gex & J. 496.

A testator bequeathed a fund in trust for his sister A for life, and after her death to be divided between the children of his sisters B C and D who should survive the testator, such children taking *per stirpes*, "with benefit of survivorship among members of the same family":—Held, that the latter words of themselves meant survivorship at the death of the tenant for life, and could not be otherwise interpreted by

comparison with other bequests in the same will, shewing an intention that these bequests should not go over if the legatee had children:—Held, also, that the survivorship applied to accrued shares. *In re Craswell's Trust*, 8 De Gex, M. & G. 480.

Bequest to four persons equally, and "in case of the death" of any or either of them "in the lifetime of the other or others," their shares to go to the "survivor or survivors of them":—Held, that the survivorship had reference to the period of the testator's death. *Howard v. Howard*, 21 Beav. 550.

A testator empowered his widow if his children should conduct themselves to her satisfaction up to the age of twenty-five, and marry with her approbation, but not otherwise, to give them 1,000*l.* each for the purpose of setting out in the world:—Held, that she had a discretionary power, which she might exercise after a child attained twenty-five, though unmarried. *Davidson v. Rook*, 22 Beav. 206.

A testator authorized his trustees to apply any sum not exceeding 600*l.* in the purchase of church preferment for A. A died before any sum had been so applied:—Held, that the gift wholly failed. *Cowper v. Mantell*, 22 Beav. 231.

Bequest to four equally "and as each dies his or her share shall be equally divided amongst the others that's living":—Held, that the accrued shares did not go over. *Goodwin v. Finlayson*, 25 Beav. 65.

A testator by his will gave F B 80*l.* per annum, long annuities to the year 1860 and a "deferred annuity" of 80*l.* from Christmas 1859. By a codicil (which did not mention F B's name) he said, "I direct that my executors 'make my long annuities of 80*l.* instead of 80*l.* be only 30*l.* per annum and a reversionary annuity purchased on her life 30*l.*, as I have lately expended money on her account":—Held, that F B was referred to, and that she was entitled to 30*l.* a year only. *Ellis v. Bartrum* (No. 1.), 25 Beav. 107.

Direction in a will to pay and discharge all the just and lawful debts owing by a deceased brother at the time of his death:—Held, upon the terms of the will and looking to the circumstance that the brother had been dead about forty years at the date of the will, to comprise debts, but not interest. *Askew v. Thompson*, 4 Kay & J. 620.

A testator bequeathed life interests in four distinct funds to four nieces respectively, and directed that upon the decease of any or either of them, the principal of the fund, to the interest of which such niece was entitled, should be held in trust for the benefit of all and every the lawful children of her or them so dying, and of the survivors or survivor of the testator's other nieces therein before named in equal shares. One of the nieces died leaving two children, and then another niece died without having had a child:—Held, upon the construction of the whole will, that the children of the former niece were entitled to participate in the fund of which the latter had been tenant for life. *Peacock v. Stockford*, 7 De Gex, M. & G. 129.

A testator who had lent money to his son John, bequeathed his residuary estate to John and his other children equally for life, with remainder over to their children; and he declared that neither of his children should receive anything until they should have accounted for any sum lent by him to them. The testator afterwards agreed to accept a composi-

tion on his debt, but which was not paid at his death. *Semble*—that the son was only liable to account for the composition; but held, that the son's debt was not to be deducted from his children's interest. *Silverside v. Silverside*, 25 Beav. 340.

A testator gave all his personal estate to his wife for life, and he bequeathed 40*l.* to A B and other pecuniary legacies, all of which were payable at her death. By a first codicil he gave a legacy of 200*l.* to C D (who was not mentioned in his will), and he directed that all things in his codicil should be performed as if the same were so declared in his will. By another codicil he revoked the legacy of 40*l.* to A B and gave her 50*l.*:—Held, that the legacy of 200*l.* was payable at the death of the testator, but that the payment of the legacy of 50*l.* was postponed until the death of the widow. *Giesler v. Jones*, 25 Beav. 418.

Gift to A for life and afterwards to seven named persons equally, "the share of each who shall happen to die to be equally divided amongst the survivors, unless A M P (one of them) should die leaving children, in that case I mean that her children should inherit the share of the parent." The seven all died before the tenant for life, A M P being the survivor of them:—Held, first, that the seven took equally; secondly, that the children of A M P took no more than one-seventh; and, thirdly, that the share of one of the seven who pre-deceased the testatrix was undisposed of. *Cambridge v. Rous*, 25 Beav. 409.

Bequest to the children of a deceased niece who should be living at the testator's death, followed by a bequest to a nephew for life, and after his decease upon the like "trusts" for the benefit of his issue, and subject to the same powers, limitations, &c. in respect to his issue as those expressed as to the niece's children. The nephew had no child living at the testator's death, but he afterwards had one child born:—Held, that such child was entitled to the second legacy. *Yardley v. Yardley*, 26 Beav. 38.

A testatrix who was entitled to half of her sister's residuary estate, bequeathed a large legacy, which, if it should fail, she directed should fall "into her own estate." She bequeathed the residue of her property (except that derived from her sister) to A, and the residue of her property derived from her sister's estate to B:—Held, that the latter must contribute with the former towards payment of the debts, expenses and legacies. *Greenwood v. Jemmett*, 26 Beav. 479.

Bequest of 1,000*l.* the "interest" for A for life, with power to dispose of the "principal" to her children by will, and if no will then "the said legacy" to go to her children "at twenty-one years of age." A died in 1840, and her only child attained twenty-one in 1858:—Held, that he was entitled to the intermediate interest of the legacy. *Thruston v. Anstey*, 27 Beav. 335.

A testator bequeathed certain personal property to his wife specifically, and he devised his real and personal property to trustees for sale, and out of the produce in the first place to pay his debts, funeral expenses and legacies; and in the next place to invest the surplus; and subject to the trusts aforesaid, to pay the income to his wife for life with remainder over. By a codicil he gave all his personal estate to his wife:—Held, that the widow was entitled to the

personal estate exonerated from the debts and legacies and that they were primarily charged upon the real estate. *Lance v. Aglionby*, 27 Beav. 65.

Bequest to each of A's sisters and brothers, or to such of them as may be living at the time of my decease; in case of those who may not be in existence at my death to go to their respective descendants:—Held, that the descendants of a sister who was dead at the date of the will were excluded. *Smith v. Pepper*, 27 Beav. 86.

A testatrix, after referring to a debt due from her to a partnership of A and B deceased, bequeathed a fund "upon trust to pay and divide the produce of such stock to and for the benefit of their respective estates." A and B were not partners, but one was the successor of the other. The sum of 4,517*l.* was claimed by A and 197*l.* by B, against the testatrix's estate:—Held, that the fund was divisible between their estates equally, and not in proportion to the debts due to A and B respectively. *Greville v. Greville*, 27 Beav. 594.

A testator bequeathed stock to his aunt for life, and after her death to his father, "and in case of his death then to devolve upon his brothers and sisters or their representatives." The father and two brothers predeceased the aunt:—Held, that the "death" of the father meant, death in the life of the tenant for life; that the brothers and sisters who survived the aunt and the representatives of those who predeceased her, were entitled to the stock. Secondly, that "representatives" meant executors or administrators, and not next-of-kin; and that they took as trustees and not beneficially. *Re Henderson*, 28 Beav. 656.

(b) Gift by Implication.

A testator gave a sum of money to trustees to pay the income to his then unmarried daughter for life, and after her decease to permit her husband to receive the income for his life, nevertheless to be by him applied for the maintenance, education or benefit of the children of his daughter. The daughter afterwards married, and her husband subsequently took the benefit of the Insolvent Act; his wife afterwards died, leaving her husband and two children surviving:—Held, that he took beneficially a life interest in the legacy. *Byne v. Blackburn*, 27 Law J. Rep. (N.S.) Chanc. 788; 26 Beav. 41.

Bequest to A for life, and after her death to B and C "or" their children. B and C survived A:—Held, that their children took nothing. *Sparks v. Restall*, 24 Beav. 218.

Bequest to A for life, and in case he should die without child or children, then to B:—Held, that the children took nothing by implication. *Ibid.*

Gift to wife for life, "to be disposed of at her death amongst my children as she shall think proper":—Held, to confer a power to appoint, by will, amongst his children living at her death, and an implied gift in default of appointment. *Reid v. Reid*, 25 Beav. 469.

A bequest to A for life, with a gift over if he die without leaving issue, gives no interest by implication to the issue. *Neighbour v. Thurlow*, 28 Beav. 33.

A testator gave his residue to his three children "for their natural lives, viz., they to have the interest during their natural lives, and if any die with-

out leaving issue, in that case to return again for the benefit of his grandchildren":—Held, that the three children took during their joint lives and the life of the survivors and survivor; and, secondly, that their children took no interest by implication, so that if the three children all died leaving issue, there would be an intestacy after the death of the survivor. *Ibid.*

(c) *Meaning of Words.*

Articles in the nature of household goods will pass under that description in a bequest, although they may never have been used by the testator, nor even kept in his house. *Pellew v. Horsford*, 25 Law J. Rep. (n.s.) Chanc. 352.

A testator bequeathed personal estate, after the death of his wife, "to be divided equally, share and share alike, amongst the following persons or their heirs for ever," and proceeded to enumerate certain classes of legatees. It having been decided that the word "heirs" was to be construed according to the nature of the property,—Held, that the next-of-kin of a deceased legatee according to the Statute of Distributions, and not the nearest of kin simply, were entitled to his share. *Doody v. Higgins*, 25 Law J. Rep. (n.s.) Chanc. 733; 2 Kay & J. 729.

Bequest in trust for such persons as testator's daughter, a married woman, should appoint, and in default of appointment, to her separate use for life, and after her death upon trust for such person or persons as at the time of her decease should or would have become entitled thereto as her next-of-kin in case she had died intestate and unmarried. The daughter survived the testator, and died without having exercised the power of appointment given her by the will, leaving her husband and three children surviving her:—Held, that the children were entitled to the fund bequeathed by the testator. *In re Gratton's Trusts*, 26 Law J. Rep. (n.s.) Chanc. 648.

A testator directed his trustees to sell and convert into money all his property, except such portion as consisted of monies in the public funds, and the proceeds thereof to be invested in the public funds:—Held, that the exception included long annuities. *Howard v. Kay*, 27 Law J. Rep. (n.s.) Chanc. 448.

A testator gave 1,000*l.* to his sister Sarah for life, with remainder to her children; he then said, "To each of my sisters, M A, C and B, I bequeath 500*l.*, and in case of death to either their portions to go to the surviving sisters 'above mentioned.'" C died in the lifetime of the testator:—Held, that her 500*l.* survived to M A and B; and that Sarah was not included in the words "the surviving sisters above mentioned." *White v. Wakley*, 28 Law J. Rep. (n.s.) Chanc. 79; 26 Beav. 23.

A, who was possessed of property, both in consols and in Bank stock, made a will, by which she gave to her brother (who received the income from all her property, and acted as her banker), "everything I may be possessed of at my decease for his own life; and should he marry and have children of his own, to those children after; but should he die a bachelor, I leave the whole of my fortune now standing in the funds to Emma Slingsby, my god-daughter." The brother died a bachelor:—Held, that under this will the Bank stock did not pass to Emma Slingsby. *Slingsby v. Grainger*, 28 Law J.

Rep. (n.s.) Chanc. 616; 7 H.L. Cas. 273: affirming 25 Law J. Rep. (n.s.) Chanc. 573; 1 De Gex, M. & G. 385.

A legacy of stock in trust for A B for life, and afterwards to divide the same amongst the testator's nephews and nieces, children of A B, then living, or their legal personal representatives, share and share alike. One of the testator's nieces died in his lifetime, without issue:—Held, affirming the decision of the Master of the Rolls, that the fund was divisible among the nephews and nieces whether surviving the tenant for life or not, and that the share of the deceased niece devolved upon her next-of-kin, and not upon her administrator. *King v. Cleaveland*, 28 Law J. Rep. (n.s.) Chanc. 835, 74, 76; 4 De Gex & J. 477; 26 Beav. 26, 166.

A testator had four grandchildren, a son and three daughters, who were children of a daughter; by his will he gave 8,000*l.* stock to such four children, payable at twenty-one; by a codicil he revoked the bequest to the three granddaughters, and directed that the trustees should hold the shares for their separate use for their lives, and in case of any of his granddaughters dying without issue, that their shares should accrue to the survivors of all the children of his daughter, including the son. The accruing shares of the granddaughter were to be subject to the condition attached to the original shares:—Held, that the word "survivors" referred to the death of each granddaughter, and that on the death of the one last surviving, without issue, her share fell into the residue as undisposed of. *Nevill v. Boddam*, 29 Law J. Rep. (n.s.) Chanc. 738; 28 Beav. 554.

A testator gave "all property belonging to him in the county of N." In that county the testator was entitled to collieries in respect of which debts were due to him, and it was held that these debts passed under the above gift. *The Earl of Tyrone v. the Marquis of Waterford*, 29 Law J. Rep. (n.s.) Chanc. 486; 1 De Gex, F. & J. 618.

A testator gave all his personal estate, after payment of debts, to his wife for life, and upon her death he gave whatever should remain, after payment of various legacies, equally between the heirs of his late uncle W. Neve, J. Neve and his aunt P. Francis, all three of whom were dead at the date of the will:—Held, that the word "heirs" applied to the heirs-at-law of the three persons named, and not their next-of-kin. *In re Rootes*, 29 Law J. Rep. (n.s.) Chanc. 868; 1 Dr. & Sm. 228.

"Next-of-kin" in a will held to mean the nearest of kindred in blood, and not the persons who would be entitled under the Statute of Distributions. *Avison v. Simpson*, Johns. 43.

Bequest of "household furniture, goods, ready money, debts and securities" held to comprise the whole residuary personal estate and effects of the testatrix. *Ibid.*

Bequests of sums of stock to the following societies in London: *the Church Building Society*, the *Clergy Society*, the *Society for Promoting Christian Knowledge*, the *Church Missionary Society* and the *Clergy Orphan Society*. There being no society answering the description of the *Clergy Society*,—Held, that extrinsic evidence could not be received to prove that by that name a charity not in London was intended. Held, also, that a scheme *cy-près*

must be directed, and that this must be done in the presence of the Attorney General. *In re the Clergy Society*, 2 Kay & J. 615.

Bequest to J D, a younger son of A D, as soon as he should attain twenty-one; but in case he should die before attaining twenty-one, then to each of the other children of A D who should attain twenty-one. J D died an infant:—Held, that the words "such, &c. as should attain twenty-one" were equivalent to "at twenty-one," or "when and as they should attain twenty-one"; and that on J D's death the share of a child who had then attained twenty-one became immediately payable, and no after-born child, if any, would be entitled to a share in the fund. *Gillman v. Daunt*, 3 Kay & J. 48.

While the act 3 & 4 Will. 4. c. 85, for the regulation of the East India Company's charter, was in force, the capital stock of the company was not "a government or parliamentary stock or fund," nor was it a "foreign stock or fund." *Brown v. Brown*, 4 Kay & J. 704.

Bequest of personality "to the heirs of my late partner for losses sustained during the time that the business of the house was under my sole control":—Held, that the persons to take were those who at the testator's death would have been entitled under the Statute of Distributions to the personal estate of the deceased partner in case he had died intestate, and not the heir-at-law strictly so called. *In re Gamboa's Trusts*, 4 Kay & J. 756.

Where the words "children" and "issue" are used interchangeably in a will the operation of the word "children" may be extended to "issue" generally to effectuate the intention. *Harley v. Mitford*, 21 Beav. 280.

A testator declared that in case his daughters should "leave issue" they might appoint a fund "unto such children" in "such manner" as they should choose; and in default of any child they might appoint it to their sisters and their children; "and in case all his daughters should die without issue" then over:—Held, that "children" must be construed "issue," and that an appointment to a grandchild was within the power. *Ibid.*

Held, also, that the word "such" did not refer to the issue a daughter might leave, but to such of the class as she might choose. *Ibid.*

A testator bequeathed leaseholds equally to his four grandchildren, and after their decease to "such lawful issue" as they or any or either of them should leave:—Held, that on the death of each grandchild his issue of every degree then living became equally entitled to his one-fourth; and that "issue" was not to be read "children," though, in a subsequent gift, he had used that expression. *Waldron v. Boulter*, 22 Beav. 284.

Under a similar devise of renewable leaseholds and copyholds to the four grandchildren equally, and after their death "for such children as they or any or either of them should leave her or him surviving":—Held, that on the death of each grandchild his "children" then surviving took as tenants in common. *Ibid.*

A testator bequeathed to his son "the sum of i. x. s.":—Held, that extrinsic evidence was admissible to explain the meaning of these letters. *Kell v. Charmer*, 23 Beav. 195.

The word "share" alone, when there is no gift

over of the whole fund in case of the failure of all the members of the class, is not sufficient to carry over an accrued share. *Evans v. Evans*, 25 Beav. 81.

The character of "eldest son" is in ordinary cases to be ascertained at the period of vesting, and not of payment. *Adams v. Adams*, 25 Beav. 652.

Bequest to A for life, and afterwards in trust for her children, who, not being an eldest or only son, should attain twenty-one. In 1854, after George, the second son, had attained twenty-one, the eldest son died, and the second thereupon became eldest. The tenant for life died in 1857:—Held, that George, though an eldest son at the time the fund became payable to the children, took a share. *Ibid.*

Bequest of "all my household furniture and effects, plate, linen, china, glass, books, wearing apparel," &c., held to pass the articles enumerated and others *ejusdem generis*, but not the general residue. *Newman v. Newman* (No. 3), 26 Beav. 220.

Stock in the funds in which the testator has a reversionary interest will not pass by a bequest of "my goods and furniture, my plate and linen, all money and notes that may be due to me at my decease." *Cowling v. Cowling*, 26 Beav. 449.

Bequest to "descendants" of A "in such proportions as each may be entitled" under the Statute of Distributions:—Held, that a child of A took in exclusion of grandchildren. *Smith v. Pepper*, 27 Beav. 86.

A testator occupied a house at B, and stables in the neighbourhood, held under a different title. He bequeathed the lease of the house at B, "with all buildings belonging to me," and what the "buildings may contain":—Held, that the stables and the carriages and horses therein passed to the legatee. *Kennedy v. Kelly*, 28 Beav. 223.

(B) WHO TAKE AS LEGATEES.

(a) Description of Legatee.

A testator bequeathed a sum of 2,000*l.* consols to be divided between his children when each of them attained the age of twenty-one years, but should neither of them attain that age, then he bequeathed the said sum to his wife for her life and afterwards to his "next heir-at-law":—Held, that the "heir-at-law," at the death of the testator was the person entitled, and not the next-of-kin. *Southgate v. Clinch*, 27 Law J. Rep. (N.S.) Chanc. 651.

A testator gave several legacies to a woman by the description of "my wife," he having gone through the ceremony of marriage with her; but she was the wife of another man, whom she had left nineteen years before:—Held, in the absence of proof that she knew her husband was living, and of any intention to commit a fraud upon the testator, that she was entitled to the legacies as *persona designata*. *In re Pitts*, 29 Law J. Rep. (N.S.) Chanc. 163; 27 Beav. 576, *nom. In re Pitts*.

A testator gave a life interest in a trust fund to the husband of a daughter dying, leaving issue, with remainder to the children of the daughter by the present or any future husband. The daughter was married at the date of the will and at the death of the testator; her husband afterwards died, and she married again, and died leaving her second husband and children by the first marriage surviving, but without having had any children by the second mar-

riage. Upon a bill by the second husband,—Held, that he was not entitled to a life interest in the trust fund; that the term "husband" was confined to the first, who was living at the date of the will and at the death of the testator. *Franks v. Brooker*, 29 Law J. Rep. (N.S.) Chanc. 292; 27 Beav. 635.

A testator bequeathed nineteen guineas each to the "surgeon" and resident "apothecary" of the S. Dispensary, or any who might hold the like situation at his decease. There were two surgeons and no resident apothecary, but a "dispenser".—Held, that the three were entitled to nineteen guineas each. *Ellis v. Bartrum* (No. 2), 25 Beav. 109.

Under a bequest to the testator's "servants in his service at the time of his decease," the Court held that two out-door servants, continuously employed at weekly wages, were entitled, but that a boy employed a few months in the year, whilst the testator was at his country residence, at weekly wages, to carry letters to the post, and who was so employed at the testator's death, was not entitled. *Thrupp v. Collett* (No. 2), 26 Beav. 147.

The plaintiff acted as the land agent and house steward of the testator, but he resided out of the house.—Held, that he was entitled under a bequest "to all my servants and day labourers who shall be in my service at the time of my death one full year's wages." *Armstrong v. Clavering*, 27 Beav. 226.

(b) Attesting Witness.

Bequest by will dated in 1849, of an annuity to A. Codicil revoking other legacies and confirming the will was signed by A as an attesting witness.—Held, that the annuity given to him by the will was not thereby made void. *Tempest v. Tempest*, 2 Kay & J. 635.

(c) Gift to a Class.

(1) When and how ascertained.

A testator gave personal estate to his wife for life, and after her death to Mrs. M, or in case of her death to be equally divided between "her children living." Mrs. M died in the testator's lifetime, leaving one child, who survived the testator, but died in the lifetime of the tenant for life.—Held, (affirming the decision of the Master of the Rolls,) that the child of Mrs. M took a vested interest. *Hodgson v. Smithson*, 26 Law J. Rep. (N.S.) Chanc. 110; 21 Beav. 354.

A testator bequeathed certain leasehold estates, after the failure of previous limitations in favour of A and his issue, "in trust for such persons as at the time of such failure of issue should be his (the testator's) next-of-kin, according to the statute, &c., and as if the testator had survived the said A, and in the like shares as they would be entitled to the same under the same statute." He afterwards bequeathed a legacy in trust for M for life; and, after her decease, without issue, in trust for his own "next-of-kin in manner aforesaid".—Held, that the persons entitled to the legacy would be the persons who would be the next-of-kin of the testator living at the death of M, and not the next-of-kin at his own death. *Bessant v. Noble*, 26 Law J. Rep. (N.S.) Chanc. 236.

Although the available personal estate of a testator was employed in the payment of debts and legacies, and in providing a fund to pay an annuity, and no-

thing could be divided until the death of an annuitant and the falling in of a reversionary interest, still the class of objects entitled under a gift "to the children of J H, M H, J P, and M P, who should attain twenty-one, to be equally divided between them *per capita*, and not *per stirpes*," was held to be ascertained at his death, and some of such objects having attained twenty-one in his lifetime, it was held, that the interests were vested, and that those born in the testator's lifetime took to the exclusion of others subsequently born. *Hagger v. Payne*, 26 Law J. Rep. (N.S.) Chanc. 617; 23 Beav. 474.

A legacy to a class not definitively fixed will be carried into effect so far as the objects can be ascertained, but blanks in a will cannot be filled up, though the testator apparently contemplated an extension of the class. *Mason v. Bateson*, 28 Law J. Rep. (N.S.) Chanc. 391; 26 Beav. 404.

Bequest to trustees for A for life, and if he should die childless, upon trust to apply the sum to the benefit of such of testator's children, or their issue as the trustees should think fit, for the interest and good of the testator's family; with no gift in default of appointment. No appointment having been made, and the tenant for life having survived the donees of the power and died childless.—Held, that children and remoter issue took in equal shares *per capita*, and that the period for ascertaining the class was the death of the tenant for life. *Re White's Trust*, Johns. 656.

A testatrix having given legacies to several persons by name, describing each as her niece, bequeathed her residuary personal property upon trust for her respective "nephews and nieces," in equal shares. Two of the legatees in the will called nieces, were nieces not of the testatrix, but of her late husband.—Held, that the circumstance that the testatrix had in her will called these two her nieces, did not enlarge the meaning of the words "nephews and nieces" in the residuary bequest, so as to make it include all the nephews and nieces of her husband living at her death, nor even to include the two legatees, whom she had called her nieces in the will. *Smith v. Lidiard*, 3 Kay & J. 252.

Bequest upon trust to pay and divide equally to and amongst all the children of testator's daughter when the youngest should attain twenty-one, followed by a gift over in case of the death of his daughter "without leaving any child or children".—Held, the youngest child having attained twenty-one, that the fund was divisible equally amongst all the children, and that such interests were not defeasible in the event of the death of the testator's daughter without leaving any child or children. *Kennedy v. Sedgwick*, 3 Kay & J. 540.

In such case, the gift over being contradictory if the word "leaving" be construed literally, that word will be read as equivalent to "having." *Ibid.*

A testator bequeathed to RS 1,000*l.* to be placed out on real security, and the interest to be paid to her during her life; and he directed that at her death the principal should be called in and distributed equally among her children, and that if any children were living from son or daughter being dead, such child or children should take the share their parent would have been entitled to if living.—Held, that the representatives of such children of RS as survived the testator and died without issue in the life-

time of R S were entitled to shares. *Strother v. Dutton*, 1 De Gex & J. 675.

A fund was bequeathed upon trust for a daughter of the testator for life, and after her death for her husband for his life, and after the death of the survivor, for the daughter's children who should be living at her decease equally, and the children of such children as should be dead, such children to have their parent's shares only, and if there should be no such child or grandchild, in trust to transfer the fund to all the testator's children who should be then living equally, and the children of such of them as should be dead, such children to have their parent's shares only:—Held, (*dubitante Turner, L.J.*) that under the last-mentioned clause only such grandchildren of the testator took as survived the tenant for life. *In re Kirkman's Trusts*, 3 De Gex & J. 558.

Gift of personality to A for life, remainder to the children of tenant for life *nominatim* or such of them as should be living at the death of tenant for life. If any of them should die in the lifetime of tenant for life, leaving issue, such issue to take the share the parent would have been entitled to. There were four children of the tenant for life, who all died in the lifetime of tenant for life. Two died in the lifetime of the testatrix, and one of those two left issue. None of the others left issue:—Held, that the children of the deceased child took the whole fund. *Ashling v. Knowles*, 3 Drew. 593.

Testator gave after the death of A, one of his children, to such of his other children as should be living at the death of A:—Held, this was a gift to a class, and that one of the children having died before the testator, the survivors took the whole. *Cruss v. Howell or Nowell*, 4 Drew. 215.

Bequest to wife for life, and afterwards to all testator's nephews and nieces living at the death of his wife, namely, all the children of my brother S H, &c. [naming the greater part, but not the whole of his brothers and sisters, and excepting one of his nieces by name, and giving her a legacy]:—Held, that this was not a gift to a class consisting of all the testator's nephews and nieces, but to the children only of those brothers and sisters who were specifically named. *In re Hull's estate*, 21 Beav. 314.

Bequest to A for life, and afterwards to his children, and in default "then" unto the persons "of the blood or next-of-kin" of the testator "as would by virtue of the Statute of Distributions, have become and been then entitled thereto in case the testator had died intestate." A died without issue:—Held, that the class comprising the ultimate gift was to be ascertained on the death of the testator and not of A, and that the class took as tenants in common, notwithstanding the exclusion of the testator's widow. *Dornes v. Bullock*, 25 Beav. 54.

Survivorship as to a class in a gift after the death of the tenant for life, referred to the death of the testator and not to the death of the tenant for life. *Evans v. Evans*, 25 Beav. 81.

Gift to A for life, and after her decease to "the surviving children of B and C, except the youngest son of B," who was to have 30*l.* to his share more than the others. The will proceeded, "should either of the said children die leaving no issue, his or her share to be then equally divided amongst the survivors:"—Held, that the children of B and C took vested interests at the death of the testator, in remainder

expectant on the decease of A with a gift to the survivors in the event of any one dying without issue in that interval. *Ibid.*

On a gift, after a tenancy for life, to a class equally, with benefit of survivorship upon their severally attaining twenty-one, the survivorship was held to refer to the attaining twenty-one, and the representatives of one who attained twenty-one, but died in the lifetime of the tenant for life, were held entitled to a share. *Knight v. Knight*, 25 Beav. 111.

Under a bequest in trust for all the sons and daughters of A, B and C (who were living) who shall attain twenty-one, it was held that the class was not to be ascertained on the first of the class attaining twenty-one, in consequence of the will containing a power of maintenance and advancement, whether they shall or not have attained twenty-one, and notwithstanding the liability of the share to be lessened by the subsequent addition to the class entitled to the entire fund. *Iredell v. Iredell* (No. 2), 25 Beav. 485.

Gift to "issue" after the death of a tenant for life, held to include issue of every degree. *Maddock v. Leff*, 25 Beav. 531.

Bequest to persons for life, and after their deaths "unto their and each of their issue, and the survivor or the survivors of them on their severally attaining twenty-one, in equal proportions." On the death of the last tenant for life there were three generations of issue living:—Held, that all who survived and attained twenty-one participated in the fund. *Ibid.*

Bequest of 100*l.* to the testator's two sisters and his ornaments to be equally divided amongst the unmarried ones:—Held, that the class of unmarried daughters was to be ascertained at his death. *Blagrove v. Coore*, 27 Beav. 138.

Bequest of shares, the profits to be invested and the interest applied in the education of the children of A and B, in equal shares: "and on their attaining twenty-one the whole to be sold and divided equally among them." There was a gift over if A and B died without issue. A and B had no child at the testator's death:—Held, that all the children of A and B took, and that the class was not limited to those born when the first attained twenty-one; and, secondly, that the children of A and B took *per capita* and not *per stirpes*. *Armitage v. Williams*, 27 Beav. 346.

Gift, after a previous life estate to C, to the children of W who should be living at the death of the testator and C:—Held that a child of W, who was born after the death of the testator and survived C, was included in the class and took a share. *Fox v. Garrett* (No. 2), 28 Beav. 19.

Bequest to the testator's two sisters for their lives, and after the death of the survivor "to be equally divided between the testator's surviving brothers and sisters or their children equally." The brothers and sisters having all died in the life of the last tenant for life,—Held, that those children only who survived the tenant for life participated, and that they took *per capita*. *Atkinson v. Bartrum*, 28 Beav. 219.

Survivorship held to apply, not only to the original but to the substituted class. *Ibid.*

A testator bequeathed legacies of "500*l.* a piece to each child that may be born" to either of the children of my brothers:—Held, that the class included only the children coming into *esse* between the date of

the will and the death of the testator, and that children born at the date of the will and those born after his death (unless *en ventre sa mère* at that period) were excluded. *Townsend v. Emly*, 28 Beav. 429.

(2) *Distribution per Capita or per Stirpes.*

A direction in a will for trustees to apply the whole or so much as they should think necessary of the income of property until the period of distribution towards the maintenance, education, and advancement of testator's grandchildren *per stirpes*:—Held, not to afford ground for presuming that he intended a division *per stirpes* of the capital. *Neckolds v. Locke*, 8 Kay & J. 6.

The testator had a son and two daughters (A and C) living, another daughter (B) was dead having left five daughters. He bequeathed 15,000*l.*: as to 5,000*l.* for A for life, with remainder to her children; as to 5,000*l.*, to the five daughters of B, and as to the remaining 5,000*l.* to C for life, with remainder to her children. He then gave the residue "equally amongst his son, his daughter A, the five daughters of B and his daughter C, to be settled as he had directed the three sums of 5,000*l.* upon them and their issue":—Held, that the five daughters of B took *per capita*, so that each was entitled to one-eighth of the residue. *Tyndale v. Wilkinson*, 28 Beav. 74.

(3) *Children.*

Where a testator bequeathed a fund in trust for the children of his late sister A (the issue of her daughter B excepted) and of his sisters C and D *per stirpes*:—Held, that grandchildren of C were entitled to participate. *In re Crawhall's Trust*, 8 De Gex, M. & G. 480.

(4) *Illegitimate Children.*

In order to enable illegitimate daughters to take under a bequest to daughters, it is necessary to impute to the testator a knowledge of the state of the family; but though such knowledge will not be presumed as a matter of course, it is not necessary that it should be strictly proved if it can be reasonably inferred from facts *dehors* the will. *Re Herbert's Trusts*, 29 Law J. Rep. (N.S.) Chanc. 870; 1 Jo. & H. 121.

A testator had only one illegitimate nephew (John) and only one legitimate nephew (William), and he had no nieces. By his will he gave a legacy to John, whom he described as "his nephew," and he gave his residuary estate "to the children lawfully begotten of his nephews and nieces":—Held, that the children of John participated in the residue. *Tugwell v. Scott*, 24 Beav. 141.

Bequest to "A and her daughters" equally. A had an illegitimate daughter at the date of the will, and never had any other daughter. A predeceased the testator:—Held that legitimate daughters alone could take under this bequest, and that the construction was not altered by the circumstance that in the same will there was a bequest to B and her son John, the son John being illegitimate. *Kelly v. Hammond*, 26 Beav. 36.

(C) WHAT PROPERTY PASSES.

(a) *In general.*

Under the gift of "the plant and goodwill of my

business in Aldergate Street":—Held, that stock-in-trade and furniture in the house of business did not pass; but it appearing that the house was held by the testator on a lease of which a few years remained at a rack rent, and exclusively for the purpose of the business:—Held, that the testator's interest in the house passed under the bequest. *Blake v. Shaw*, Johns. 732.

Under the 27th section of the Wills Act, a general bequest by a married woman will include property over which she has a power of appointment. *Bernard v. Minshull*, 28 Law J. Rep. (N.S.) Chanc. 649; Johns. 276.

A bequest of "all and singular other my property and estate" will include not only everything not before mentioned in the will, but everything the previous disposition of which fails, unless it appears from the will that the property comprised in the previous disposition was intended to be excepted for all purposes from the residuary bequest, and not merely for the purpose of giving it to the particular legatee. *Ibid.*

(b) *Monies.*

[*Manning v. Purcell*, 7 Law J. Dig. 418; 7 De Gex, M. & G. 55.]

A testator, after directing payment of debts, &c., gave to his wife for life the interest of all sums of money he might die possessed of; after her decease he gave all such "interest money" to his daughter for life, and after her decease he gave the principal and interest to be divided between his daughter's children. The testator, at his death, was possessed of 455*l.* cash, besides furniture, farming stock and a farm at a yearly tenancy:—Held, that there was a specific bequest of the money only, and an intestacy as to the rest of his property; and that the debts, &c. must be paid out of his general estate. *Larner v. Larner*, 26 Law J. Rep. (N.S.) Chanc. 668; 3 Drew. 704.

A married woman having a power of appointment over trust funds, and being also entitled to considerable sums of money, consisting partly of cash at the bank, and partly of money held by the bankers on deposit-notes, gave, by her will, certain pecuniary legacies, which she directed to be paid out of any monies of or to which she might be possessed or entitled at the time of her decease, and then gave all the residue of the monies of which she might, at the time of her decease be absolutely possessed to B and K absolutely:—Held, that the residuary bequest carried, not only the cash at the bank, but also the money held on deposit. *Langdale v. Whitfield*, 27 Law J. Rep. (N.S.) Chanc. 795; 4 Kay & J. 426.

An officer in the army died abroad, having by his will, made the day before his death, (after giving two legacies of 10*l.* each, and directing his carpet-bag, portmanteau and sea-chest to be sent to England to his father), directed that "the remainder of his money and effects might be expended in purchasing a suitable present for his godson." After payment of the testator's debts there remained in the hands of the paymaster of his regiment a sum of about 11*l.* At the time of his death, the testator was entitled to a reversionary interest in one-third part of two sums of 2,397*l.* consols, and 11,344*l.* consols:—Held, that, upon the context of the will, the testator's reversion-

any interest in the above sums did not pass to his godson by the direction that "the remainder of his money and effects might be expended in purchasing a suitable present for his godson." *Borton v. Dunbar*, 29 Law J. Rep. (n.s.) Chanc. 572; 2 Giff. 221.

A testatrix, possessed of a sum of stock, made her will, and bequeathed "all the money I may die possessed of." She died possessed of no money, but of some personal chattels:—Held, that the intention of the testatrix could only be applied to the stock, and that it passed by her will, and did not form part of the residue. *Chapman v. Reynolds*, 29 Law J. Rep. (n.s.) Chanc. 594; 28 Beav. 221.

Cash of a testatrix at a savings bank as to which she had given notice requiring payment, and which only awaited her receipt, held to pass by a bequest of "all her ready money." *In re Powell's Trust*, Johns. 49.

But sums secured to her on notes of hand, held not to pass by that bequest, although preceded by a direction for payment of her funeral and testamentary expenses. *Ibid.*

In the absence of any other bequest of the residue of testator's personal estate and effects, a bequest of any "money" which may remain after payment of his debts, includes the general residue of the personal estate not specifically bequeathed and which by law is liable to the payment of testator's debts. Such a bequest of "money," held to pass testator's reversionary interest in a sum charged on real estate. *Sticks v. Barré*, Johns. 54.

A share in long annuities, held, upon the context, to pass under the words "remaining sum or sums of money." *Grosvenor v. Dutton*, 25 Beav. 97.

South Sea Stock and 3*l.* 5*s.* per cents, held, on the context, to pass by the expression "surplus money." *Newman v. Newman* (No. 1.), 26 Beav. 218.

A testatrix bequeathed specific sums of South Sea stock and 3*l.* 5*s.* per cents. to her sister for life, and at her death she left "this money in trust to her niece" to pay certain legacies which did not exhaust the whole. She authorized her sister and niece (who were her executrices) to sell out the residue of her money in the 3*l.* 5*s.* per cents. over the sum she had mentioned, for payment of her debts, and proceeded "then, if there is any surplus money, I give it to my niece":—Held, that the niece took the surplus of both the funds. *Ibid.*

(c) *Dividends.*

A testator bequeathed stock in a company to V for life. At a meeting of the company, held on the 26th of May 1858, a resolution was passed, declaring a bonus of 470*l.* on each share, payable on and after the 10th of June then next. The sum applicable to this payment arose from a large sum recently paid to the company on the compromise of a suit. The testator died on the 29th of May, between the time of the declaration of the bonus and the time appointed for payment:—Held, that the bonuses formed a part of the general estate of the testator, and did not belong to V. *Lock v. Venables*, 29 Law J. Rep. (n.s.) Chanc. 179; 27 Beav. 598.

Whether, if the resolution had been passed after the death of the testator, this sum would have belonged to the tenant for life—*quære*. *Ibid.*

(D) WHAT INTEREST VESTS.

(a) *Absolute.*

A testator devised and bequeathed real and personal estate to trustees, upon trust for his wife for life, and after her decease to sell and divide the proceeds among his five children (whom he named) "or their heirs or assigns." One of the children died in the lifetime of the testator's widow, leaving her husband and a son and a daughter surviving. The husband took out letters of administration to her estate, and on the death of the testator's widow claimed one-fifth of the produce of part of the real estate, which had been paid into court:—Held, that the gift to the five children was absolute, and that the share of the deceased daughter belonged to her husband as her administrator. *In re Wallon's Estate*, 25 Law J. Rep. (n.s.) Chanc. 509; 8 De Gex, M. & G. 175.

An absolute gift of a legacy is not cut down to a life interest by the addition of a general power of disposition at the death of the legatee. *Re Mortlock's Will*, 26 Law J. Rep. (n.s.) Chanc. 671; 3 Kay & J. 456.

Quære—if the power had been limited. *Ibid.*

A bequest to a daughter of "all the interest of my monies in the public funds," followed by a bequest "in the event of her dying without issue" to the testator's brother and sister,—Held, to be a gift not of a life interest merely, but of the principal absolutely. *In re Andrews*, 29 Law J. Rep. (n.s.) Chanc. 291; 27 Beav. 608.

A testator bequeathed 3,000*l.* upon trusts for investment, and as to 1,000*l.*, part thereof, in trust for his daughter E, and to apply the interest for her benefit until she should attain twenty-one or marry, and afterwards one moiety of the principal to be assigned to her, and the income of the other moiety to be paid to her for life, with remainder to her children; and he declared precisely similar trusts of two other sums of 1,000*l.* in favour of his daughter M and his niece S and their children respectively; and provided that in case of the death of any or either of his said daughters or niece after the age of twenty-one years, without leaving a child or children, the moiety or moieties thereinbefore reserved for the benefit of the child or children of her or them so dying should from thenceforth remain vested in his executors, as to the income thereof, in trust for the survivors and survivor during her or their natural lives or life; and as to the principal, in trust for the child and children of such survivor and survivors, in such manner, &c. as thereinbefore prescribed with regard to the original reserved moieties. E & M both died in the lifetime of S, leaving issue. S died without having been married:—Held, first, that there was an absolute gift to S, subject to certain modifications, and, those modifications failing, the original gift remained in force; secondly, that the words "survivors and survivor" must be taken in their natural sense, and could not be read as "others and other"; consequently, the gift over on the death of S, without issue, did not take effect. *Re Cobbett's Will*, 29 Law J. Rep. (n.s.) Chanc. 458; Johns. 391.

Bequest of a legacy to the plaintiff for her sole use and benefit, "and in the event of her death then" bequest thereof to her youngest surviving son:—

Held, that the event contemplated was a death in testator's lifetime; and that the plaintiff having survived him, was entitled absolutely. *Lord Douglas v. Chalmers* (2 Ves. jun. 501), observed on. *Schenk v. Agnew*, 4 Kay & J. 405.

Bequest of 1,000*l.* to a married woman for her own use, nevertheless during her life to pay the dividends for her separate use, independent of any husband,—Held, an absolute interest. *Gurney v. Goggs*, 25 Beav. 334.

Two bequests were made to the same person in successive sentences, and in the latter the words "for life" were added:—Held, that the limitation applied to the second gift only, and that the legatee took the first absolutely. *Gower v. Towers*, 26 Beav. 81.

A testator having five daughters gave a legacy to one and the residue to the remaining four (by name) "and their issue," but he afterwards directed that any subsequent born daughters and their issue should be entitled to equal shares with the four daughters. One of the four died without issue in the life of the testator:—Held, that there was no intestacy, that the daughters took as a class, and that those who survived took absolutely. *Re Stanhope's Trusts*, 27 Beav. 201.

Bequest of personality to five daughters "and their issue":—Held, that they took absolutely. *Ibid.*

Bequest of consols in trust to purchase a life annuity for a lady to be held for her separate use, without power of anticipation; and in case of her illness or incapacity, the testator gave the trustees a discretionary power as to the application of the annuity, for her maintenance, support or otherwise for her personal benefit. The legatee being unmarried,—Held, that she was entitled to a transfer of the consols. *Re Browne's Will*, 27 Beav. 324.

(b) For Life.

A residuary estate was bequeathed to trustees upon trust to permit the testator's wife to receive the income for life, and also to apply such parts of the capital to her own use as she should think proper, and after her decease to apply the residue to such persons as she by will should direct. The widow used no part of the capital, but by her will she directed that the property should be distributed as directed by the will of her husband:—Held, that the widow took a life interest only in the fund, with power to apply the capital for her own benefit, and if not so disposed of, with a power to appoint it by will. *Scott v. Josselyn*, 28 Law J. Rep. (N.S.) Chanc. 297; 26 Beav. 172.

A testator gave leasehold property to M R for life, and at her death to A R and her children; but if they should die without issue, in that case the property was to be divided between four persons named. A R had no children at the death of the testator or at the death of the tenant for life:—Held, affirming the decision of the Master of the Rolls, that A R took only an estate for life, with remainder to her children. *Audley v. Horn*, 29 Law J. Rep. (N.S.) Chanc. 201; 1 De Gex, F. & J. 226; 28 Law J. Rep. (N.S.) Chanc. 293; 26 Beav. 195.

The rule in *Wild's case* held not to apply to personality. *Ibid.*

Gift by will of all the testator's funded property and other personal and real estate to his daughter S,

she paying all his debts, "and the said S shall in no way dispose of any of the said funded property, but to hold the same for her natural life; and if she should die without issue, the said landed property shall go to J for life. I will and direct that all the funded property shall go to W and her heirs for ever":—Held, that S took the funded property for her life only, and that on her death it belonged to W. *In re Bank's Trust, ex parte Hovell*, 2 Kay & J. 387.

Gift "to survivors of a class and the issue of such survivors, such issue to take the parent's share only" is a gift to the parents for life with remainder to their children, and not a substitutionary gift. *Parsons v. Coke*, 4 Drew. 298.

A testatrix bequeathed a legacy to A, his executors, &c., "but in case he should die leaving lawful issue," she bequeathed it to A's children. A survived the testatrix:—Held, that A took a life interest only. *Johnson v. Antrobus*, 21 Beav. 556.

Bequest to a married woman "for the benefit of herself and such children as she then had or might thereafter have by her then husband, free from the control of her husband":—Held, that she took for life with remainder to such children. *Jeffery v. De Vitre*, 24 Beav. 296.

Farming stock and implements of husbandry are not things *quæ ipso usu consumuntur*, and therefore a gift of them for life does not confer upon the legatee for life the absolute interest in them. *Groves v. Wright*, 2 Kay & J. 347.

A farmer bequeathed farming stock and implements of husbandry, and residuary real and personal estate to trustees upon trust to permit his wife to have the full benefit and enjoyment of the same for life, and then to sell them and divide the proceeds among his children. The widow, after the testator's death, with the assistance of her son, who was one of the trustees and a legatee in remainder, carried on the testator's farm, and took additional land to farm on lease in the name of her son. On the death of the widow,—Held, that the lease of the additional land, and the stock thereon, belonged to her estate, and the stock on the original farm to the estate of her husband. Held, that the son was bailiff of the widow, and on his making a claim to be beneficially entitled to the additional land and the stock thereon, which was not supported by any evidence proving a gift of it to or a purchase by him, he was made to pay the costs occasioned by such claim; but an inquiry was directed whether any and what sum was proper to be allowed him as bailiff. *Ibid.*

A testator gave the "residue of his estate and effects" to trustees upon trust to sell sufficient to pay his debts, and after payment to hold "his said residuary estate and effects" in trust, to pay "the rents," interest, dividends, and annual produce to A for life. There was a power to let and sell with the consent of A:—Held, that A was entitled to enjoy leaseholds in specie. *Hind v. Selby*, 22 Beav. 373.

(c) Joint Tenancy or Tenancy in Common.

Bequest of a legacy upon trust to pay, assign and divide the same, upon the death of the testator's daughter, unto and equally between all her children if more than one, as joint tenants, and if but one, then to such one child:—Held, to create a tenancy in common amongst the legatees. *Booth v. Alington*, 27 Law J. Rep. (N.S.) Chanc. 117.

Gift of a legacy upon trust to pay the income to wife for life, and after her death to pay the interest to the testator's three sons "for their natural lives, in equal shares"; and after their decease he gave one-third of the fund to the children of each of them in equal shares and proportions, to be paid when and as they should respectively attain the age of twenty-one years, and directed that the interest be paid to the children until they should attain twenty-one; and he gave the residue to the same three sons:—Held, that the life interest was, notwithstanding the words *in equal shares*, a joint tenancy; and one of the three sons, having survived, took the whole income; and that on the death of the survivor the capital was divisible among the children of the sons in three shares *per stirpes* and not *per capita*. *Bagley v. Cook*, 3 Drew. 662.

Bequest to A and B with benefit of survivorship; as to the moiety of B at B's death to A, her executors, administrators and assigns:—Held, that A and B took as tenants in common, and A having died in the testator's life, that her share lapsed, and that B took a life interest only in the other moiety which fell into the residue on his death. *Paterson v. Holland*, 28 Beav. 347.

(d) Trust or Beneficial.

A testator bequeathed to his wife all his property "under the firm conviction that she would dispose of and manage the same for the benefit of her children":—Held, that under these words the wife took the property of the testator only as a trustee, for the absolute benefit of the children. *Barnes v. Grant*, 26 Law J. Rep. (N.S.) Chanc. 92.

G P gave the residue of his personal estate to trustees for the wife for life, and after her decease to his nephew R P, for his own use and benefit absolutely. After the death of G P an undated letter was found in his handwriting, addressed to R P, entreating him, as a last request, to accept the letter in explanation, lest there should be anything not fully explanatory of his intention in the terms of his will. The paper then went on to make certain bequests in very vague and ambiguous language. It was admitted to probate. One of the Vice Chancellors decided that the absolute gift of the residue contained in the will was cut down to a life estate by the terms of the letter; but on appeal, it was held, that though the letter was a testamentary instrument, it was uncertain in its meaning, and did not revoke or cut down the absolute gift to R P in the will; and, moreover, that the words of the letter were not sufficient to create a trust which this Court could enforce. *In re Pinckard's Trust*, 27 Law J. Rep. (N.S.) Chanc. 422.

In order to raise a trust by precatory words in a will there must be a certain subject-matter and a certain object; but it is not necessary that the object should be so defined that it can be distinctly ascertained; if there is a definite object intended, that is a sufficient creation of a trust to exclude the legatee from taking beneficially. *Bernard v. Minshull*, 28 Law J. Rep. (N.S.) Chanc. 649; Johns. 276.

Thus, where a testatrix bequeathed to her husband absolutely a specific sum of £3,000, and requested that after reserving to his own absolute use and benefit 2,000, he would make such disposition of the remainder as he might deem most desirable to

carry out her wishes, often expressed to him by word, and it appeared that she had never expressed any wishes on the subject, it was held, that there was a definite object intended; and though that object could not be ascertained, there was a sufficient creation of a trust to exclude the husband from taking the beneficial interest in the remainder of the fund, although the trust itself failed. *Ibid*.

A testator gave his personal estate to his wife, declaring, although he had given her the whole, he desired if his children conducted themselves to her approbation, she would leave such property equally amongst all his children. The widow by her will gave the property to those living at her decease. The Court held, the widow took subject to a trust, and on both wills declared the four surviving children entitled. *Bosser v. Kinnear*, 2 Giff. 195.

Bequest in trust to pay the interest to the testator's wife for life, for the separate use of his wife and their children, and applied for the maintenance and support of herself, and the maintenance, education, clothing and support of such children. The widow mortgaged her interest and became insolvent:—Held, that the trust was only for the benefit of those children requiring support, and a reference was directed to ascertain what part of the income was necessary for that purpose. *Carr v. Living*, 28 Beav. 644.

(e) Separate Use.

Bequest in case a husband and wife should not at testator's death be living together as husband and wife, to the wife "absolutely":—Held, upon the construction of the will, to be for her separate use. *Shewell v. Dwarries*, Johns. 172.

And the bequest upheld, notwithstanding the rule which avoids gifts providing for a future separation. *Ibid*.

(E) ON WHAT PROPERTY CHARGEABLE.

[*Tench v. Cheese*, 7 Law J. Dig. 422; 6 De Gex, M. & G. 453.]

The testator, by his will, directed his trustees to set apart or purchase a sum of consols for a legacy; and by a codicil he directed that, if at his death he had not so much consols, his trustees should purchase the deficiency out of the rents and profits of his freehold estates:—Held, that the general personal estate was thereby exonerated. *Bessant v. Noble*, 26 Law J. Rep. (N.S.) Chanc. 236.

The testator possessed, at the date of the codicil and at his death, a sum of imperial annuities, which many years after his death were converted, by act of parliament, into consols:—Held, that no part of this fund was applicable to make up the legacy of consols. *Ibid*.

The principle of the decisions in reference to the question whether a charge on real estate is affected by reason of a residuary devise, is the same in the case of legacies as in that of debts, and is this, that where residuary real and personal property is given in one mixed fund to the executor, who is to pay debts and legacies, there legacies as well as debts are charged upon the real estate. *Wheeler v. Howell*, 8 Kay & J. 198.

Testator, after bequeathing a legacy and expressly charging part of his real estate with an annuity to the legatee, devised and bequeathed all the rest,

residue and remainder of all and singular his real and personal estate (subject to his debts, funeral and testamentary expenses) to trustees, whom he had also appointed executors, upon certain trusts:—Held, following *Francis v. Clemow* (Kay, 435), that the legacy was well charged upon the real estate. *Ibid.*

A testator gave various annuities for lives, with bequests over of them and charged them upon his freehold and leasehold estates. He gave all his real and personal property to trustees in trust to pay the rents of his freehold, copyhold and leasehold estates, and the interest of all his stock in the public funds, with the interest of all mortgages, annuities and other securities of which he might die possessed to his son for life, with a disposition in favour of the son's children; and after his death without any, (which happened,) the testator gave his freehold, leasehold and copyhold estates to one daughter and her issue, and all his funded property and other personal estate to another daughter and her issue:—Held, that the gift of the leasehold to one daughter was specific, but that the gift of the funded property to the other was not, and that the latter was consequently chargeable with the annuities in priority to the former. *Fielding v. Preston*, 1 De Gex & J. 438.

Held also, that in case of its insufficiency, the freeholds and leaseholds specifically devised and bequeathed, must contribute rateably to the payment of the annuities. *Ibid.*

Held also, that for the purpose of this contribution, the values of the freeholds and leaseholds must be taken at the death of the testator, and not at the death of the tenant for life. *Ibid.*

A testator "bequeathed" legacies and "devised and bequeathed annuities or rentcharges," and he charged them on a real estate, and subject thereto he devised that real estate to A. He dealt similarly with another real estate, and he bequeathed his personal estate in trust to pay his debts and certain specified expenses, and to pay the rest to a charity:—Held, that the annuities and legacies were charged on the real estate, and that the personal estate was exonerated. *Ion v. Ashton*, 28 Beav. 379.

(F) VESTED OR CONTINGENT.

(a) *In general.*

A testator gave the interest of a sum of money to a son for life, and in case of his death, leaving lawful issue, "my executors are to divide the principal amongst his surviving children, paying an equal proportion to each as he or she shall attain twenty-one respectively, but if my son should die without lawful issue, I bequeath a moiety of the capital to be disposed of as my said son shall think fit." The son died a bachelor and intestate:—Held, that he had an absolute interest in a moiety of the fund, and that it passed to his administratrix. *In re Maxwell's Trusts*, 26 Law J. Rep. (N.S.) Chanc. 854; 24 Beav. 246.

A legacy given absolutely will not be divested if the event on which it is given over does not strictly happen. After the ceasing of a life estate, "a gift to three persons equally, or in case of the death of each or either of them, to be divided between the survivors or survivor, or their representatives":—Held, on

the death of the three before the tenant for life, that their legal personal representative was entitled to the fund. *Page v. May*, 27 Law J. Rep. (N.S.) Chanc. 242; 24 Beav. 323.

A testator devised his real estate to trustees upon trust for one for life, and afterwards upon trust to sell and hold the proceeds of the sale and the rents in the mean time in trust to pay H A D the sum of 500*l.* sterling when she should attain the age of twenty-five years. He then directed that the "said legacy" should carry interest from the time of the death of the tenant for life, such interest to be paid in and towards the maintenance, education, and support of H A D, until she should attain the age of twenty-five years. He then directed that, subject as aforesaid the said trust monies should remain and be in trust for certain parties. One of the Vice Chancellors, on the authority of *Batford v. Kibbell* and *Watson v. Hayes*, decided that the legacy was contingent, and that, as the legatee did not attain twenty-five, the 500*l.* belonged to the residuary legatees of the testator; but, upon appeal,—Held, reversing his Honour's decision, that as the direction for sale was absolute in every event, and as the legatee survived the tenant for life, the legacy vested absolutely in her. *In re Hart's Trusts*, 28 Law J. Rep. (N.S.) Chanc. 7; 3 De Gex & J. 195.

A testator gave a portion of his personal property to trustees, to invest the same in the securities therein mentioned, and pay out of the proceeds an annuity of 5*l.* to T P, and apply the residue of the interest, &c. towards the maintenance and education of W C until twenty-one, and on his attaining that age to transfer the principal of the trust-monies charged with the said annuity of 5*l.* unto W C absolutely. But if W C should die before twenty-one, and during the life of T P, then the trustees were to pay T P for life an annuity of 10*l.* in lieu of the 5*l.*, and to pay the remainder of the interest during the life of T P, as well as the principal after her death, to a third person absolutely. T P, the annuitant, died before W C, but W C died a minor:—Held, that the gift to W C was an absolute vested interest in him, and notwithstanding he died under twenty-one the estate was not divested, since the precise contingency of W C dying under twenty-one and during the life of T P never happened; that consequently the representatives of W C were entitled to the property. *Potts v. Atherton*, 28 Law J. Rep. (N.S.) Chanc. 486.

A testator directed his trustees to pay the dividends of 5,000*l.* to his wife for life, and after her death to pay the principal to P and W; but if either died in the lifetime of the wife, then to pay the whole to the survivor of them, P and W, his executors, administrators or assigns. P died in the lifetime of the wife. Upon a claim by W,—Held, reversing a decision of the Master of the Rolls, that he was absolutely entitled in remainder to the fund during the life of the wife. *White v. Baker*, 29 Law J. Rep. (N.S.) Chanc. 577; 2 De Gex, F. & J. 55.

The use of such words as "pay and transfer" as the only words of gift in a deferred bequest does not make such bequest contingent; the true criterion is what was the reason for the postponement. If it was the position of the fund, as in a gift to one for life, and after his death to others, the bequest in remainder vests at once; but if it was the position of

for life, and if she should leave any child or children, to be divided among such children, whose interests were to be vested at twenty-one, with a direction to apply the interest of the fund towards the maintenance of the daughter's children, and a power for the trustees, with the daughter's consent during her life, to make advancements to her children not exceeding their respective presumptive shares, with a gift over if no child attained twenty-one:—Held, that a child who attained twenty-one and died in the daughter's lifetime took no share. *Sheffield v. Kennett*, 4 De Gex & J. 592; 27 Beav. 207.

(G) SPECIFIC OR DEMONSTRATIVE.

A testatrix had power, under her brother's will, to appoint real and personal estate; she gave the real estate to trustees to raise 1,000*l.* and pay the amount as legacies to various persons, and subject thereto for E P and his heirs. She then gave several legacies, payable out of her own personal estate, and other legacies payable out of an unappointed moiety of her brother's personal estate, after the decease of his widow, and she directed the duty on all the foregoing legacies to be paid out of her personal estate, and if deficient for full payment either of duty or legacies, such deficiency was to be made good out of the said real estate, on which she charged the same. By two codicils the testatrix left other legacies, and directed that the sums bequeathed out of her brother's estate should be paid, with the other legacies, immediately after her decease:—Held, that the legacies given by the codicils were charged on the real estate, and that the legacies payable out of the brother's estate were not specific, but demonstrative. *Williams v. Hughes*, 27 Law J. Rep. (n.s.) Chanc. 218; 24 Beav. 474.

A testatrix, by her will, gave all her real and personal estate to be converted into money, on trust, to pay debts, &c. and "the following legacies"; then followed a legacy of 10*l.* and a legacy of 5*l.*, and the will proceeded thus: "Also I give to my nephew G T the sum of 2,000*l.*, in which sum, or thereabouts, he now stands indebted to me, subject nevertheless to and I hereby charge the same with the payment of the following annuities and sums of money, that is to say, to—" &c. The will, after declaring when these legacies were to be paid, went on thus: "Provided always, and I hereby declare that I do not intend by the legacy of 2,000*l.* hereinbefore bequeathed to my said nephew, G T, to exonerate and release him from the debt which may be due from him to me of the time at my decease. But I direct that whatever sum or sums of money shall be due or owing from him to me at the time of my decease, shall be taken and considered in part or in satisfaction (as the case may be) of the said legacy or sum of 2,000*l.*, and shall be reckoned and accounted for by him accordingly." G T became insolvent, and was never able to satisfy the debt due to the testatrix's estate:—Held, by the *Lord Chancellor* and *Lord Cranworth* (*Lord Wensleydale dissentiente*), that the deficiency to meet the annuities and legacies charged on the 2,000*l.* must be made up out of the general assets. *Vickers and Philpot v. Pound*, 28 Law J. Rep. (n.s.) Chanc. 16; 6 H.L. Cas. 885.

A testator, by his will, stated that he had lent his money to various persons named on their respective notes of hand, and to sundry other persons, whose

names and notes would be found among his papers; he then said, "Now my will is, that the monies as aforesaid be disposed of as follows"; the testator then gave legacies to the amount of 9,900*l.* At his death none of the enumerated investments existed:—Held, that the legacies were not specific, but general legacies. *White v. Wakley*, 28 Law J. Rep. (n.s.) Chanc. 79.

If a specific bequest of shares is made under an impression that they are not subject to any increase, an accidental increase caused by a payment out of the general personal estate of the testator, will not pass to the legatee. *Maclaren v. Stainton*, 29 Law J. Rep. (n.s.) Chanc. 401; 27 Beav. 460.

A testator, under the impression that he was not indebted, dealt with his entire estate, and made a specific gift of shares held by him in a company. A suit was afterwards instituted against his executors by the company, and he was found largely indebted. The debt was paid out of the testator's general personal estate, and in consequence large bonuses were declared upon all the shares of the company. Upon a claim by the specific legatee,—Held, that the bonuses on the bequeathed shares formed a part of the general personal estate of the testator, and did not belong to the specific legatee. *Ibid.*

A testator gave to his son all his furniture, plate, &c., and all other his goods and chattels whatsoever, not being money or securities for money, whereof he might be possessed at the time of his decease, and in a subsequent part of the will he bequeathed to his trustees "all my property, as well real and personal or mixed, not hereinbefore disposed of":—Held, that although "goods and chattels" might, if unrestrained by the subsequent part of the will, have constituted a residuary bequest, yet that a residuary bequest being found in the subsequent part of the will, the gift to the son was specific and not residuary. *Mullins v. Smith*, 1 Dr. & Sm. 204.

A testator gave a legacy of 500*l.* 3*l.* per cent. consols or other stock into which the same might be converted, or in case he should not be possessed of such stock, then he gave a legacy of as much sterling money as that amount of stock would have been worth at his decease; and by a subsequent clause the testator gave another legacy of like stock to the same person in addition to the legacy already given, to be raised out of the proceeds of his residuary estate:—Held, that the first legacy, there being sufficient stock to answer it, was specific, but the second legacy, though expressed to be a substitute for the first legacy, was general. Distinction between specific, demonstrative and general legacies. An annuity is included under the term "legacy." *Ibid.*

Bequest of "household furniture, plate, linen, china, glass, books, pictures, plated articles, prints, and all and singular other my household furniture and effects, which at the time of my decease shall be in and about my said mansion-house":—Held, not to include articles exclusively of personal ornament and not adapted for the use or ornament of the house. *Tempest v. Tempest*, 2 Kay & J. 635.

Leaseholds specifically bequeathed to married women successively for life, for their separate use, with remainder to infants proved *damnum hereditas*. The Court decreed a sale, notwithstanding the executors had so far assented to the bequest as to put the first tenant for life into possession.

And the second tenant for life, who had declined the property in specie, was held nevertheless entitled to a life interest in the proceeds of the sale, and that without such life interest contributing to the charges on the estate which accrued since she became entitled in possession. *The Earl of Lonsdale v. the Countess of Berchtoldt*, 3 Kay & J. 186.

Where a benefit is conferred by will for a specific purpose, although that purpose cannot be achieved *modo et forma* as intended by the testator, still, if there is a clear intention on the part of the testator that the benefit should be conferred, if the testator has excepted from the general property bequeathed to the residuary legatee, the latter is entitled to the benefit of the bequest, and to enjoy it in any manner he may think fit. *Ibid*.

And where the purpose for which one of the two bequests, given by will to the same parties, is expressed in the will to be for the better enjoying of the other, the mere circumstance that the legatees cannot enjoy the latter shall not deprive them of the benefit of the former. *Ibid*.

Therefore, where the interest of a fund was directed to be laid out in payment of the rent and charges of leaseholds specifically bequeathed, and the leaseholds proved *damnosa hereditas*, and could not be specifically enjoyed, and were therefore sold by order of the Court, held, that the legatees were entitled, not only to the proceeds of the sale, but also the interest of the fund set apart for the better enjoyment of the leaseholds in specie. *Ibid*.

A testator bequeathed to A B his furniture, &c., which at the time of his death should be in the house he then occupied at X. The testator at his death had ceased to occupy that house, and had no furniture, &c. therein:—Held, that the bequest failed. *Spencer v. Spencer*, 21 Beav. 548.

The testator bequeathed to C W C the full amount of whatever sum H H might be indebted to C W C at the testator's decease. The testator added, "And it is my positive will that the amount required for the payment of the same, whatever it may be, be taken out of the amount of that share to which H H becomes entitled to a life interest under my will." The share of H H proved insufficient to pay the debt:—Held, that this was not a demonstrative legacy to C W C, and that this debt could only be satisfied out of the assets so far as the share of H H therein would extend. *Coard v. Holderness*, 22 Beav. 391.

Bequest of legacies to be transferred by the executors "either in the three per cent. consols or three per cent. reduced stock standing in the testator's name" within twelve months after his decease. The transfer was made after the twelve months:—Held, that, notwithstanding the discretion, the legacies were specific, and that the legatees were entitled to all the dividends accruing thereon subsequent to the testator's death. *Chester v. Urwick* (No. 1), 23 Beav. 402.

In June a testator directed his bankers to purchase 1,127 francs French rentes for him. They entered the purchase in their books, but never transferred the amount into the testator's name; they had, however, sufficient rentes to answer it, which they considered they held for the testator. In July following the testator bequeathed "the annual rent of 1,127 francs inscribed in his name in the book of the public

debt of France" to A B:—Held, that A B was entitled to 1,127 rentes although the testator had none in his name, and although on the balance of previous transactions in rentes with his bankers he was entitled only to 708 francs in rentes. *Ellis v. Eden*, 25 Beav. 482.

A testator directed his furniture in Gloucester Square to be applied in payment of his debts, and in a subsequent part of his will he bequeathed his furniture in England to his sisters. The testator removed the furniture in Gloucester Square to another residence:—Held, that it did not pass to his sisters. *Blagrove v. Coore*, 27 Beav. 138.

A testator bequeathed "10,000 dollars Indiana 51. per cent. stock." He had, prior to his will, possessed that amount, but at that time it had been changed into 5,000 of that stock, some 2½ per cent. Indiana stock, and some canal stock, all of which he retained until his death:—Held, that the 5,000 dollars alone passed. *Gilliat v. Gilliat*, 28 Beav. 481.

When a testator has stock which accurately answers the description in his will, though different in amount, the description will not be extended to stock of a different description. *Ibid*.

A testatrix bequeathed to A B "the sum of 2,000*l.* long annuities standing in my name in the books of the Governor and Company of the Bank of England":—Held, that this was a specific legacy payable out of the long annuities, and not out of the general assets; and the testatrix, not possessing at the date of her will or her death, sufficient to pay the legacy, that it failed to the extent of the deficiency. *Gordon v. Duff*, in re *Ward*, 28 Beav. 519.

(H) CUMULATIVE OR SUBSTITUTIONAL

A testator, by a codicil to his will, gave 500*l.* free of legacy duty, out of his pure personal property, to a charity; and by a second codicil he gave and bequeathed to the same charity the sum of 1,000*l.*:—Held, reversing the decision of Wood, V.C., that the second legacy was subject to the same condition as the first, and was therefore payable out of the pure personality, and free of legacy duty. *Johnstone v. the Earl of Harrowby*, 29 Law J. Rep. (N.S.) Chanc. 245; 1 De Gex, F. & J. 183; Johns. 425.

The testator bequeathed to A for her life an annuity of 10*l.*, the annuity of 19*l.* 19*s.* upon the death of A, and the annuity of 50*l.* when the mortgage on his estate should be reduced to 500*l.*, "and which respective sums of 10*l.*, 19*l.* 19*s.*, and 50*l.*, as the case might be," were to be paid half-yearly:—Held, that they were cumulative. *Hartley v. Oatler*, 22 Beav. 449.

A testator bequeathed to A 1,000*l.*, part of a policy of 1,200*l.*, and the remaining 200*l.*, together with all advantages arising from the policy, to his widow. By a codicil he gave the 1,000*l.* to trustees for A and her children, and in case of A's death without children to his widow "or her heirs." The widow died, having bequeathed the 1,000*l.* to B, and A died afterwards without children:—Held, that B was not entitled, but that the next-of-kin of the widow (ascertained at her death, and not at the period of distribution,) took the 1,000*l.* by substitution. *In re Owen*, 23 Beav. 338.

By his will a testator gave 20,000*l.* to his daughter for life, with remainder to her children, to be vested at twenty-one or death under that age leaving issue. By a codicil, "instead of the 20,000*l.*," he gave 15,000*l.* to his daughter for life, with remainder to her children "or the survivors":—Held, that the gift by the codicil was not substitutional so as to make the limitations of it similar to those in the will, and therefore that children who died after attaining twenty-one in the life of the daughter were excluded as against the surviving children. *Haley v. Bannister*, 23 Beav. 336.

A testator gave a legacy of 7,000*l.* to his wife, and other similar legacies. By a codicil he gave a legacy of 6,000*l.* to his wife, and other legacies, and he directed "that so far as the codicil was in addition to any testamentary document he had already made, he wished it to take effect, and not cancel or revoke any prior document which might exist":—Held, that the legacies were cumulative. *Townshend v. Mostyn*, 26 Beav. 72.

A testator bequeathed to his niece 500*l.* owing to him from A B, and he directed that if his estate should not be sufficient to pay his legacies in full they should (exclusive of that to his nieces) abate proportionably, and if it should be more than sufficient they should be increased proportionably. The testator received the debt, and by a subsequent codicil, "in the place of the said intended legacy," gave his nieces 500*l.* to be paid out of his general personal estate:—Held, that the second legacies were substitutionary and subject to the same incidents, and that the nieces were not entitled to have them increased proportionably out of the undisposed of estate. *Duncan v. Duncan* (No. 2), 27 Beav. 392.

(I) CONDITIONAL.

A testator directed that his brother should be entitled to an equal share of the residue of his estate with his three sisters, subject to the condition that he should prove that he had received 150*l.* for professional services rendered during twelve consecutive months; and in the event of his death, or not leaving legal issue, or not having fulfilled the above condition, then his share of the estate and the accumulations, were to be divided between his three sisters, or their issue. The testator's brother died without having performed the condition, but leaving a widow and three children:—Held, that his representatives were entitled to his share. *Law v. Thorpe*, 25 Law J. Rep. (n.s.) Chanc. 75.

A testator bequeathed a sum of money to trustees for S S for life, and after her decease, upon trust for her children as she should appoint, and in default of appointment, for children equally, to be vested at twenty-one, and in default of appointment and in case such children should die before their interests vested, then in trust for the next-of-kin of his daughter S S at the time of her decease. S S never had any child:—Held, that the next-of-kin of the daughter were entitled. *Tennant v. Heathfield*, 25 Law J. Rep. (n.s.) Chanc. 197; 21 Beav. 255.

A legacy to a married woman upon condition that she absolutely convey, or cause to be conveyed, their interests in a portion of certain estates vested in trustees upon trust for herself for life, without power of anticipation, with remainder to her children, can-

not be paid to her as she is unable to comply with the condition. *Robinson v. Wheelright*, 25 Law J. Rep. (n.s.) Chanc. 385; 6 De Gex, M. & G. 535; 21 Beav. 214.

The Court cannot assist a married woman to convey an interest which is restricted from anticipation by her, although it be to enable her to receive a legacy given upon condition of such interest being absolutely conveyed to other parties. It is not an exchange, and confers none of the rights of election. *Ibid.*

An offer to settle the legacy as the Court should direct cannot vary the case. *Ibid.*

Where a prohibition is attached to a legacy, and dispensed with by the subsequent acts of the testator, by a codicil confirming the will generally the legacy is confirmed and the prohibition not revived. *Viollet v. Brookman*, 26 Law J. Rep. (n.s.) Chanc. 308.

A testator, by will, gave his daughter an annuity of 50*l.*, and, provided she did not marry under twenty-eight, a legacy of 1,000*l.*, both for her separate use. He gave her by a codicil 5,000*l.*, upon the terms "hereinbefore mentioned." Upon receiving proposals of marriage with her from a gentleman, the testator gave his "qualified consent," but said that he must hear from his daughter before he could make it absolute. He also promised by letter to give her 5,000*l.* stock at the time of her marriage. The daughter wrote to say that she consented, and the testator replied that he was too ill to attend to business, and on the following day he died. The daughter married the same gentleman:—Held (reversing the decision of the Master of the Rolls), that the daughter was only entitled to the 50*l.* annuity. *Yonge v. Furze*, 26 Law J. Rep. (n.s.) Chanc. 117, 352.

A testator bequeathed to J P, in case he should remain in Australia or out of this kingdom, 600*l.*, but if he should return to England, the further sum of 400*l.* J P was lost at sea whilst on his return to England:—Held, that the condition on which the 400*l.* legacy was given had not been performed. *Priestley v. Holgate*, 26 Law J. Rep. (n.s.) Chanc. 448; 3 Kay & J. 286.

A testator, by a codicil, said, "I renounce L B M, my daughter, from any benefit from my will; but should she follow the paths of virtue, and obedience to the wishes of my wife and my executors, they may give her by instalments, when they think proper, 200*l.*" The executors renounced. Upon a bill by L B M against the administratrix, —Held, that the daughter was entitled to the sum of 200*l.* *Maud v. Maud*, 29 Law J. Rep. (n.s.) Chanc. 312; 27 Beav. 615.

A testator gave a legacy to his son A, subject to a condition, that if on request he should refuse or neglect to execute a conveyance to his son B of A's share in the X estate, the legacy should not be paid or payable, and the said conditional bequest should be from thenceforth null and void. The testator, in a subsequent part of his will, gave his real and personal estate to trustees, upon trusts for sale, &c. After the date of his will, the testator bought A's share in the X estate:—Held, that the condition having been rendered impossible by the act of the testator, the legacy to A was absolute. *Walker v. Walker*, 29 Law J. Rep. (n.s.) Chanc. 856.

Testator directed, that "within three months after his death, in case any child or children of his son

should be then living, his executors should invest 5,000*l.* for such child, or if more than one, for such children equally, if his said son should attain the age of twenty-one." A subsequent clause was to this effect:—"And in case no child or children of my said son shall at my decease have attained, or shall afterwards attain the age of twenty-one years," then over:—Held, that the first clause was not a condition precedent, but merely pointed at the time of investment, and that though the son had no children, the fund must be invested. *Edmunds v. Waugh*, 4 Drew. 275.

A testator bequeathed 1,500*l.* towards adding to the endowment of a church. By a codicil he declared that in consideration of it, his nephew and his heirs should have every third nomination of the clergyman. The bishop (who was the patron) refused to relinquish the patronage:—Held, that the gift failed, and that the 1,500*l.* fell into the residue. *In re Weststead*, 25 Beav. 612.

(K) IN SATISFACTION OF DEBT.

A testator, after directing that his just debts should be paid, bequeathed 100*l.* to his daughter, a married woman, to whom he was indebted in 25*l.* balance of monies deposited by her in his hands before her marriage:—Held, that the legacy was in satisfaction of the debt. *Edmunds v. Low*, 26 Law J. Rep. (N.S.) Chanc. 432; 3 Kay & J. 318.

Where a debtor gives a legacy to his creditor, the Court will lay hold of minute discrepancies between the debt and the thing given to rebut satisfaction. Thus, when a debtor gave 400*l.* to a creditor to whom he owed 145*l.*, and gave him also other large benefits by way of life estates and remainders in real and personal estate, and expressly directed his debts and legacies to be paid, it was held that the debt was not satisfied by the legacy or any other of the benefits given. *Hassell v. Hawkins*, 4 Drew. 468.

It is dangerous to extend the doctrine of *Eden v. Smyth* (5 Ves. 341). The testator bequeathed 1,000*l.* to A B, who was indebted to him on bond. He gave instructions for a codicil, and in his own hand wrote his wish that A B's legacy should be made up 8,000*l.*, specifying the bond as part of that sum. The codicil was never executed, and the document was not proved as testamentary:—Held, that the bond debt was not released, and that A B took the legacy subject to the payment of the debt. *Chester v. Urwick* (No. 2), 25 Beav. 404.

(L) ABATEMENT.

E B, a married woman, having under the will of her father a power of appointment over a legacy of 120,000*l.*, which was bequeathed, subject to her life interest and to her power of appointment, equally among all her children, appointed 30,000*l.* part of the said sum of 120,000*l.*, to her husband, and died without making any appointment of the residue. The assets of the testator being insufficient for the payment of the 120,000*l.* in full,—Held, reversing the decision of one of the Vice Chancellors, that the appointment was an appointment of an absolute sum of 30,000*l.*, and not merely of a proportionate part of the legacy actually realized. *Booth v. Alington*, 26 Law J. Rep. (N.S.) Chanc. 138; 6 De Gex, M. & G. 613.

A testatrix, after reciting that she was entitled to

a legacy of 1,000*l.* under her husband's will, gave the 1,000*l.*, as to 100*l.* part thereof to A, as to 400*l.* part thereof to B, and as to all the residue of the said legacy of 1,000*l.* and all the residue of her estate to C. At the death of the testatrix 216*l.* only were due on the legacy:—Held, that A B and C must abate in proportion. *Wright v. Weston*, 26 Beav. 429.

A testator gave a house and 800*l.* to his daughter for life, and after her death he directed 500*l.* to be paid to her issue; "and that after such payment the remaining part of the said principal 800*l.*, that is 300*l.*," and the house, should revert to his "next lawful heirs." The assets were insufficient, and only 400*l.* was paid in respect of the legacy and what had accumulated:—Held, that the legatees of the 500*l.* had no priority over the legatees of the 300*l.*, and that the fund must be apportioned rateably between the two legacies. *Haslewood v. Green*, 28 Beav. 1.

(M) ADEMPMENT AND SATISFACTION.

A general gift, with a cumulative description, will include property which has been varied between the date of the will and the death of the testator. *Drake v. Martin*, 26 Law J. Rep. (N.S.) Chanc. 786; 23 Beav. 89.

A bequest of Bank stock held to pass 3½ per cent. annuities, no other stock being standing in the name of the testator, either when he made his will or at his death. *Ibid.*

A bequest of eight Russian bonds, purchased by L, his broker, held to pass different Russian bonds, purchased through another broker. *Ibid.*

A bequest of "my property not in England, in the hands of my attorney abroad, W, consisting of Russian bonds," held to pass bonds of the Hamburg Fire Company, which had been purchased with the produce of the Russian bonds by another agent abroad. *Ibid.*

A testator, after settling 10,000*l.* upon his daughter R, bequeathed to her 1,000*l.* on the day of her marriage as a marriage portion. R was married in the lifetime of the testator, who subsequently advanced to her husband 800*l.* in detached sums:—Held, that the advances were *pro tanto* in satisfaction of the legacy. *Ferris v. Goodburn*, 27 Law J. Rep. (N.S.) Chanc. 574.

A testator bequeathed all the personal estate of which he should die possessed, except such share as he should become entitled to in the property of A B, to his wife absolutely; and he bequeathed all his share in A B's property upon certain trusts mentioned in his will. A B's estate, which consisted of two separate sums of stock, came into the testator's possession after the date of his will, and the sums were transferred into his name. One of such sums of stock remained standing in his name at his death, but the other sum was sold out by him and applied for his own purposes:—Held, that there was an ademption of the legacy in respect of the stock sold out, it having been mixed with the testator's property and spent, but the stock transferred to him and continuing to stand in his name passed under the bequest. *Lee v. Lee*, 27 Law J. Rep. (N.S.) Chanc. 824.

A testator gave to his brother absolutely certain collieries, and all debts which might be due to him at the time of his decease in respect of such collieries and works, but subject to the payment of all debts and engagements due and payable in respect of or

connected with the said works; and for the better enabling his brother to carry on the collieries, the testator bequeathed to him 10,000*l.* Shortly before his decease the testator sold all his property in the collieries to his brother:—Held, that there was no ademption of the legacy of 10,000*l.*, but that the direction as to receiving and paying debts could not be carried into effect. *Parsons v. Coke*, 27 Law J. Rep. (N.S.) Chanc. 828.

A testator, by his will, made an equal division of his real and personal estate among his children; in the course of fifteen years afterwards he made advances of large sums to some of his daughters on their marriage, and to some of his sons on establishing them in business: to others of his sons and daughters he gave trifling sums only:—Held, that the small sums were intended as free gifts, but that the larger sums being for permanent advancements, were in part satisfaction of the benefits given to them by the will. *Schofield v. Heap*, 28 Law J. Rep. (N.S.) Chanc. 104; 27 Beav. 93.

If a presumption arises that payments by a testator to his children were made in satisfaction of legacies they would become entitled to under his will, it is not rebutted by their believing such payments to have been gifts, when the belief is unsupported by any testimony of the intention of the testator. *Ibid.*

Whether a settlement by a father, on the marriage of his child, is an ademption of a legacy previously given in a will, which will is subsequently confirmed by a codicil, is a matter in which the presumption against double portions may be rebutted by evidence. *Hopwood v. Hopwood*, 29 Law J. Rep. (N.S.) Chanc. 747; 7 H.L. Cas. 728; reversing 26 Law J. Rep. (N.S.) 292; 22 Beav. 488.

A testator, by his will, gave to each of his three children, A, B and C, 3,000*l.* sterling; and after reciting that A, one of them, had received an advance of 3,000*l.*, and that B, another of his sons, had received an advance of 1,500*l.*, and had had settled upon his marriage 2,000*l.* stock, the testator directed that these sums should, in calculating his residue, be brought into hotchpot; and he gave the residue to trustees upon trust as to one-third for A for life, or until he should assign, and after his decease for his children, and in default of children for his next-of-kin; and similar trusts were declared as to the two other third parts for the benefit of B and C and their children. A afterwards married, and the testator then settled 2,000*l.* stock upon trust for the wife of A for life, after her death for A for life, and after the death of the survivor for the children, and in default of children for the next-of-kin of A. A question having arisen, whether this 2,000*l.* stock was to be considered as an ademption of the absolute legacy given to A, or of the share of residue bequeathed in his favour, it was held, that there might be ademption of a residuary bequest; and that in the present case the ademption was *pro tanto* of the third part of the residue. *Montefiore v. Guedalla*, 29 Law J. Rep. (N.S.) Chanc. 65; 1 De Gex, F. & J. 93.

A testator bequeathed leaseholds subject to the payment thereof of an annuity to A B. He afterwards assigned the leaseholds on other trusts, and reserved a power to appoint a like annuity to A B. Subsequently he confirmed his will, but he did not in terms execute his power:—Held, that the annuity failed. *Couper v. Mantell*, 22 Beav. 223.

An adeemed bequest is not set up again by a subsequent confirmation of the will. *Ibid.*

(N) ASSENT OF EXECUTOR.

An assent to a legacy, given by an executor who dies without proving the will, becomes operative, on administration being afterwards taken out with the will annexed. *Quare*—whether an assent to a legacy given by an executor while he was acting as administrator would be operative. *Johanson v. Warwick*, 25 Law J. Rep. (N.S.) C.P. 102; 17 Com. B. Rep. 516.

The doctrine that slight evidence is sufficient of the assent of executors to a bequest, or that it may be implied, only applies in ordinary cases, where the assent would be rightful, and not where it must be implied against their own acts. And where the bequest to the defendant was by a husband, of leasehold property devised to his deceased wife for her separate use, and which she had bequeathed to the plaintiff, and the husband's executors joined with the devisee of the wife in suing,—Held, that even supposing that the husband's assent was necessary to the validity of the wife's will, the assent of the executors to the bequest by him to the defendant required to be proved by express evidence, and was not to be presumed or implied opposed to their own act in suing. *Tudor v. Guest*, 27 Law J. Rep. (N.S.) Exch. 395.

(O) FORFEITURE.

Bequest to A for life and afterwards to her children living at her death, with a proviso that if any child "should acquire a vested interest" and should encumber the same before his share should become payable, it should not be paid to him or his incumbent, but to others. A child mortgaged his share in the life of A and survived her:—Held, that the forfeiture took effect. *In re Payne*, 25 Beav. 556.

(P) VOID.

A testator gave to his trustees and executors 2,500*l.* to be laid out as they should think fit, with the concurrence of the trustees of Shakespeare's house, in forming a museum at Shakespeare's house, and for such other purposes as the testator's trustees should think fit, for the purpose of giving effect to his wishes. Shakespeare's house had been purchased by a society of gentlemen out of money raised by public subscription, but no trusts had been declared of it; and the testator had contributed a sum of money in his lifetime, which was vested in the trustees, for the purpose of being applied to the restoration and preservation of the house:—Held, affirming the decision of Wood, V.C., that the legacy could not be supported as a charity or as a trust, for want of certainty as to the persons to be benefited by it; and there being no indication of intention to vest it beneficially in the trustees, it must fail for the benefit of the next-of-kin. *Thomson v. Shakespear*, 29 Law J. Rep. (N.S.) Chanc. 276, 140; Johns. 612; 1 De Gex, F. & J. 399.

A legacy given to the minister or ministers of a Unitarian chapel at the time of the testator's death, to be applied in such manner as he or they should think fit towards the support of Unitarians,—Held, to be a good legacy, and payable to the ministers as directed by the will, and that a scheme was unneces-

sary. *In re Barnett*, 29 Law J. Rep. (N.S.) Chanc. 871.

A testator after gifts to "his sister M F T D" and to his niece "A T D" (but who were really the sister and niece of his wife), gave a portion of his residue to "his niece M F T D." He had no niece of that name. The Court being unable to come to a conclusion whether the word "niece" had been by mistake substituted for the "sister," or the name M F T D for A T D:—Held, that the gift of the residue was void for uncertainty. *Drake v. Drake* (No. 2), 25 Beav. 642.

Bequest for purchasing the discharge of poachers, "committed to prison for non-payment of fines, fees or expenses under the Game Laws":—Held void, as encouraging offences and opposed to public policy. *Thrupp v. Collett* (No. 1), 26 Beav. 125.

Where a testator gave 4,000*l.* to trustees on trust to pay the income to J for life, and after his decease to divide the principal equally between the child and children of J living at his death (except Thomas his eldest son), and the issue then living of any (except the said Thomas) then dead; though it appeared that the eldest son was otherwise provided for, and that Thomas was the youngest son:—Held, the exception void for uncertainty. *Hodgson v. Clarke*, 1 Giff. 139: reversed, on appeal, it being held that the eldest son and not Thomas was the son intended to be excepted. 1 De Gex, F. & J. 394.

(Q) REMOTENESS.

In a gift by will to the present and future children of J L who should be living at the decease of the testator's wife, a direction that the shares of daughters should be settled upon themselves for life, with remainders to their children, is not void for remoteness as regards the share of a daughter born in the testator's lifetime, the gift not being to a class, but a separate gift in favour of each child. *Wilson v. Wilson*, 28 Law J. Rep. (N.S.) Chanc. 95.

A legacy to unborn children of a person named in a will to vest at twenty-five being void for remoteness, a direction in the same will to apply the income in the mean time for their maintenance is also void, and cannot be supported even for a period of twenty-one years. *Pickford v. Brown; Brown v. Brown*, 25 Law J. Rep. (N.S.) Chanc. 702; 2 Kay & J. 426.

Bequests of personalty in the will of a freeman of the city of London having failed,—Held, that the property must be distributed according to the Statute of Distributions, and not according to the custom. *Ibid.*

Where two administration suits were instituted, one relating to the personal and the other to the real estate, the costs of both suits were ordered to be borne by the personal estate. *Ibid.*

Unless there is in a will or some codicil thereto clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised until they attain twenty-five, but that some other person is to have that enjoyment; or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five, as to induce the Court to hold that as to the previous rents and profits there has been an intestacy, the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they

attain the age of twenty-five years. *Gooding v. Gooding*, Johns. 265.

Expressions in a codicil of testator's desire that real and personal property given by his will should not be enjoyed by any of the successive devisees till twenty-five, and direction to accumulate in the mean time,—Held, imperative, there being no gift over. *Ibid.*

Devise in trust for A for life, and after her decease to apply the rents for the benefit of her children until the youngest attained twenty-five; and as soon as the youngest should have attained twenty-five, to sell and "pay and divide" the produce equally "among such of the children of A as should be then living, and the issue of such, if any, of her children as might be then dead," such issue to take their parent's share only:—Held, that the gift of the income was valid, but that the gift of the corpus was void for remoteness. *Read v. Gooding*, 21 Beav. 478.

Where there is a gift to a class, some of the objects of which are too remote and some not, effect cannot be given to the latter separate from the former, but the whole gift is void. *Seaman v. Wood*, 22 Beav. 591.

The produce of real and personal estate was bequeathed upon trust for A for life, and after his death, upon trust, "to pay or transfer" it unto such children of A as should attain the age of twenty-one years, and also such children of any son of A who should die under twenty-one or should attain that age, equally; but the children of any deceased son, collectively, to take their parent's share equally, with certain gifts over:—Held, that the whole of the limitations subsequent to the life estate were void for remoteness. *Ibid.*

Effect given to a gift over in one of two alternatives which happened, though the other was too remote. *Cambridge v. Rous*, 25 Beav. 409.

Bequest to trustees for A for life and after her decease to divide between her children when they should attain twenty-seven, and in the event of A not leaving any child at her death then over. A had no issue:—Held, that the gift over took effect. *Ibid.*

A testator devised his estates to trustees, in trust, after A C's decease, "in case she should have only one child which should survive her," to pay 200*l.* a year for his maintenance until he should attain twenty-five, and from and after such only child should attain that age to raise 10,000*l.* and pay the same to him at that age, or in case A C should "at her decease have two or more children," then to raise an annuity for their maintenance until they should respectively attain twenty-five, and when they respectively attained that age to pay each an equal share of the 10,000*l.* The plaintiff was *en ventre sa mère* at the testator's death, and was the only child of A C who survived her:—Held, that the bequest of the 10,000*l.* was too remote. *Merlin v. Blagrove*, 25 Beav. 125.

Distinction between a bequest having two alternatives, one of which is valid and the other too remote, and a gift depending on the failure of a previous limitation which is too remote. *Re Thatcher's Trusts*, 26 Beav. 365.

The case of *Taylor v. Frobiisher* (5 De Gex & S. 191) approved of. *Ibid.*

Bequest to A for life, and afterwards to her chil-

dren equally, "to be vested" in such as should attain twenty-five, and to be payable as soon as might be after that age should be attained, with powers of maintenance and advancement out of their "vested or expectant portions," with a gift over to B if no child should attain twenty-five:—Held, first, that the gift to the children was too remote; and, secondly, on A's death without having been married, that the gift to B could not take effect as an alternative limitation to a person *in case* at the date of the will. *Ibid.*

A testator directed that as his sons attained twenty-five his executors should pay them a share of his estate and effects, it being his will that his sons and daughters should receive equal shares of his estate; and as his daughters attained twenty-five, the executors were to invest 1,000*l.* each for them for life, and the difference between this and their share paid to them. In case any daughter "should die without issue" the 1,000*l.* was to be divided "amongst such of his children as might be then living, and the issue of such as might be dead, share and share alike," the issue to take the like share as the parent would, if living, have been entitled to:—Held, that the gift over was on an indefinite failure of issue; that there was an absolute gift of the 1,000*l.* in the first instance to the daughters, which had not effectually been cut down, and that the daughters were absolutely entitled to the 1,000*l.* *Webster v. Parr*, 26 Beav. 236.

A testator gave his residuary estate to his daughter for life, and afterwards to her two sons Henry and Charles, and all other her children thereafter to be born, and the issue of his grandchildren, who, being a son, should attain twenty-one, or, being a daughter, should attain that age or marry with consent, equally to be divided, such issue to take a parent's share:—Held, void for remoteness. *Webster v. Boddington*, 26 Beav. 128.

Bequest to a living person for life, and afterwards to his children, followed by a declaration that these interests should be considered a vested interest at the age of twenty-five, and a gift over to the issue of any dying under twenty-five:—Held, too remote. *Rowland v. Tawney*, 26 Beav. 67.

(R) REVOKED.

A bequest in a will of specific chattels to H,—Held, not to be revoked by a gift of the same chattels by codicil to other legatees, it appearing that the last-mentioned gift was founded on the supposition that the chattels had been by the will bequeathed to C, and that the bequest had lapsed by his death. *Barclay v. Mackelvie*, 28 Law J. Rep. (N.S.) Chanc. 115; Johns. 124.

A testator gave to each of his daughters a legacy of 1,500*l.*, and gave a legacy of 6,500*l.* upon trusts for each of them and her children; and in the event of any of the daughters dying without children who should attain a vested interest, he directed that the 6,500*l.* legacy of each of such last-mentioned daughters should go over to the other daughters and their children, in equal shares *per stirpes*, their respective shares to be held upon the same trusts for them and their respective children as were declared concerning their original legacies of 6,500*l.* Afterwards, on the marriage of E A, one of his daughters, he settled on her by deed 8,000*l.* By a codicil, reciting the gift

of the two sets of legacies and the advance of the 8,000*l.*, and that the testator intended it to be in satisfaction of the two legacies of 1,500*l.* and 6,500*l.* bequeathed to her or for her benefit as aforesaid, the testator revoked the said legacies of 1,500*l.* and 6,500*l.* in and by his said will given and bequeathed "to or for the benefit of" his said daughter E A "and otherwise as in the said will" was mentioned:—Held, that the codicil revoked only the original legacies of 6,500*l.* and 1,500*l.* to E A and her children, and not their contingent interest under the gift over of the other 6,500*l.* legacies. *Agnew v. Pope*, 1 De Gex & J. 49.

Held, also, that though the trusts of the accruing shares in favour of E A and her children were declared only by reference to the trusts of their original legacy, the revocation of the original legacy did not invalidate the declaration of the trusts of the accruing shares. *Ibid.*

A testator directed his trustees to stand possessed of a sum of money upon trusts in favour of his son and his son's wife and children, with a power to the son on failure of issue to appoint the fund by will or codicil. He also gave the trustees a discretionary power to give the fund to his son, discharged of all the trusts. By a codicil, the testator revoked the power given to the son, and directed that after the son's decease, and on failure of issue, the fund should go to the son's wife for life, and after her decease form part of the testator's residuary estate:—Held, that the discretionary power given by the will to the trustees was not revoked by the codicil. *Butler v. Greenwood*, 22 Beav. 308.

(S) LAPSED.

Whenever there is an interest limited by will either by way of remainder or by way of executory interest, if all the preceding estates are out of the way, or the events on which the executory interest is limited have occurred, it is immaterial whether those estates are taken out of the way or those events occur in the lifetime of the testator or after his decease. *Varley v. Wins*, 25 Law J. Rep. (N.S.) Chanc. 831; 2 Kay & J. 700.

A testator gave to his five daughters a sum of 6,000*l.* each, to be invested in real or government securities within seven years from the testator's decease; such investment to be in the names of the executors in trust for them or their children, "but if any of my said daughters shall die leaving no issue, then their share or portion so invested shall be divided amongst those surviving who have issue, share and share alike, as they arrive at the age of twenty-one years, and if only one, the whole to go to that one only." One of the daughters died without leaving issue in the lifetime of the testator, leaving two sisters, who had issue living at his death, and two who had none:—Held, that the share of the deceased daughter did not lapse, but was divisible between the two daughters who had issue, and that they took absolute interests. *Ibid.*

Held, also, that the executors were bound to invest the money as soon as they had assets, and not to wait for seven years from the testator's death, the postponement being for the convenience of the estate and not for the benefit of the residuary legatee. *Ibid.*

A testator gave the moiety of the residue of his

estate to be equally divided between his brother Richard and two other brothers, their executors, administrators and assigns: Provided always, that should not his brother Richard, who was supposed to be then alive and resident in Australia, make any claim to the share or interest in the trust monies to which he might become entitled under the said will within the space of three years next after the testator's decease, then, at the expiration of the three years, the trustees were to pay, transfer and assign the said share or interest of Richard unto the testator's sister and his two brothers, their executors, administrators and assigns. Richard was ascertained to have died before the testator:—Held, that the legacy to him did not lapse, but passed under the gift over. *In re Green's Trusts*, 29 Law J. Rep. (N.S.) Chanc. 716; 1 De Gex & Sm. 68.

The enactment in section 38. of 1 Vict. c. 26. that a bequest to a child of the testator, who died in the testator's lifetime, leaving issue living at the testator's death, should not lapse, applied to a testamentary appointment made in exercise of a general power. *Kocles v. Cheyne*, 2 Kay & J. 676.

Testatrix, by her will in 1840, in exercise of a general power, appointed proceeds of real estate to a daughter who died in her lifetime, leaving issue living at the testatrix's death:—Held, that the personal representative of the daughter was entitled. *Ibid*.

A testator, who had been bankrupt and had obtained his certificate thirty years before the date of his will, directed by his will that all his debts should be paid, including the debts proved and not paid in full in the bankruptcy, and directed his executors to pay to the official assignee in the bankruptcy in trust to pay all such creditors so much money as would make the dividend in the bankruptcy equal to 20s. in the pound:—Held, that the benefit thereby intended to be conferred on a creditor did not lapse by his death in the testator's lifetime. *In re Sowerby's Trust*, 2 Kay & J. 630.

Distinction between a general and a particular residue. *De Trafford v. Tempest*, 21 Beav. 564.

A testator bequeathed particular chattels at his residence to A, and his chattels there "not thereinbefore otherwise disposed of" to B, and his general residue to C. The gift to A lapsed by her death in the testator's lifetime:—Held, that the chattels bequeathed to A passed to B as part of a particular residue, and not to C as part of the general residue. *Ibid*.

Bequest of a quarter of a residue to A, and on his death to his children; but if he should die without leaving lawful issue as aforesaid, then to B and three other persons, and to the respective issue of such of them as should die leaving issue, such issue being intended to take the share which their parent would have taken if living. A died in the lifetime of the testatrix without having been married. B survived, and had children:—Held, that there was no lapse, but that one quarter of A's share passed to B, who took it absolutely. *Johnston v. Antrobus*, 21 Beav. 556.

By his will the testator gave a legacy "equally between my brothers and sisters now living," and he directed that their shares should not lapse by their deaths in his lifetime, but should go to their executors. By a codicil of the same date he bequeathed another legacy "between my brothers and sisters in like manner as I have directed by my will":—Held,

that the class mentioned in the codicil were not the same as that in the will; that the "manner" referred to the mode in which the class were to take, and not to the class itself, and consequently that the representatives of a sister who pre-deceased the testator took no interest in the second legacy. *Re Wilder's Trust*, 27 Beav. 418.

(T) RESIDUE.

A feme covert had power by will to appoint a trust fund, of which 2,000*l.* was payable immediately, and the remainder subject to her husband's life interest therein. She appointed the 2,000*l.*, and directed the trustees after the decease of the husband to stand possessed of the "residue" of the stock after payment thereof of the 2,000*l.* upon trust to pay 5,700*l.* as the husband should appoint, and to apply the residue in payment of a number of legacies. The husband appointed the 5,700*l.* to himself:—Held, notwithstanding there was a probability that the fund would prove insufficient for the payment of all the legacies, that he was entitled to immediate payment of the 5,700*l.*; the "residue" applicable to the payment of the legacies (other than the 5,700*l.*) being held to mean simply what remained after payment of the 5,700*l.*, and not a proportionate share of the fund. *Vivian v. Mortlock*, 21 Beav. 252.

(U) INTEREST ON.

A testatrix gave two legacies, and directed them to be paid out of a reversionary interest in stock to which she was entitled:—Held, that the legacies were payable when the reversion fell into possession, and that interest was payable from that time. *Earle v. Bellingham*, 27 Law J. Rep. (N.S.) Chanc. 545; 24 Beav. 448.

(V) ANNUITY.

A testator directed his trustees to invest so much money as would be sufficient to produce an annuity of 120*l.* per annum, and to pay the annual sum of 120*l.* to his widow until certain property to which he would be entitled should fall into possession, when his trustees were to invest so much money as would, with the money before directed to be invested, produce an annual income of 250*l.*, and to pay the sum of 250*l.* to his widow for her life, and after her decease in trust to call in the sum of 1,000*l.*, part of the money so directed to be invested, and pay that sum to such persons as the widow should appoint, or, in default of appointment, to her next-of-kin. The testator then gave other legacies and bequeathed the residue of his property. The income of the testator's estate proved to be insufficient for the payment of the annuity to his widow, and the arrears would exhaust the whole estate:—Held, that the arrears of the annuity were the first charge upon the estate, in priority over the legacy of 1,000*l.* and the other general legacies. *Ingleman v. Worthington*, 25 Law J. Rep. (N.S.) Chanc. 46.

A testator, by his will, gave several annuities, but, by a codicil, he postponed the payment until after the death of his widow, who, by the will, was entitled to two fourth parts of the testator's residuary estate. In a suit to secure a fund for payment of the annuities,—Held, that there was no apparent intention to benefit the widow, and that the income of the fund

to arise during her life did not belong to her, but that it formed a part of the testator's residuary estate. *Oranley v. Dixon*, 26 Law J. Rep. (N.S.) Chanc. 529; 23 Beav. 512.

A testator by his will bequeathed to each of his five daughters 400*l.* per annum, to be payable during their natural lives, and after their respective decease he gave the same to their children respectively, share and share alike, such children not to be entitled to more than their deceased parent's share; and in case any or either of his daughters should die without issue, he directed such annuity to cease and fall into the residue of his estate:—Held, overruling a decision of the late Master of the Rolls, that the annuities given to the daughters and after their deaths to their children were perpetual, and not merely life annuities; also, that the words "die without issue" did not enlarge the gift to the daughters to an absolute gift; and also that no interest vested in the children of daughters who died in the lifetime of their parents. *Hedges v. Blicks*; *Hedges v. Harpur*, 27 Law J. Rep. (N.S.) Chanc. 742; 3 De Gex & J. 129.

A testator gave an annuity or clear yearly rent-charge of 300*l.* to his niece A B, for her life; and after her decease he gave the said annuity or rent-charge unto her children equally, if more than one, share and share alike, to be applied for their maintenance until the youngest should attain twenty-one; on the happening of which event he directed the said annuity to be absolutely sold by such children, and the proceeds to be equally divided among them; and he charged the said annuity upon his real estates, which, subject to the said annuity, he devised to H in fee:—Held, affirming a decision of the Master of the Rolls, that the gift created a rent-charge on the estates in fee simple. *Manseergh v. Campbell*, 28 Law J. Rep. (N.S.) Chanc. 61; 27 Law J. Rep. (N.S.) Chanc. 769; 3 De Gex & J. 232; 25 Beav. 544.

A testator devised certain estates in fee, subject nevertheless, and he thereby charged the same estates with the payment of an annuity of 80*l.* a year. He also devised other estates to trustees upon trust to sell and apply the proceeds arising from such sale, together with his personal estate, which he bequeathed to them, in discharge of his debts and legacies; and if any surplus should remain, the testator directed the same to be paid to the then minister of a Catholic chapel, to whom he gave and bequeathed the same:—Held, that the annuity of 80*l.* was a charge upon the *corpus* of the estates; that the fund for payment of debts and legacies was a mixed fund; and that the devise of the surplus of the proceeds arising from the sale of the property to the Catholic minister was void under the Statute of Mortmain. *Thorner v. Wilson*, 28 Law J. Rep. (N.S.) Chanc. 145; 4 Drew. 350.

A testator gave a sum of 4,300*l.* consols to his executors, upon trust as to the annual dividends thereof, amounting to 129*l.* to pay his brother and two sisters an annuity of 20*l.* each during their lives; the remainder of the said dividends he directed to be paid to his nephew during his life; and as and when the brother and two sisters should die, then the three annuities of 20*l.* were to be paid to A, B and C, the eldest taking the first of the said annuities that should fall in, and the others in like manner by seniority. And after the decease of the survivor

of A, B and C, then the principal sum of 4,300*l.* was given to Ann Beale:—Held, that the bequests to A, B and C were gifts of certain portions of the dividends of the capital sum of money, and not annuities; and that the personal representative of one of the three who had died was entitled to receive his annual sum of 20*l.* until the death of the survivor of the three. *Bignold v. Giles*, 28 Law J. Rep. (N.S.) Chanc. 358; 4 Drew. 348.

A testator bequeathed all his money and securities for money to his executors upon trust to employ 400*l.* or 500*l.* in purchasing a house, and allow L to reside therein and have the use thereof for her separate use, and after her decease the same to go to her children (if any) equally. He further requested his said trustees to invest sufficient money in their names to produce 40*l.* per annum, and to pay the same, quarterly, to the said L, to her separate use. The Court refused, upon the petition of L, to direct the *corpus* of the fund to be paid to her, but declared her entitled to an annuity for her life only, and to have a sufficient fund appropriated to answer such annuity. *Re Grove's Trusts*, 28 Law J. Rep. (N.S.) Chanc. 536; 1 Giff. 74.

A testator directed an annuity to be purchased for a married woman, for her separate use, and directed that she should not be allowed to take the value of it:—Held, that she was, notwithstanding such declaration, entitled to receive such a sum of money as the annuity would have cost if purchased. *Stokes v. Cheek*, 29 Law J. Rep. (N.S.) Chanc. 922; 28 Beav. 620.

A testator, by his will, confirmed an annuity which, upon his marriage, he had covenanted to pay to his wife for life; he then devised his real estates to her for life, with remainder over:—Held, that the wife had no right to have any portion of the real estate sold for the redemption of the annuity. *Yates v. Yates*, 29 Law J. Rep. (N.S.) Chanc. 872; 28 Beav. 637.

Held, also, that the annuity was a charge on the life estate and the reversion, and that it must be paid proportionally, according to the value of each. *Ibid.*

An annuity bequeathed out of personality is not within the 42nd section of the Statute of Limitations (8 & 4 Will. 4. c. 27). *In re Ashwell's Will*, Johns. 112.

Payment of arrears of such annuities ordered as against residuary legatees, after thirty-seven years of defective payments, the residuary personal estate remaining still unapplied. *Ibid.*

But interest on such arrears refused on the ground of laches. *Ibid.*

Annuity given by will to one, for life, out of the interest, dividends and annual proceeds of a given fund, although without restriction as to time, and followed by a gift over after the annuitant's decease of "the residue" of the fund:—Held, not a charge upon the *corpus*; chiefly upon the ground that the will contained a gift over of surplus income during the life of the annuitant. And the circumstance that the annuity was given to testator's widow, to be accepted by her in lieu of dower, held not to affect the question. *Stelfox v. Sugden*, Johns. 284.

Testator, by his will, in 1844 directed his trustees to pay to his widow during her life the annual sum of 500*l.* "free from legacy duty and other deduc-

tions":—Held, that the annuity was subject to income-tax under the act, 16 & 17 Vict. c. 34, to be paid out of the annuity itself. *Sadler v. Rickards*, 4 Kay & J. 302.

Where an annuity was given by will charged on the *corpus* of a fund, with a provision for forfeiture in the event of certain contingencies, the Court held that the annuitant was not entitled to have the gross value of the annuity paid out of the *corpus* on the principle of *Wroughton v. Colquhoun* (1 De Gex & Sm. 357), but was entitled to have the accruing payments of the annuity made good, if necessary, out of the *corpus*, as in *Wright v. Callander* (2 De Gex, M. & G. 625), *Gratrix v. Chambers*, 2 Giff. 321.

Gift by a testatrix to trustees of a debt of 1,000*l.*, upon trust to invest the same in stocks or real securities, and to stand possessed of the debt and interest and of the stocks, funds and securities, on trust thereout to pay the plaintiff an annuity of 30*l.*, and to pay three-fourths of the residue of the interest or dividends received from the said debt, or the investment thereof, to his daughter Mary; and after plaintiff's death, he gave four-tenths of the debt of 1,000*l.* to his daughter Mary. By his codicil, the testator revoked the gift of four-tenths of 1,000*l.*, and gave instead thereof three-tenths of the debt on the same trusts as the four-tenths:—Held, that the annuity was a charge on the capital of the debt of 1,000*l.* *Hickman v. Upall*, 2 Giff. 124.

A testator devised a real estate to A B for life, in terms which gave him the legal estate, and he bequeathed to him his personal estate, subject to some annuities bequeathed to the plaintiffs, and appointed him an executor. A B wasted the assets:—Held, that his life estate in the realty was not liable to make good the annuities. *Egbert v. Butter*, 21 Beav. 560.

Gift of 30*l.* each yearly so long as A and B shall live:—Held to be several annuities to each during their several lives. *Lill v. Lill*, 23 Beav. 446.

An annuity held payable out of the interest only of a fund, and not out of the *corpus*, and to fail upon a deficiency of the income. *Earle v. Bellingham* (No. 1), 24 Beav. 445.

A testator bequeathed an annuity to his wife for life, and his residuary estate to his children. The executors set apart a fund to answer the annuity. Four of the children settled their shares in this fund by specific description, and they afterwards incumbered the shares in the other residuary estate. By the reduction of the interest of the fund set apart, the capital of it was resorted to for payment of the annuity:—Held, that the persons claiming under the settlements were not entitled, as against the incumbrancers of the residue, to have the annuity fund made good out of the residuary estate. *Wedderburn v. Wedderburn*, 25 Beav. 113.

A testator bequeathed to his daughter a perpetual annuity of 250*l.* a year. By a codicil, he directed that instead of the money being paid to her, it should be paid to trustees for her, and he proceeded thus:—"After my daughter C's death, I give the above money to be divided as follows: to my sister Anna M 100*l.* a year, and all the rest to be equally divided between her other brothers and sisters, or their children." All her brothers and sisters predeceased C:—Held, first, that Anna M was entitled to a capital

sum sufficient to produce 100*l.* a year; secondly, that the grandchildren who survived their parents took by substitution; and, thirdly, that they took *per stirpes*. *Timins v. Stackhouse*, 27 Beav. 434.

Where the *corpus* of an estate charged by will with annuities is insufficient to pay the arrears, it will be divided between the annuitants in proportion to the value of their respective annuities. If all the annuitants be living at the period of the division, the value must be ascertained as at the death of the testator. If they be all dead, the value must be taken to be the respective amounts of arrears; but if some be dead and others living, the value as to the former will be taken at the amount of their arrears, and as to the latter, at the amount of their arrears added to the calculated value of the future payments. *Todd v. Bielby*, 27 Beav. 353.

Gift of an annuity after the death of my mother, "or" the second marriage, death or forfeiture of my wife. The mother having predeceased the testator, —Held, that the annuity was payable from the testator's death, and that "or" could not be read "and." *Hawksworth v. Hawksworth*, 27 Beav. 1.

(W) RIGHTS AND LIABILITIES OF THE LEGATEES.

A testator devised all his freehold estates to his executors and their heirs, to hold the same to them and their heirs, to the use of them, his executors, during the natural life of M J, upon the trusts after declared; and he bequeathed to his said executors, their executors, &c., thirty shares held by him in a certain joint-stock banking company therein named, with the accumulated profits and capital belonging to him in respect to the said shares; and he declared that his executors should be possessed of the said freehold estates and of the said bank shares, in trust to pay the income arising therefrom for or towards the maintenance and education of the said M J during her minority; and, upon her attaining the age of twenty-one years, to pay the said income to her, for her separate use for life; and after her decease the testator devised the said freehold estates, and bequeathed the said bank shares, upon trusts for the benefit of the children of M J, or, failing them, as to the real estate, to the testator's right heirs for ever; and as to the bank shares, to the testator's nephews and nieces, and such of them as might be living, absolutely as tenants in common; and he made his said nephews and nieces his residuary legatees. For some years after the death of the testator, the executors and trustees paid an annual sum to the father of M J, the infant legatee, for her maintenance and education; and it appeared that this sum was paid by them out of a gross fund in hand, arising from the rents of the real estates and the dividends of the bank shares. The bank subsequently became insolvent; and by an order of Court its affairs were wound up under the Joint-Stock Companies Winding-up Acts. An order for a call upon the shares having been made, the official manager sued the executors in the Court of Chancery for payment of the amount; and by the decree in the suit, the amount of the call was declared to be a specialty debt due from the testator's estate, and the executors were ordered to pay such amount to the official manager, with costs. M J, on coming of age, repudiated the bequest to her of the bank shares:—Held, upon a suit instituted by the execu-

tors to obtain the opinion of the Court as to what funds were to be appropriated to the payment of such call, that, as between M J and the residuary legatees, the residue was to bear the burthen of the payment, and not M J, or the real estate devised to her. *Moffett v. Bates*, 26 Law J. Rep. (N.S.) Chanc. 465; 3 Sm. & G. 468.

Leasehold property was specifically bequeathed to F R. The residue was bequeathed to J R, and in the residue were included other leasehold houses. The executor handed over the residue to J R, and when F R attained twenty-one, the executor assented to the specific bequest, and assigned the same to F R. A creditor, in respect of unpaid rent and repairs to the leaseholds included in the residue, obtained judgments against the executor, and these remaining unpaid, he filed a bill for the general administration of the testator's estate. The chief clerk of one of the Vice Chancellors certified that the specifically bequeathed leaseholds were liable to the plaintiff's debt, but his Honour varied the certificate: Held, on appeal (reversing the latter decision), that, notwithstanding the assent and assignment, the specifically bequeathed leaseholds were liable to the debt; that creditors were entitled to pursue their remedies against all the assets; and that, therefore, if there were no assets in the hands of the executor, there must be a decree against the leaseholds specifically bequeathed, for payment of the plaintiff's debt. *Davies v. Nicholson*, 27 Law J. Rep. (N.S.) Chanc. 719; 2 De Gex & J. 693.

The mere circumstance that the personal estate of a testator not specifically bequeathed is more than sufficient to pay all his debts, funeral and testamentary expenses, and discharge all his liabilities, even with the added fact that the property specifically bequeathed has been, in consequence, by the executor assigned and delivered to the specific legatee, is not sufficient to discharge the specifically bequeathed property from the demands of the creditors of the testator. *Ibid.*

If an executor administers the estate of his testator and pays over the residue, so that no part can be recovered to answer a subsequent debt of the testator, he will not, as against appropriated legacies, be entitled to the costs of an action brought against him by the creditor, or of a proceeding necessary to establish the debt, or of any suit by him to make the appropriated legacies available for the payment of the debt. *Noble v. Brett*, *Noble v. Hodges*, 28 Law J. Rep. (N.S.) Chanc. 322; 26 Beav. 233.

A testatrix, who held unpaid-up shares in a banking company, bequeathed them specifically by a codicil to her will. She subsequently received notice of a series of calls on days named. This was accompanied by a notice that the first call must be paid on a specified day, and a form of receipt was inclosed. The testatrix paid the first call, but died before the days named for the other calls. Similar notices were sent to her executors fourteen days before each of the other days named for payment:—Held, that the notification of the series of calls did not create a charge on the estate of the testatrix within the meaning of the company's deed of settlement, or prevent a transfer of her shares; that the liability was created by the subsequent notice to pay, and that the legatees must take the shares *cum onere*, and that they must reimburse the executors such calls as had

been paid by the executors after the death of the testatrix, with interest at 4l. per cent. *Addams v. Ferick*, 28 Law J. Rep. (N.S.) Chanc. 594; 26 Beav. 384.

The practice of a company must affect the decision of a Court in questions relating to calls and the forfeiture of shares. *Ibid.*

Executors who transfer shares in a company under a decree of the Court will be indemnified from future liability, when they have brought before the Court all the facts of the case. *Ibid.*

A testator gave to his son "any shares in railways, mines, and other undertakings that might belong to him at his decease":—Held, that all calls upon railway shares becoming due subsequently to the death of the testator, were payable by the legatee; but such payments as might be necessary to constitute the testator a complete shareholder, and such calls as should be due at the time of his decease, would be payments out of his general assets. *Day v. Day*, 29 Law J. Rep. (N.S.) Chanc. 466; 1 Dr. & Sm. 261.

Where two distinct legacies are given by the same will, one of which is burdensome and the other profitable, the legatee may accept the profitable legacy and refuse the other, unless an intention to connect the two appears by the will; and the doctrine of election does not apply to such a case. *Warren v. Rudall*, *ex parte Godfrey*, 29 Law J. Rep. (N.S.) Chanc. 543; 1 Jo. & H. 1.

A testator possessed of various leasehold estates, some of which were mortgaged and others not, specifically bequeathed the latter to the plaintiff, and the former to other parties; and after making other specific and pecuniary bequests, gave the residue of his personal estate to his wife, and directed his trustees and executors to receive the rents of all his property, and to apply the same in payment of his debts together with the principal money and interest owing upon the mortgage of his property and of the legacies and annuities given by his will, until the whole should be fully paid:—Held, that the bequest of the incumbered leaseholds was not a bequest of the equity of redemption only; that the relative values of all the leaseholds should be ascertained; and that the plaintiff was not entitled to be let into possession before she had contributed her rateable proportion in discharge of all the debts and legacies. *Harper v. Munday*, 7 De Gex, M. & G. 369.

Legatees held not liable to refund, at the suit of other legatees, payments voluntarily made to them by the executors under a mistake, but held liable to recoup out of the undistributed funds in which they were interested. *Downes v. Bullock*, 25 Beav. 54.

(X) LEGACY DUTY.

[See DOMICIL.]

The 31st section of "The Succession Duty Act, 1853," (16 & 17 Vict. c. 51.) which enacts, that where it shall be required to calculate for the purpose of legacy duty, the value of any annuity, such value shall, after the time appointed for the commencement of that act, be calculated according to the tables in the schedule to that act, and not according to the tables in the 36 Geo. 3. c. 52, is confined to cases where the testator died after the commencement of the act, and does not extend to cases where, the death being before, the acts of calcu-

lation and payment occur after the commencement of the statute. *In re Cornwallis*, 25 Law J. Rep. (n.s.) Exch. 149; 11 Exch. Rep. 580.

A bequest of monies to trustees for the purpose of building, endowing and repairing a church is subject to a legacy duty of 10l. per cent. *In re Parker*, 29 Law J. Rep. (n.s.) Exch. 66; 4 Hurl. & N. 666.

Semble—that the duty attaches as well by virtue of the Legacy Duty Acts as under section 16. of the Succession Duty Act, 1858. *Ibid*.

A testator bequeathed his real and personal estate to his executors, in trust for sale and investment, the dividends to be paid to his widow for life, and then to A absolutely, except 4,300l. stock, part thereof, which he directed should be transferred into the names of his executors, in trust to pay certain annuities; and after the death of the survivor he gave the said stock to A absolutely. By an arrangement with the widow and A, the executors, instead of investing the personality, paid it to A at once. After the death of the widow, A, for a valuable consideration, assigned the stock (subject to the annuities) to B. The personal representative of the executors was a party to the deed of assignment. The legacy duty payable at the death of the widow was not paid:—Held, that the legacy of the 4,300l. stock was distinct from the dispositions of the other personality; and that B was not liable to the legacy duty, under the 36 Geo. 3. c. 52, on more than 4,300l. stock assigned to him. *Attorney General v. Giles*, 29 Law J. Rep. (n.s.) Exch. 176; 5 Hurl. & N. 255.

W, having, by way of provision, under a marriage settlement, executed a bond to the trustees of the settlement, for securing 16,000l. after his death, in trust for C and his wife, and then, subject to certain trusts in favour of their issue, upon trust for W absolutely, W, by his will, bequeathed the said sum of 16,000l., in case it reverted into the residuum of his estate at any time, in trust, as to 14,000l. thereof, for L. Upon the death of W, in 1794, a Chancery suit was instituted for carrying his will into effect, and the Master having reported that the 16,000l. was a specialty debt, due from the estate of W to the trustees of the settlement, certain stock (paid into court by W's executors), to the value of 16,000l., was, in 1807, under an order of the Court, transferred to the account of C in the cause. C died without issue between the date of the order and the transfer; and the dividends of the stock were paid to his widow until her death, in 1848, when, upon the petition of L, the Court ordered the stock to be sold, and the 14,000l. to be paid to him:—Held, that the legacy was paid, delivered, retained, satisfied or discharged before the 31st of August 1815, within the meaning of the stat. 55 Geo. 3. c. 184. Schedule III., Part the Third; and that, consequently, no legacy duty was payable on the actual receipt of the 14,000l. by L in 1848. *Attorney General v. Loscombe*, 29 Law J. Rep. (n.s.) Exch. 305; 5 Hurl. & N. 564.

The case of *Loscombe v. Wintringham* commented upon. *Ibid*.

A P, on the marriage of his daughter I B, covenanted to pay to the trustees of the settlement then made, as a provision for his daughter on her marriage, 2,000l. The trusts were to pay the income to I B for life, and after her death to her husband for life, and after the decease of the survivor to the children, and if there should be no child then to such person

as she should appoint, and in default of appointment then to her next-of-kin; and in the same settlement he covenanted that his executors should pay the further sum of 2,000l. to the trustees, to be held upon the same trusts, within six months after his decease. On the marriage of his daughter, E B, he covenanted to pay to the trustees of the settlement then made 2,000l. within one month after the marriage. The trusts of this sum were to pay the income to G B, the husband of E B, for his life, and after his death to E B for her life, and after the death of the survivor to the children, and if there should be no child then to such person as E B should appoint, and in default of appointment to her next-of-kin. By his will the testator directed "that the covenants on his part contained in the settlements made on the marriage of his daughters, for the payment of monies and annuities for the benefit of themselves and their respective children and grandchildren as therein stated, should be performed"; and proceeded as follows:—"In addition to the property settled by my daughter I B's marriage settlement, I give the further sum of 8,000l. to the trustees, &c., to be held, &c., upon the same trusts in all respects, for the benefit of my daughter I B and her children, as thereby declared as to the property thereby settled; and in addition to the property settled by my daughter E B's marriage settlement I give the further sum of 8,000l. to the trustees of such settlement, to be held upon the same trusts in all respects, for the benefit of my daughter E B and her children and grandchildren, as thereby declared as to the property thereby settled:—Held, that the words "to be held, &c., upon the same trusts in all respects for the benefit of my daughter and her children and grandchildren, as thereby declared as to the property thereby settled," were to be construed as words of reference, incorporating the trusts of the settlements in the will; that the trusts for the husbands were not excluded, and therefore that legacy duty was payable upon that principle. *In re Palmer*, 3 Hurl. & N. 26.

D by his will bequeathed to W certain personal estate of the value of 7,487l. upon trust for D's daughter, the wife of B, during her life, and provided she died without issue, he bequeathed the same to B, his heirs and assigns. B by his will bequeathed the said and all his other personal estate to S and the defendant, upon trust to pay debts and legacies, and as to the residue in trust for such purpose as his wife should by her will appoint, and in default of such appointment, in trust for her executors and administrators. B appointed S and the defendant executors of his will, and died, leaving his wife him surviving. After the death of B his wife appointed the defendant with two other persons trustees of the will of D in the place of W, and all the personal estate of D was assigned by D to them. The wife of B appointed the defendant, with the two last-mentioned persons, executors of her will, and bequeathed to them the whole of her personal property on certain trusts. She died without ever having had issue, and more than two years after her death S and the defendant, on being applied to for payment of legacy duty on the above sum of 7,487l., by a certain writing, signed by them, reciting the bequest by D to B, professed to disclaim and renounce such bequest:—Held, that it was not competent for the defendant to disclaim the bequest after B had accepted and bequeathed it,

and that the defendant was liable as executor of B to pay the legacy duty of 10l. per cent. *Attorney General v. Munby*, 3 Hurl. & N. 826.

A testator, who had been a bankrupt in 1822, by his will, dated in 1851, directed his just debts to be paid, in which he included the unpaid in full debts proved in the bankruptcy, and directed his executors to pay to the official assignee, in trust to pay all the creditors under the bankruptcy, so much money as would make the dividend on the estate equal to 20s. in the pound. Several of the creditors under the bankruptcy did not survive the testator; but it was held, that the official assignee was entitled to receive a sum sufficient to pay all the creditors 20s. in the pound, he distributing it among the creditors then living and the representatives of those who were then dead: and, further, that legacy duty was payable on the amount. *Turner v. Martin*, 26 Law J. Rep. (n.s.) Chanc. 216; 7 De Gex, M. & G. 429.

A B and his wife were, under a will, entitled to successive life interests in a fund in court. The legacy duty on the wife's interest was paid. The life interests were assigned by way of mortgage, and part of the dividends were paid to the assignees during the wife's life. Upon the death of the wife an order was made for payment of the dividends to the assignees, but no provision was made for the payment of the duty on A B's interest. On the death of A B this mistake was discovered. The Court, on the petition of the Attorney General, ordered the assignees to pay the duty and the costs of the application. *Bryan v. Mansion*, 26 Law J. Rep. (n.s.) Chanc. 510.

Bequest to trustees of 2,000l. consols to divide the income yearly between twelve poor persons, but no person to be eligible two years in succession.—Held, liable to legacy duty. *In re Pearce*, 24 Beav. 491.

A specific fund was bequeathed for payment of debts. A claim being made in respect of a debt barred by the statute, the administrator offered 1,150l. as the price to be paid for a release from all claims. Legacy duty was claimed on this account:—Held, that it must be borne by the administrator and not by the creditor. *Greville v. Greville* (No. 2), 27 Beav. 596.

LIBEL.

[See SLANDER.]

- (A) DEFAMATORY WRITINGS.
- (B) PRIVILEGED AND PROTECTED PUBLICATIONS.
- (C) ACTION.
 - (a) *By and against whom maintainable.*
 - (b) *Pleading.*
 - (1) *Plea of Justification.*
 - (2) *Plea of Apology in Newspaper.*
 - (3) *Innuendo.*
 - (4) *Amendment.*

(A) DEFAMATORY WRITINGS.

Declaration that the plaintiff was the proprietor and possessed of rooms called the Argyll Rooms, adapted for a dancing academy, or subscription ball-room or concert-room, yet the defendant falsely and maliciously published of the plaintiff, and of the

plaintiff as the proprietor thereof, the words following: "Argyll Rooms. Notice is hereby given, that the magistrates of the county of Middlesex having this day refused to renew a music and dancing licence to the proprietor of the above rooms, all such entertainments there carried on, whether advertised under the name of an academy, subscription ball, concert, or otherwise, are illegal; that the proprietor (meaning the plaintiff), renders himself thereby indictable for keeping a disorderly house, and that every person who shall be found upon the premises is liable to be apprehended and dealt with according to law." By means of which premises the plaintiff was prevented from using or letting the said building or rooms as a dancing academy, &c., or for any other purpose which he might and otherwise could and would have done, for profit and reward, and the said building and rooms became and were useless and unproductive to the plaintiff: On demurrer, it was held (*debentur*), that the declaration disclosed a cause of action. *Bignell v. Buzzard*, 27 Law J. Rep. (n.s.) Exch. 356; 3 Hurl. & N. 217.

(B) PRIVILEGED AND PROTECTED PUBLICATIONS.

It is a question of law, to be determined by the Judge, whether the occasion of publishing defamatory matter is such as to repel the inference of malice, so as to constitute a privileged communication; and if at the close of the plaintiff's case he is of opinion that the communication is privileged, and there is no evidence, intrinsic or extrinsic, of malice in fact, the Judge ought to nonsuit. But wherever there is evidence, either intrinsic or extrinsic, of malice to answer the immunity derived from the occasion of the publication, that question must be determined by the jury; overruling *Tyson v. Evans*. *Cook v. Wildes*, 24 Law J. Rep. (n.s.) Q.B. 367; 5 E. & B. 328.

The defendant in an action of libel was clerk of the peace of the county of K, whose duty it was, under the 6 Vict. c. 18, to get the register of county voters printed, the expense of which was to be allowed by the Justices at Quarter Sessions. He had employed the plaintiffs in former years to print the register, but in 1854 had employed another printer, who had agreed to do the work at a less sum than that required by the plaintiffs, who alleged that they had sustained a loss on the contract in former years, and that other printers would not do the work for the same sum. The defendant had, in explanation of the change of printers, written a letter to the finance committee, which was annexed to their report, and read by the defendant in his official capacity in court at the next Quarter Sessions. This letter, which was the libel complained of, after stating facts to shew that the price received by the plaintiffs for printing the register was higher than that asked by other printers, and to negative the assertion that the contract had been unremunerative, concluded with these words: "Under the circumstances I have stated, it will be seen that I had no alternative but to adopt the course I have taken, rather than submit to what appears to have been an attempt to extort a considerable sum from the county by misrepresentation." The Judge held, that the concluding words exceeded the privilege afforded by the occasion, and left to the jury only the question of damages:—Held, that the occasion of writing the

letter rebutted the presumption of malice, and rendered it a privileged communication; but that the concluding part, imputing improper motives to the plaintiffs, ought to have been left to the jury, as affording evidence of express malice. *Ibid.*

A communication made *bond fide* upon any subject-matter in which the party communicating it has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty. *Harrison v. Bush*, 25 Law J. Rep. (N.S.) Q.B. 25; 5 E. & B. 844.

Quere—whether a mistake made *bond fide* in sending a communication otherwise privileged to a wrong party will affect the privilege. *Ibid.*

The defendant, an elector and inhabitant of the borough of F, *bond fide* signed and sent to the Secretary of State for the Home Department a memorial complaining of the conduct of the plaintiff, a magistrate of the county, during an election for the borough, imputing to him gross acts of violence, and praying that the Secretary of State would cause an inquiry into the plaintiff's conduct to be made, and that if the allegation in the memorial were substantiated he would recommend to Her Majesty that the plaintiff should be removed from the commission of the peace:—Held, that this was a privileged communication, the defendant having both an interest and a duty in the subject-matter of the memorial; and that the memorial being substantially a petition to the Queen for the removal of the plaintiff from the commission of the peace, the Secretary of State had a corresponding duty to cause the inquiry prayed for to be made, although the Lord Chancellor is the functionary by whose advice and agency the Crown usually acts in removing magistrates. *Ibid.*

To an action for a libel published in a newspaper, it is no defence that the alleged libel consists of a true and accurate report of the proceedings at a public meeting held under a local act for the improvement of a town. *Davidson v. Duncan*, 26 Law J. Rep. (N.S.) Q.B. 104; 7 E. & B. 229.

It is a good defence to an action for a libel that it consists of a fair, correct, and impartial report of a trial in a court of justice; and such defence is admissible under the plea of not guilty. Such a report is protected; but if it contains other libellous matters, such as comments reflecting upon any of the parties whose names appear in it, it entirely loses the privilege which it might otherwise claim. *Lewis v. Levy*, 27 Law J. Rep. (N.S.) Q.B. 282; E. B. & E. 557.

No action will lie for defamatory expressions, against a third party, contained in an affidavit made and used in the proceedings in a cause, though such statements be false, to the knowledge of the party making them, and introduced out of malice. *Henderson v. Broomhead* (Ex. Ch.), 28 Law J. Rep. (N.S.) Exch. 360; 4 Hurl. & N. 569.

(C) ACTION.

(a) By and against whom maintainable.

An action is maintainable against a corporation aggregate for a libel published by the order of the corporation; and it is not necessary in such an action to shew that the defendants had any ill-will, or that they meant to injure, the plaintiffs. *Semble*—that under some circumstances express malice may

be proved against a corporation aggregate. *Quere*—whether in such an action it is necessary to allege malice. *Whitfield v. the South-Eastern Rail. Co.*, 27 Law J. Rep. (N.S.) Q.B. 229; E. B. & E. 115.

A joint-stock company, registered under the 19 & 20 Vict. c. 47, can maintain an action for libel against one of its shareholders. Therefore, to a declaration for libel by a company, a plea that the defendant is a shareholder in the company is no answer to the action. *The Metropolitan Saloon Omnibus Co. (Limited) v. Hawkins*, 28 Law J. Rep. (N.S.) Exch. 201; 4 Hurl. & N. 87.

(b) Pleading.

(1) Pleas of Justification.

Declaration for a libel, in a letter written by the defendant to A, the plaintiff's master, stating "there is duplicity about your bookkeeper (meaning the plaintiff) in serving your interest in this affair of ours, which is sadly too transparent. No doubt, he would like to ascertain the date, and to have a look at the memorandums. I gratified him with the latter; the former, if he could have obtained, he would have used greatly to advantage, for I conceive there is nothing too base for him to be guilty of." Plea—That the defendant had lent to A two sums of 15*l.* each on two several occasions, and on each, at the request of H, the plaintiff gave, in his own name and handwriting, an I O U for the amount to the defendant. That the defendant afterwards applied to H for repayment, and disputes arose as to the loans; upon which the plaintiff, on having the first I O U shewn to him, falsely and fraudulently denied it to be in his handwriting; upon which the plaintiff wrote the letter complained of:—Held, that the plea justified the whole of the libel. *Tighe v. Cooper*, 26 Law J. Rep. (N.S.) Q.B. 215; 7 E. & B. 639.

In an action for libel the defendant will not be permitted to plead, in addition to the plea of not guilty, a special plea, not directly justifying the libel as true, but alleging the existence of certain facts, and stating that the alleged libel was only a fair comment in a newspaper on transactions of public notoriety. *Semble*—that the fact of the article being a "fair comment," is involved in the general issue, although the defendant may be allowed to plead the mere fact that the words were a fair comment, without malice, in addition to the plea of not guilty. *Lucan v. Smith*, 26 Law J. Rep. (N.S.) Exch. 94; 1 Hurl. & N. 481.

The Court refused leave to a defendant to plead to a declaration, containing three counts for separate libels, a general plea of justification, that the libels in the several counts were true. *Honess v. Stubbs*, 29 Law J. Rep. (N.S.) C.P. 220; 7 Com. B. Rep. N.S. 555.

A declaration for libel alleged that the plaintiff had advertised his goods for sale, and that the defendant published of the plaintiff and of his sale a notice reciting the advertisement, and stating that the plaintiff unlawfully detained certain goods of the defendant, which he, the defendant, was informed the plaintiff also intended disposing of, and giving notice that the same were the defendant's property, and any person purchasing would be held responsible; thereby meaning to cause it to be believed that no

person could safely purchase any goods at the advertised sale, by means of which persons were prevented from attending, and the sale failed altogether. Plea—that the plaintiff did unlawfully detain certain goods of the defendant, who was informed and believed that the plaintiff did intend to dispose of the same at the advertised sale, and thereupon the defendant published the said words, for the purpose of warning all persons from purchasing the said goods so unlawfully detained by the plaintiff, and not otherwise:—Held, on demurrer, that the plea was an answer to the action. *Semble*—that the plea amounted to the general issue, and would have been struck out on summons at chambers, either on that ground or because it was calculated to embarrass, as being uncertain whether it was pleaded as a justification or as a privileged communication. *Carr v. Duckett*, 29 Law J. Rep. (N.S.) Exch. 468; 5 Hurl. & N. 788.

The defendant published of the plaintiffs, coal-merchants, what purported to be a report of an inquiry before a guardian respecting the fraudulent conduct of the plaintiff's agent, who, in performance of a contract for best coals, had delivered at the workhouse coals of an inferior description, and (by falsifying the weighing-machine by means of a wedge) deficient in weight. The libel commenced, "The way in which Messrs. P. (the plaintiffs) do things at Guildford. Inserting the wedge"; and ended with a recommendation of one of the guardians to "have nothing more to do with Messrs. P."—innuendo, "the defendant meaning thereby that the plaintiffs were cognizant of and had sanctioned improper and fraudulent conduct by their agent at Guildford, and were accustomed to carry on their said trade there improperly and fraudulently." The defendant pleaded a justification, following the innuendo, and saying that the coals delivered, as mentioned in the libel, were inferior in quality, as the plaintiffs well knew, and deficient in weight. The Judge ruled, that the defendant having by his plea alleged that the fraud of their agent was sanctioned by the plaintiffs, he must prove it: and he told the jury that they must find for the plaintiffs, unless they were satisfied that the defendant had shewn some complicity on their part in the misconduct and fraud imputed to their agent. The jury having found for the plaintiffs,—Held, that there was no misdirection, and that the libel imputed personal misconduct and fraud to the plaintiffs. *Prior v. Wilson*, 1 Com. B. Rep. N.S. 95.

(2) *Plea of Apology in Newspaper.*

The statute 6 & 7 Vict. c. 96. s. 2, which permits newspaper publishers in actions for libel to plead that the libellous matter was inserted without malice, and that a full apology had been inserted in the newspaper, and to pay money into court by way of amends, contemplates the insertion of an apology, not merely sufficient in its terms, but inserted in a proper mode as to type and place. Where, therefore, on an issue on such a plea the jury found that the libel was inserted without malice, and that the apology was sufficient in its terms, but that it should have been in larger type and inserted in a different part of the paper,—Held, that this entitled the plaintiff to a verdict. *Lafone v. Smith*, 28 Law J. Rep. (N.S.) Exch. 33; 3 Hurl. & N. 735.

(3) *Innuendo.*

Under section 61. of the Common Law Procedure Act, 1852, it is not necessary in a declaration for libel or slander that there should be any *colloquium*; but the plaintiff may set out the words, and put any construction he pleases upon them. *Hemmings v. Gasson*, 27 Law J. Rep. (N.S.) Q.B. 252; E. B. & E. 346.

Where the libel upon which the action is brought is a privileged communication, it is allowable to give in evidence statements made by the defendant on an occasion subsequent to the publication of the libel, which statements tend to shew malice in the defendant towards the plaintiff; but the Judge ought to call the attention of the jury to the distance of time which had elapsed before the subsequent statements, and to caution them that those statements might have referred to some other matter, and that they might therefore not be any proof of malice at the time of publication of the libel. *Ibid.*

In an action for libel, the main complaint being as to the word "truck-master," without any innuendo, the defendant having pleaded a justification, and gone into evidence thereon, assuming the defamatory sense imputed to the word, viz., that the plaintiff, a manufacturer, was guilty of practices in contravention of the Truck Act, and no direct evidence having been given as to its meaning,—Held, that the term being composed of common English words, no evidence was necessary as to its meaning; and that the Judge had rightly left it to the jury to say, whether the word was used in a libellous sense; and a verdict for the plaintiff was upheld. *Homer v. Taunton*, 29 Law J. Rep. (N.S.) Exch. 318; 5 Hurl. & N. 661.

(4) *Amendment.*

The declaration stated that the defendant wrote and published of the plaintiff that, "a receipt was obtained from the defendant by fraudulent means, and that the plaintiff was cognizant of such fraud." The Judge, at the trial, allowed the declaration to be amended by introducing the letter, alleged to contain the libel, with the words "meaning thereby" immediately before the libel charged in the declaration:—Held, that the amendment was properly made. *Saunders v. Bate*, 1 Hurl. & N. 402.

LICENCE.

Determination by Assignment of Subject-matter.

A licence is determined by an assignment of the subject-matter in respect of which the privilege is to be enjoyed. *Coleman v. Foster*, 1 Hurl. & N. 37.

By lease, not under seal, R and C, trustees on behalf of themselves and the other proprietors of a theatre, demised it to S for three years, reserving to themselves and the other proprietors free liberty of admission to the theatre. S, by lease, not under seal, let the theatre to the plaintiff for two nights, subject to the terms on which he held the theatre:—Held, that the licence was determined, and that an action of trespass might be maintained by the plaintiff against the defendant, a proprietor, who entered the theatre during his tenancy. *Ibid.*

LIEN.

An artificer who, in the exercise of his right of lien, detains a chattel upon which he has expended his labour and materials, has no claim against the owner for taking care of the chattel while so detained. *The British Empire Shipping Co. v. Somerset*, 27 Law J. Rep. (N.S.) Q.B. 397; E. B. & B. 353: affirmed by the Exchequer Chamber, 28 Law J. Rep. (N.S.) Q.B. 220; E. B. & E. 353.

A shipwright received a ship into his dock to be repaired (no separate charge being made for the use of the dock during the repairs), and the repairs being complete he detained the ship in the dock until the charges were paid, giving notice to the owner that he should demand 21*l.* a day for the use of the dock during the detention:—Held, that the shipwright was not entitled to any payment for dock-room during the detention. *Ibid.*

H gave a warrant of attorney to confess a judgment for 2,000*l.* to L, to secure the payment of four bills of exchange drawn the same day by him upon and accepted by H, and judgment was entered up and registered the next day. The bills were renewed, and the renewals were deposited by L with a creditor of his own to secure a debt of 1,200*l.*, with a memorandum stating that the bills were secured by a judgment, but not making any mention of interest or the rate of interest. It was proved that interest was paid to the creditor by L for ten years at the rate of 12*l.* 10*s.* per cent. per annum. L subsequently became bankrupt, and, the creditor having died, his executors presented their petition, praying to be declared entitled to an equitable lien on certain monies then in the hands of the official assignee of L, such monies being part of the produce of the sale of real estate belonging to H, on which L was declared to have a lien by virtue of the judgment given to him by H:—Held, confirming the decision of one of the Commissioners, that as no interest was mentioned in the memorandum, it was to be taken to refer to the principal money alone, and that the memorandum created a new contract. The executors of the creditor were, therefore, declared to be entitled to a lien for the principal of the debt, but not for the interest. *Ex parte Hodge, in re Lane*, 26 Law J. Rep. (N.S.) Bankr. 77.

Bonds, payable to bearer, and passing by delivery only, were deposited with bankers for safe custody, and the bankers afterwards fraudulently deposited them with their brokers as a security for money advanced, and became bankrupt:—Held, that the bonds were subject to the general lien of the brokers for all money advanced by them to the bankers, and not merely for the advance made upon the security of those particular bonds. *Jones v. Peppercorne*, 28 Law J. Rep. (N.S.) Chanc. 153; Johns. 430.

Semble—the Court will take judicial notice of the custom of brokers as part of the general custom of merchants. *Ibid.*

A lien upon chattels confers no right of sale upon the person holding such lien, though the retention of the chattels may be attended with expense. *The Thames Iron Works and Ship-building Co. (Limited) v. the Patent Derrick Co. (Limited)*, 29 Law J. Rep. (N.S.) Chanc. 714; 1 Jo. & H. 93.

Therefore, where ship-builders, having a lien on a ship built by them according to contract for the

unpaid purchase-money, filed a bill to enforce their lien by sale, a demurrer to such a bill was allowed. *Ibid.*

A Judge's order, made by consent, whereby it was ordered that proceedings in an action should be stayed upon certain conditions, does not amount to an agreement to perform those conditions; and a bill for specific performance will not lie. *Ibid.*

A being interested in a moiety of a cargo, and having entered into a contract with B to let him have half his share, wrote to C & D, the consignees, informing them and authorizing them to sell the cargo and carry the proceeds to their separate accounts. The consignees acted upon this, and made advances to B, and B also charged his interest in favour of E. It had been agreed between A & B that they should pay for the cargo by two bills, each to be paid by one of them. B did not pay his bill; it did not appear whether A had paid it or not:—Held, that A had no lien on the proceeds of B's share, either as against him, as against C & D, or against E. *Holroyd v. Griffiths*, 3 Drew. 428.

A and B were joint owners of a house, and A had laid out on it monies he had obtained from B:—Held, that B had no lien on the house for the amount. *Kay v. Johnston*, 21 Beav. 536.

A trustee advanced to A B (one of his *cestuis que trust*) a part of the trust funds to enable him to purchase a real estate. A B died without having repaid the money, having devised the estate, and his personal estate was insufficient to pay his debts and legacies:—Held, first, that there was a lien on the estate for the trust funds, and, secondly, that the pecuniary legatees had, as against the devisees, a right of marshalling, so as to have the lien satisfied primarily out of the purchased estate. *Birds v. Atey* (No. 2), 24 Beav. 618.

The plaintiffs were merchants in London and Melbourne. The defendant consigned goods to the Melbourne house on an agreement that the advances made to him by the plaintiffs in London and Melbourne should be retained out of the proceeds of the goods, and that the surplus should be handed over to the defendant. The Melbourne house remitted to the defendant a sum as the balance, but omitted to retain the advances made in London:—Held, that the plaintiffs had merely a right of lien or of retainer, which they had abandoned by remitting the balance; and a bill to make the remittance available for their debt was dismissed. *Bligh v. Davies*, 28 Beav. 211.

LIMITATIONS, STATUTE OF.

[As to merchants' accounts, absence beyond seas and acknowledgments, see 19 & 20 Vict. c. 97. ss. 9-14.—Time of Prescription in certain Cases in Ireland, shortened by 21 & 22 Vict. c. 42.—The Limitation of Actions and Suits by the Duke of Cornwall in relation to Real Property enacted, and certain Leases of Possessions of the Duchy authorized by 23 & 24 Vict. c. 53.]

[Action on a Statute, see ACTION, *Shepherd v. Hills*, ante, page 4.]

(A) WHEN AVAILABLE.

(a) In general.

- (b) *In Actions and Suits relating to Real Property under 3 & 4 Will. 4. c. 27.*
- (c) *Exception as to Persons in Prison or beyond Seas.*
- (B) COMPUTATION OF TIME.
- (C) HOW THE STATUTE MAY BE BARRED.
 - (a) *Promise or Acknowledgment.*
 - (b) *Part Payment.*
 - (c) *Payment of Interest.*
 - (d) *Equity of the Statute.*

(A) WHEN AVAILABLE.

(a) *In general.*

A plea that the alleged causes of action did not accrue within six years is a bad plea to a declaration for a mandamus, as the Statute of Limitations does not bar an application for such a writ. *Ward v. Lovndes* (Ex. Ch.). 29 Law J. Rep. (N.S.) Q.B. 40: affirming the judgment below, 28 Law J. Rep. (N.S.) Q.B. 265.

Commissioners appointed and acting under the powers and provisions of the T Improvement Act, 1847, became indebted to the plaintiff, as architect, for work, labour and plans done and provided between the years 1848 and 1853. Whilst that debt remained unsatisfied, the General Board of Health published a provisional order in pursuance of their powers under the Public Health Act, 1848, which order was, by the Public Health Supplemental Act, 1855, confirmed and made absolute. By that order, the Public Health Act, 1848, was applied to the township of T, the powers of the T Improvement Commissioners were made to cease, and their property and estates transferred to the T Local Board of Health. And it was thereby ordered that the debts contracted by the Commissioners should be satisfied by the local board out of such parts of the said transferred property as would have been chargeable therewith if the said order had not been made, and should be paid by the said local board as by the said Commissioners; provided, that if such property were insufficient for that purpose the deficiency should be charged upon the rates leviable under the Public Health Act, 1848. The plaintiff having brought an action more than six years after the debt accrued against the clerk to the local board, stating the facts and claiming a writ of mandamus to levy a rate for the payment of such debt, the defendant pleaded, among others, a plea founded on section 89. of the Public Health Act, 1848, that the cause of claim for such writ did not accrue within six months before the action was brought, and that the said debts were not nor are a charge or expense incurred by the said local board within six months before suit or within six months before demand for the said rate:—Held, that the plea was no answer to the claim, as the six months' limitation in section 89. for levying a retrospective rate did not apply to a debt or claim like that of the plaintiff's, made chargeable on the rates by act of parliament. *Ibid.*

Two partners gave a promissory note: one died in the year 1849, leaving the other partner his executor. The survivor continued to pay interest on the note until the year 1852, when he became bankrupt. The holder of the note then claimed payment out of the assets of the deceased partner's estate:—

Held, that the Statute of Limitations was a bar to the claim, and that the payments of interest by the surviving partner must be presumed to have been made in his character of surviving partner, and not as executor of his deceased partner. *Thompson v. Waitman*, 26 Law J. Rep. (N.S.) Chanc. 134; 3 Drew. 628.

A debt, secured by an assignment by way of mortgage of an interest in a legacy charged on land, expectant upon the death of a tenant for life, became barred or extinguished by the operation of the Statute of Limitations, before the death of such tenant for life:—Held, that the assignment did not thereupon cease to operate as a valid security. *In re the Estate of William Seager, and Seager v. Aston*, 26 Law J. Rep. (N.S.) Chanc. 809.

To a suit by a barrister to recover out of the assets of his deceased clerk fees embezzled and retained by such clerk, the Statute of Limitations cannot be set up as a defence. *Teed v. Beere*, 28 Law J. Rep. (N.S.) Chanc. 782.

Under a decree in an administration suit, a barrister tendered his claim for an amount of fees embezzled and retained by the intestate, who had been his clerk. The chief clerk, by his certificate, disallowed the claim, on the ground that it was barred by the Statute of Limitations. The claimant took no proceeding in the administration suit to vary the certificate, and a decree was soon afterwards made on further directions, under which the residuary estate was distributed amongst the parties beneficially interested. The barrister subsequently instituted another suit in this court for the recovery of his demand out of the assets in the hands of the parties amongst whom they had been distributed:—Held, that he was entitled to maintain such suit, and to a decree for payment, with costs. *Ibid.*

O, L & H carried on business as copartners under articles containing a covenant by which the partnership effects were made a security for the repayment of the sum in which the concern might be indebted to any partner, and the other partners covenanted to make up the deficiency according to their equitable liability. After the deaths of O and L, their respective personal representatives filed a bill against H to take the accounts of the partnership, and a receiver was appointed, who got in the assets, and, without the sanction of the Court, but with the approbation of the parties, paid them to the executors of O, to whom the partnership was largely indebted, and the suit was not further prosecuted. These payments were insufficient to discharge the debts due to O's estate, and the estate of L remained liable to the estate of O to a considerable amount in respect of that debt:—Held, that it not being proved that the receiver made the payments with the sanction of the personal representative of L for the purpose of discharging the liability of L's estate, these payments did not take the demand against L's estate out of the Statute of Limitations. *Whitley v. Lowe*, 2 De Gex & J. 704; 25 Beav. 421.

A promissory note, dated the 4th of October 1842, was payable "at six months' notice." An action was brought on it in October 1848, and the indorsement on the writ stated that on payment within four days proceedings would be stayed. The action was abandoned, and a formal notice to pay in six months was given in January 1850. The testator died in

December 1850, having devised his real and personal estate to his executors in trust to sell, and in the first place to pay his debts. A creditors' suit was instituted by the payee in 1855, to which the executors pleaded the Statute of Limitations. The Court held, that the trust for payment of the debts prevented the operation of the statute both as to the real and personal estate; and that neither the action nor the indorsement on the writ were sufficient notice to pay according to the tenor of the note. *Moore v. Peitchell*, 22 Beav. 172.

A testator devised his real estate to trustees for a term of 5,000 years to raise the deficiency of his personal estate to pay his debts and legacies, and which term was to cease on the performance of the trusts; subject thereto he devised it to his son in fee. In 1807 the son conveyed his estate to a creditor (A B) in trust by sale or mortgage to raise and pay the debt. In 1811 a suit was instituted to administer the testator's real and personal estate, but A B was not made a party until 1841. He took no steps to realize his security, and obtained no payment or acknowledgment. The estate was sold, and the surplus was in Court:—Held, in 1857, that A B's claim was barred by the Statute of Limitations, and that it was not protected either by the prior term or the pending litigation. *Humble v. Humble*, 24 Beav. 535.

A fund was standing to the account of two trustees in the books of some bankers, who had notice that it was a trust fund. By the direction of the tenant for life alone they, in 1843, transferred it to his account, and thereby obtained payment of a debt due from him to them:—Held, that the trustees might sue the bankers in this court to have the trust fund replaced, and that the Statute of Limitations was inapplicable. *Bridgman v. Gill*, 24 Beav. 302.

A *cestui que trust* of real estate under a will was discharged in 1825 under the Insolvent Act, but omitted the estate from his schedule. In 1831 he became bankrupt, and his assignee in bankruptcy took a conveyance of the legal estate from the trustee in trust for the creditors under the bankruptcy:—Held, that it thereby became vested in him upon an express trust, viz., that declared by the will, the benefit of which belonged to the creditors under the insolvency, and that on a bill being filed by the assignee in insolvency in 1853, the Statute of Limitations afforded no defence to the recovery of the estate or the mesne profits. *Sturgis v. Morse*, 3 De Gex & J. 1; 24 Beav. 541.

It appearing that the assignee in bankruptcy had entered into the receipt of the rents with notice of the insolvency, and had acted in defiance of the title under it:—Held, not a case for limiting the time from which the account was to be taken. *Ibid.*

Parties claiming a portion of the residue held not barred after twenty years' delay either by the statute or by laches, the fund still existing as a trust fund, and all parties having acted under a misconception of rights. *Dowdes v. Bullock*, 25 Beav. 54.

A testator died in 1818; A B, his administrator, received assets and placed them in a bank to an account "A B's trustees," and where they still remained. A B died in 1868, and to a suit instituted by the administrator *de bonis non* of the original testator against the representatives of A B and the bankers, to recover the fund, the representatives of

A B set up the Statute of Limitations, but the bankers were willing to pay the amount:—Held, that the statute was inapplicable, and a decree was made for the plaintiff. *Smith v. Acton*, 26 Beav. 210.

Held, also, that in such a suit the representatives of A B could not be charged with interest. *Ibid.*

A testator charged his real estates with his debts, and he devised his C plantation in trust to pay his debts. He died in 1834, and the produce of C being in court:—Held, in 1859, that the creditors were not barred as to the fund in court, a trust having been created in their favour, but that they were barred as to the other real estates, they having a mere charge thereon. *Jacquet v. Jacquet*, 27 Beav. 332.

A's furniture was seized under an execution by the sheriff, who assigned it to the judgment creditor. A's friends afterwards purchased it from the judgment creditor, and the sheriff's officer then retired, and left the goods in A's possession, who remained in undisturbed enjoyment for more than six years. After his death the furniture was claimed by his friends, who had purchased it, and adversely by his administratrix:—Held, that the rights of the former were not barred by the Statute of Limitations; and that as A's possession was rightful, the statute could only apply from six years from a conversion. *Edwards v. Clay*, 28 Beav. 145.

(b) *In Actions and Suits relating to Real Property, under 3 & 4 Will. 4. c. 27.*

The effect of the Statute of Limitations, 3 & 4 Will. 4. c. 27. ss. 2, 34, as to land, is that, after twenty years' possession adverse to a title, it is extinguished, so that it cannot be revived or re-vested by a re-entry after that period, upon the doctrine of remitter; because such an application of that doctrine requires that the former title should be in existence at the time of the re-entry; and the express provision in the statute that no person shall be deemed in possession of lands merely by reason of an entry thereon, applies to cases of such re-entry. *Brassington v. Llewellyn*, 27 Law J. Rep. (N.S.) Exch. 297.

In 1781, the lord of a manor, with the consent of the tenants of the manor, granted to five persons licence to inclose three acres of the waste, and that they and their heirs and all persons claiming under them should and might lawfully hold the same so inclosed, in trust for the purpose of building a workhouse for the poor of the parish of M, rendering to the then lord and all other lords the yearly rent of 5s. for the same in every year for ever. The overseers and churchwardens of M took possession of the land, and built a workhouse, which was used as such up to the year 1836. It appeared from the accounts of a deceased steward of the manor that the yearly rent of 5s. was paid from 1781 to 1791, and from the parish books that it was paid from 1825 to 1836. In 1835 (the five trustees having all died before 1817, and the heir of the survivor not coming in after due proclamations) the parish, in vestry, pursuant to a notice from the steward, in order to save a forfeiture, nominated seven persons, who were then admitted, on the payment by the parish of a fine, the entry on the roll being that the lord granted the land to them and their heirs, to hold by copy of court-roll and at the will of the lord according to

the custom of the manor, with a similar trust to that in the grant of 1781, yielding and paying the rent of 5s. a year, &c. In 1840, there being no further use for the workhouse, the parish officers and trustees, under a resolution of the vestry, surrendered the premises to the then lord, who took possession, and had by himself or persons claiming under him held possession ever since. In 1859 the overseers and churchwardens of M brought an action to recover the premises against the defendants, who were in possession, and claimed through the lord of 1840:—Held, on a case stating the above facts, the Court being at liberty to draw inferences of fact, that the plaintiffs had not established that the holding by the parish officers had become adverse in 1833, the time of the passing of the 3 & 4 Will. 4. c. 27, and that the lord had, therefore, five years after the passing of the act during which he might have entered and resumed possession; that before the lapse of the five years a fresh tenancy at will was created by what took place in 1835, and that estate was put an end to in 1840, before the lapse of twenty-one years from the commencement of the tenancy; and the plaintiffs, therefore, had failed to make out any title. *Hodgson v. Hooper*, 29 Law J. Rep. (N.S.) Q.B. 222.

In 1832 the plaintiff, then an infant, became entitled to real estate in fee, and his father entered into possession. In 1836 the plaintiff attained his majority. In 1852 the father died, having continued in possession of the property down to the time of his death. In 1854 the plaintiff filed his bill against the devisees of his father for an account of the rents and profits:—Held, that the entry of the father in 1832 must be taken to have been as guardian of the infant and not as a trespasser; and the Statute of Limitations, therefore, could not be set up. *Thomas v. Thomas*, 25 Law J. Rep. (N.S.) Chanc. 159; 2 Kay & J. 79.

The owner of a reversion in fee simple of land subject to life estates to two persons and the life of the survivor, granted an annuity during the lives and life of four persons and the survivor of them, and demised the reversion to two trustees for 500 years, upon trust to sell one month after any arrear in payment of the annuity, either before or after the cesser of the life estate. The grantor became bankrupt, and the reversion was sold, subject to the annuity, and from that time the annuity fell into arrear. Twenty-four years after this, and when one of the tenants for life of the estate was still living, and two of the lives named in the annuity deed were still in existence, the grantee of the annuity filed his bill against the assignee of the estate of the grantor, and against the purchaser of the reversion, praying a sale of the term, and payment of the arrears of the annuity, and the investment of the surplus, and payment out of the interest of the annuity in future:—Held, affirming a decision of one of the Vice Chancellors, that the 42nd section of the Statute of Limitations, 3 & 4 Will. 4. c. 27, did not restrict the grantee to receiving, by means of a sale of the term, only six years' arrears of the annuity. *Snow v. Booth*, 25 Law J. Rep. (N.S.) Chanc. 417; 8 De Gex, M. & G. 69; 2 Kay & J. 132.

Sir G B, the tenant for life of the R estate, in March 1814, granted six redeemable annuities charged on his life estate. By a deed of even date he appointed

a receiver of the rents of the R estate, and directed that the six annuities should be paid *pari passu*. By another deed of even date he conveyed his life estate to a trustee, upon trust, if default should be made in payment of the six annuities, to sell the estate and pay the annuities. In August 1814 Sir G B granted three annuities, and by deed of even date he directed the receivers and trustees to pay the whole nine annuities out of the rents *pari passu*. Notice was given to the receivers and trustee, and the latter entered into possession and paid the annuities, and also the interest on a mortgage (charged on the estates, and which had been assigned by Sir G B after the grant of the three annuities), but only for a very short time, after which the rents were only sufficient for payment of the six annuities. In 1846 G B, the tenant in tail of the R estate, purchased the six annuities, and having become entitled to the above-mentioned mortgage he obtained possession of the estate. In 1855, forty years after the last payment in respect of the three annuities, the three annuitants filed their bill for an account. During the pendency of another suit, relating to the incumbrances on the R estate, the interest of some of these annuitants was purchased by the solicitor of one of the other parties to that suit, who covenanted to indemnify his vendors against past and future acts, and he joined as a plaintiff in this suit. The Master of the Rolls decided that the deed of receivership and trust created a trust for the benefit of the incumbrancers; that the plaintiffs were not barred by the Statute of Limitations; that they were entitled to an account; that the purchaser of the mortgage from Sir G B had notice of the trust; that after his death the interest on the mortgage was subject to the payment of the annuities; and that the purchase by the solicitor was not open to objection as champerty. On appeal, it was held, by Lord Justice Turner, affirming the decree of the Master of the Rolls (Lord Justice Knight Bruce doubting, and not assenting), first, that an express trust under the 25th section of the Statute of Limitations (3 & 4 Will. 4. c. 27.) was created in the receivers and trustee, and that that section applies to the case of one *cuius que* trust excluding another, and that, therefore, the plaintiffs were not barred by the statute; secondly, that by reason of the express trust the plaintiffs' claim was not a stale demand; thirdly, that although the plaintiffs had by their bill offered to redeem prior incumbrances, the Court would not hold them to that offer, the same being inequitable; fourthly, that the purchaser of the mortgage had constructive notice of the trust for the annuitants by receiving interest on the mortgage from the trustee; fifthly, that the purchase by the solicitor was free from champerty, and that even if it had been a purchase from his own client no objection on that ground could be maintained by a third party; and sixthly, that the direction of the accounts was correct. *Knight v. Bowyer*, 27 Law J. Rep. (N.S.) Chanc. 520; 2 De Gex & J. 421; 26 Law J. Rep. (N.S.) Chanc. 769; 23 Beav. 609.

Arrears of an annuity charged on a reversionary interest in land.—Held, recoverable more than six years after the same became payable, the statute 3 & 4 Will. 4. c. 27. s. 42. having no application so long as the interest is reversionary. *Wheeler v. Howell*, 3 Kay & J. 198.

To prove that a fraud was concealed within the meaning of the 26th section of the Statute of Limitations (3 & 4 Will. 4. c. 27), which enacts that the right of a person to recover land of which he has been deprived by a concealed fraud, shall accrue first at, and not before, the time at which such fraud should or might with reasonable diligence be discovered; it is not sufficient to shew that he was in such an imbecile or uncultivated condition of mind that it was scarcely possible, though the alleged fraud was by an open act, that he should have discovered the fraud, if the condition of his mind was not that of actual lunacy; for the Court cannot possibly estimate for this purpose the chance which the state of mind and education of a man afford of his making such discovery, and is therefore compelled to assume that every one not actually a lunatic is competent to judge of and to obtain advice concerning his rights and to assert them if necessary. *Manby v. Bevilke*, 3 Kay & J. 342.

Therefore, a suit cannot be maintained to set aside a compromise of an action to recover large estates made eighty years before, upon the ground that the compromise was a fraud upon the plaintiff in the action, and that he was a man of such dull intellect that, though cognizant of all the facts, it was necessarily a concealed fraud as to him. *Ibid*.

The devise of lands charged with payment of legacies devised his estate at H to S on trust to sell, and in the mean time to let the said estate and apply the rents and net proceeds towards payment of his debts and the clear legacies charged thereon by his testator's will:—Held, an express trust for the payment of the legacies; and on a bill filed by the legatees against the representative of the trustee, it was held that the claim was not barred by the 40th section of 3 & 4 Will. 4. c. 27. *Watson v. Saul*, 1 Giff. 188.

The provision of the 40th section does not apply to cases of express trust. *Ibid*.

(c) *Exception as to Persons in Prison or beyond Seas.*

The 10th section of the 19 & 20 Vict. c. 97. prevents any person, after the passing of the act,—in cases where he might otherwise have brought an action after the time limited by the statutes mentioned in the section by reason of his being beyond the seas, or in prison when the cause of action accrued,—from commencing an action after the time so limited, at whatever time the cause of action may have accrued. *Cornill v. Hudson*, 27 Law J. Rep. (N.S.) Q.B. 8; 8 E. & B. 429.

To an action for the non-payment of certain allowances to be made under 53 Geo. 3. c. 113. to the plaintiff, as a poor debtor in the Queen's Prison; plea, under the 13th section, that after the plaintiff became a prisoner he became entitled to be discharged under an Act for the Relief of Insolvent Debtors:—Held, that the plea was good. *Ibid*.

A and B, bankers at Frankfort, sued C on a bill of exchange which became due on the 2nd of December 1848. The defendant pleaded the Statute of Limitations; to which the plaintiffs replied that, at the time of the accruing of the causes of action, they were beyond the seas, and that they did not, nor did either of them, come to this country until within six years before the commencement of the action. In support of the replication A was called.

He stated that he was not in England at any time between the maturity of the bill and the year 1851; and that his partner B had never been in England. Upon cross-examination, he admitted that B was occasionally absent from Frankfort for three or four days, and sometimes for a week or a month together:—Held, that this was evidence to go to the jury; and that it was not necessary to call B himself to negative his having been in England. *Koch v. Shepherd*, 18 Com. B. Rep. 191.

(B) COMPUTATION OF TIME.

Declaration against the defendant, for maliciously opposing the discharge of the plaintiff under the Insolvent Debtors Acts, on which the plaintiff was ordered by the Commissioner to be detained for sixteen months, by which and by reason of the detainer lodged by the defendant, the plaintiff was kept in prison. Plea—the Statute of Limitations. The opposition by the defendant, the order for detaining and the lodging of the detainer by the defendant, were more than six years before suit, but the imprisonment continued within the six years:—Held, that the action was barred by the statute. *Viollet v. Symptom*, 27 Law J. Rep. (N.S.) Q.B. 138; 8 E. & B. 344.

The defendant, the owner of certain mines, in 1849 withdrew the pillars of coal which had been left as supports to the roofs in some of the old workings. The consequence was that the roof of the mine fell, the adjacent strata, one after another, subsided in slow succession, and at last, in 1854, the support of the intermediate strata having given way, the plaintiffs' land, which was 280 yards off from the defendant's mines, sunk, and their house, which stood thereon, was injured. The plaintiffs brought their action for the injury in 1856:—Held, reversing the judgment of the Queen's Bench in this case (27 Law J. Rep. (N.S.) Q.B. 378; E. B. & E. 622), and that of the Court of Exchequer in *Nicklin v. Williams*, that the Statute of Limitations was no bar to the action, as no cause of action arose to the plaintiffs by the mere excavation by the defendant of the pillars of coal on his own land, so long as it caused no damage to the plaintiffs; and that the cause of action first accrued when the plaintiffs received actual damage. *Bonomi v. Backhouse* (Ex. Ch.), 28 Law J. Rep. (N.S.) Q.B. 378; E. B. & E. 622.

Where money was advanced to a firm, to be repaid on demand, with compound interest,—Held, that the Statute of Limitations ran from the date of the advance. *Jackson v. Ogy*, Johns. 397.

Entries made in the books of the firm, crediting the person who advanced the money with interest from time to time, on the footing of periodical rents,—Held, not to bar the statute. *Ibid*.

(C) HOW THE STATUTE MAY BE BARRED.

(a) *Promise or Acknowledgment.*

[*Hughes v. Paramore*, 7 Law J. Dig. 451; 7 De Gex, M. & G. 229.]

Money lent. Plea, Statute of Limitations. The plaintiff, for the purpose of taking the case out of the Statute of Limitations, produced the following letters, written by the defendant to the plaintiff:—"I shall repeat my assurance of the certainty of your being repaid your generous loan. Let matters remain as they are for a short time longer and all

will be right. The works I have been appointed to, but owing to a dispute about a right of passage, they are not as yet worked with a full complement of labour." And, again, "So far from deeming you importunate, I look upon your forbearance as very great indeed. Bear with me a little while longer, and all will be right. Things are going on favourably at present; rest assured of my resolve to respond to your call as soon as it becomes practicable":—Held, that this was not a conditional, but an absolute promise to pay. *Collis v. Stack*, 26 Law J. Rep. (N.S.) Exch. 138; 1 Hurl. & N. 605.

The plaintiff, having repaired some cottages for the defendant, sent him his bill, and in answer the defendant wrote thus:—"I have received your bill. It does not, I think, specify sufficiently to which cottages the work is done. I shall feel obliged if you will more particularly explain, and take your agreements to Mrs. H (the defendant's agent). It is my wish to settle your account immediately, but being at a distance, I wish everything very explicit and correct. I have asked Mrs. H to mark the agreements, and send them to me, and I will return them by first post, with instructions to pay, if correct":—Held, that the letter was a sufficient acknowledgment of a debt to take the case out of the Statute of Limitations. *Sidwell v. Mason*, 26 Law J. Rep. (N.S.) Exch. 407; 2 Hurl. & N. 306.

In ejectment, the question being, whether the plaintiff is barred by the Statute of Limitations, or whether the effect of the statute has been prevented by a tenancy at will created between him and the defendant, a letter, written within twenty years of action, to the plaintiff, by the defendant's land agent or rent receiver, inquiring on what terms the plaintiff will let the property,—Held, not to be an acknowledgment of tenancy within the 4th section of the statute, not being by the "party in possession"; and, *quære*, whether it was admissible in evidence at all, as amounting to a mere inquiry. And although, in an ordinary case it might, coupled with subsequent possession, be evidence of a tenancy,—Held (*dissentiente Martin, B.*), not to be so where the parties were tenants in common, so that the defendant's possession would have been lawful, independent of any consent on the part of the plaintiff. *Semble*—that to prove a tenancy at will under the statute, it is not sufficient that there has been a tacit acquiescence by the owner in an occupation by another, but that there should appear to have been some actual assent to it, or a recognition of it as a tenancy. *Ley v. Peter*, 27 Law J. Rep. (N.S.) Exch. 209; 3 Hurl. & N. 101.

A letter, the effect of which is, that the writer is not certain whether the debt is owing, and will have the matter examined into, is not a sufficient acknowledgment in writing to take the case out of the Statute of Limitations, notwithstanding that it contains expressions of regret that the debt should have been left so long unpaid. But a letter not in itself sufficient to bar the statute may be left, with other evidence, to the jury, upon the question, whether there have been payments or deliveries of goods, in part satisfaction of the debt, within the six years. It will be a question for the jury whether the payments or deliveries of goods were made and received on account of the particular debt sued for. And where the action is by an executor, who has also claims due

to himself in his own right, it will be for the jury whether the payments were upon account of the debt due to the testator, or to the executor in his own right. *Collinson v. Margesson*, 27 Law J. Rep. (N.S.) Exch. 305.

If a person through whom the defendant in an action of ejectment claims, has, in an answer sworn by him to a bill filed by the plaintiff in reference to the same property, acknowledged the title of the plaintiff, within twenty years of the time of the action being brought, such acknowledgment will be evidence against the defendant, and will operate as a bar to the Statute of Limitations, under 3 & 4 Will. 4. c. 27. s. 14. *Goode v. Job*, 28 Law J. Rep. (N.S.) Q.B. 1; 1 E. & E. 6.

A petition to the Court of Bankruptcy, under the 7 & 8 Vict. c. 70, signed by an insolvent, in which he states that he is unable to meet his engagements, and, after setting out his debts, &c., proposes, for the future payment or compromise of his debts and engagements, to assign all his estate and effects to be applied, as far as they will extend, in full satisfaction thereof, is not an acknowledgment of a debt set out in the schedule sufficient to take the case out of the operation of the Statute of Limitations. *Everett v. Robertson*, 28 Law J. Rep. (N.S.) Q.B. 23; 1 E. & E. 16.

In order to take a debt relied upon in a set-off out of the Statute of Limitations, the defendant gave in evidence a letter written by the plaintiff to a third person, in which the plaintiff stated an account shewing the existence of the debt, but also shewing that a balance was due to himself, and proposing that the matter should be arranged upon payment by the defendant of 50*l.* The proposed arrangement was not acceded to:—Held, that there was no acknowledgment of the debt from which a promise to pay could be inferred, and that therefore the operation of the Statute of Limitations was not barred. *Francis v. Hawkeley*, 28 Law J. Rep. (N.S.) Q.B. 370.

A debtor, in reply to a letter containing a statement of accounts, wrote: "I am ashamed the account has stood so long. I must beg to trespass on your kindness a short time longer, till a turn in trade takes place":—Held, assuming the letter to have been written before the debt was barred by the Statute of Limitations, that it was a sufficient acknowledgment to take the case out of the statute. *Cornforth v. Smithard*, 29 Law J. Rep. (N.S.) Exch. 228; 5 Hurl. & N. 13.

The defendant being called upon by a creditor (the holder of two promissory notes for 510*l.*, more than six years overdue) for a statement of his affairs, made out an account, in which the notes were inserted as a debt for which he was liable:—Held, a sufficient acknowledgment within the 9 Geo. 4. c. 14. s. 8. to take the case out of the Statute of Limitations. *Holmes v. Mackrell*, 3 Com. B. Rep. N.S. 789.

An admission of a debt made to a person who at the same time signed a paper purporting to be a discharge of the debt, is not a sufficient acknowledgment of the debt to prevent the operation of the Statute of Limitations, though the discharge was inoperative in itself, and was given upon a condition which the defendant failed to observe. *Goate v. Goate*, 1 Hurl. & N. 29.

In 1847, the plaintiffs, who were solicitors, lent to the defendant 100*l.* on a mortgage, 40*l.* on a promissory note, and they had also a claim against him for costs. In 1857, the defendant wrote to the plaintiffs as follows:—"Sept. 26. I wish to inform you that I received yours this morning. I am going to leave my situation on the 1st of November, and when the policy is paid on the 29th of October, I hope that you will have the whole of your accounts ready for me, as I hope to be with you on that day."—"Oct. 25. Mr. V, when here on Saturday, stated that the amount due against me was about 280*l.* Of course this includes the 100*l.* and interest that I had some years since, and the 40*l.* promissory note that I jointly signed with the late Mr. B. Of course you are aware that you have 25*l.* to my credit that Mr. Y paid over when he could not complete the purchase of the property in the High Street."—Held, a sufficient acknowledgment of the debt to take the case out of the Statute of Limitations. *Godwin v. Culley*, 4 Hurl. & N. 378.

A bond was executed in 1821, and the obligee having claimed against the estate of the surety in the bond more than twenty years after the debt, it was held, that an acknowledgment of the debt, in the answer of the executrix of the surety, was sufficient to take the case out of the Statute of Limitations. *Moodie v. Bannister*, 28 Law J. Rep. (N.S.) Chanc. 881; 4 Drew. 432.

The Statute of Limitations, in the absence of fraud, applies to an action or suit brought by a client against his solicitor. An acknowledgment of a debt contained in a letter from one partner to another undertaking to assign to the latter the debts and liabilities of the firm upon his satisfying debts due to a person named in the letter and others, "obtaining a release of my liabilities in respect of such debts,"—Held, not to amount to a promise to pay the debts, and therefore not to take the debts out of the Statute of Limitations. *In re Hindmarsh*, 1 Dr. & Sm. 129.

(b) Part Payment.

It is questionable whether even an absolute promise by a debtor that he "will not take advantage of the Statute of Limitations to withhold payment of the debt," amounts to a promise to pay the debt, but, at all events, when it is coupled with other expressions shewing that an absolute promise to pay the debt was not intended, it will not be so construed; and where the debtor added that he was not able to pay, and that in the event of an anticipated increase of income, he might propose some satisfactory arrangement,—Held, that the acknowledgment did not import an absolute promise to pay, but only a conditional promise to propose some satisfactory arrangement, which might not be for payment of money, or might be for its payment by instalments, ranging over any period of time more or less protracted; and that, therefore, it was not sufficient to take the case out of the statute. *Rackham v. Marriott*, 25 Law J. Rep. (N.S.) Exch. 324; 1 Hurl. & N. 234: affirmed in Exchequer Chamber, 26 Law J. Rep. (N.S.) Exch. 315.

If two parties meet and go through their accounts, and the one admits that there is a balance due from him, and pays a sum of money to the other as part of that balance, the payment takes the account out of the operation of the Statute of Limitations, though

no precise sum is settled and agreed to between the parties as the balance, before the payment. *Walker v. Butler*, 25 Law J. Rep. (N.S.) Q.B. 377; 6 E. & B. 506.

The 19 & 20 Vict. c. 97. s. 14. is retrospective, and a payment on account, by one co-debtor within six years of suit, although made before that act, is no bar to the Statute of Limitations, as against the other: so held, on the authority of *Thompson v. Waikman. Jackson v. Woolley*, 27 Law J. Rep. (N.S.) Q.B. 181; 8 E. & B. 778.

The circumstance, that the payment on account by one co-debtor was made with the mere knowledge and consent of the other, gives no greater effect to the payment as against the latter. *Ibid.*

Where a payment has been made (of interest or principal) on a promissory note by one of the co-contractors, before the passing of the statute 19 & 20 Vict. c. 97, an action may be maintained by the holder of the note against any other of the co-contractors within six years after such payment, notwithstanding section 14. of that statute, as that section has no retrospective effect. *Jackson v. Woolley* (Ex. Ch.), 27 Law J. Rep. (N.S.) Q.B. 448; 8 E. & B. 778: affirming the judgment below.

S, indebted to bankers in 1826, assigned to them an annuity of 20*l.* a year payable during three lives and the lives and life of the survivors and survivor, for securing 200*l.*, part of his balance. S, in 1828, mortgaged to them the equity of redemption of a leasehold estate for securing his general balance of 1,500*l.* Interest was paid on the mortgage up to 1832, first to the bankers (who became bankrupt in 1828), and afterwards to their assignees; and who respectively received the annuity until 1847, when the annuity expired, and the money thus received was more than enough to pay the 200*l.* In 1834 the first mortgagee of the leasehold estate had entered into possession of the mortgaged property, and remained in possession. In 1853 S filed his bill against the mortgagee for redemption, and the assignees were made parties to the suit:—Held, (affirming a decision of one of the Vice Chancellors.) that the payments of the annuity having exceeded the 200*l.*, must be taken to have been made in reduction of the general balance due on the mortgage, and having been made within twenty years, the same took the case out of the operation of the Statute of Limitations, 3 & 4 Will. 4. c. 27. *Staley v. Barrett*, 26 Law J. Rep. (N.S.) Chanc. 821.

(c) Payment of Interest.

The defendant, in order to obtain an advance of money, gave a promissory note to H, a customer of the plaintiffs, who were bankers. H indorsed the note to the plaintiffs on obtaining the money, with which he was debited by them. The defendant was debited by H with the amount, and H had paid interest on the note to the plaintiffs within six years:—Held, that these payments did not take the note out of the statute as against the defendant, H not being his agent for that purpose. *Harding v. Edgecumbe*, 28 Law J. Rep. (N.S.) Exch. 813.

A B owed C D three sums on three several promissory notes, dated respectively in 1839, 1840, 1841. In 1846 C D applied for interest, and A B paid 5*l.* on account of interest generally; and a few days afterwards, C D, without the knowledge or concur-

rence of A B, made a memorandum on the note of 1841, that the payment had been made on account of interest thereon. At the time of this payment two of the notes were barred by the statute:—Held, upon appeal, reversing the order below, that the payment of the interest generally could not be referred exclusively to the two notes that were barred, but must be referred, either to the three notes, or to the one not barred; and, in either view, the effect of the payment was to take the note of 1841 out of the statute. *Nash v. Hodgson*, 25 Law J. Rep. (n.s.) Chanc. 186; 6 De Gex, M. & G. 474: reversing 23 Law J. Rep. (n.s.) Chanc. 780; Kay, 650.

Semble—the appropriation by the creditor, without the knowledge or consent of the debtor, will not, *per se*, furnish sufficient ground for raising against the debtor a new promise to pay. *Ibid*.

Where a payment is made by a debtor on account generally, the Court will not refer it to a debt barred by the statute, if it can be attributed to any debt not so barred—*per Lord Chancellor*. *Ibid*.

A B died indebted on a bond in which the heirs were bound, and having devised his real estates in strict settlement. The devisees for life entered into possession, and, after keeping down the interest on the bond for above twenty years, died, and thereupon the tenant in tail in remainder came into possession:—Held, (reversing the decision of one of the Vice Chancellors,) that, under the 3 & 4 Will. 4. c. 42. s. 5, the payment of interest by the tenant for life prevented the Statute of Limitations from barring the action against those in remainder. *Roddam v. Morley*, 26 Law J. Rep. (n.s.) Chanc. 438; 1 De Gex & Jo. 1: 25 Law J. Rep. (n.s.) Chanc. 329; 2 Kay & J. 336.

Held, also (agreeing with the Vice Chancellor), that a bond debt is not a charge upon or payable out of land within the 3 & 4 Will. 4. c. 27. s. 40. *Ibid*.

(d) *Equity of the Statute.*

Where an action of debt, commenced within six years from the cause of action accruing, abated by the death of the defendant, and delay occurred in taking out administration to the defendant, and the plaintiff commenced a fresh action after the six years, but within four months from the date of the administration,—Held, that the action was brought within due time, either according to the equitable construction of the 4th section of the Statute of Limitations, 21 Jac. 1. c. 16, or according to the principle of the old writ by journeys accounts. *Curlew v. Mornington* (Ex. Ch.), 27 Law J. Rep. (n.s.) Q.B. 439: affirming the judgment below, 26 Law J. Rep. (n.s.) Q.B. 181; 7 E. & B. 283.

Where an action on a money bond abates by the death of the defendant and no personal representative is appointed for twenty years, but after that time letters of administration are granted, a fresh action may notwithstanding the lapse of time be maintained on the bond against the administrator, if commenced within a year after his appointment, as according to the equitable construction put upon the statute, 3 & 4 Will. 4. c. 42. s. 3, adopted by analogy from the statute 21 Jac. 1. c. 16, the right of action is not in such case barred. *Sturgis v. Darell* (Ex. Ch.), 29 Law J. Rep. (n.s.) Exch. 472: affirming the judgment below, 28 Law J. Rep. (n.s.) Exch. 366; 4 Hurl. & N. 622.

LOAN SOCIETIES.

[The 3 & 4 Vict. c. 110. continued and the Laws relating to Loan Societies amended by 21 Vict. c. 19. —And see Friendly and other Societies.]

LOCAL GOVERNMENT ACTS.

[See METROPOLIS LOCAL MANAGEMENT—PUBLIC HEALTH—TOWNS IMPROVEMENT ACTS.]

A local act for lighting, watching, and improving a town, vested powers in Commissioners, and declared that no person should be qualified to act as a Commissioner who should be concerned or interested, either directly or indirectly, in any contract or bargain for furnishing, supplying or selling any article, matter or thing, to be employed or made use of for the several purposes of the act, and imposed a penalty on any person acting as a Commissioner not being duly qualified, or being disqualified. A declaration for a penalty under the act alleged that the defendant became a Commissioner, and that whilst such Commissioner, being directly concerned and interested in a certain then existing contract theretofore made by the defendant with the then Commissioners for the sale by the defendant of a certain plot of land of the defendant, to be used for the purposes of the act, viz., for improving one of the streets of the town, acted as a Commissioner in the execution of the act:—Held, on demurrer, that the declaration disclosed no cause of action. *Woolley v. Kay*, 25 Law J. Rep. (n.s.) Exch. 351; 1 Hurl. & N. 307.

By a local act, no person shall be qualified to be elected a Commissioner under the act, unless at the time of his being elected he shall be rated in the rate made for the relief of the poor of a certain township. E's name was not in the last rate made previously to the election at the time it was allowed, but he came into occupation of premises after the rate was made, and his name was inserted in the rate-book, under the 17 Geo. 2. c. 38. s. 12, before the day of election:—Held, that he was not rated within the meaning of the local act, and therefore was not qualified. *The Queen v. Eddowes*, 28 Law J. Rep. (n.s.) Q.B. 84; 1 E. & E. 330.

A meeting was duly held for the purpose of considering whether the ratepayers of M would adopt the Local Government Act, 1858. A resolution was moved and seconded in favour of the adoption, and the chairman of the meeting declared that it was carried. An appeal was presented to the Secretary of State for the Home Department, and he decided that the resolution had been carried, and that the vote of the meeting was valid:—Held, upon an application for a mandamus to compel the summoning officer to cause a poll of the ratepayers to be taken, for the purpose of ascertaining whether the act should be adopted, that the matter had been determined by the Secretary of State, and that this Court could not interfere. *Ex parte Bird*, 28 Law J. Rep. (n.s.) Q.B. 223.

LODGING HOUSES.

[Doubts as to the application of "The Common Lodging Houses Acts" to Ireland removed, and the Provisions of the same, so far as they relate to Ireland, amended by 23 Vict. c. 26.]

There is no duty on the part of a lodging-house keeper to take care of his lodger's goods; and therefore, in the absence of any misfeasance by him, he is not responsible for a loss arising from neglect to take such care of his house as a prudent owner would take, or from the wrongful act of a stranger, to whom, with the licence of the lodger, according to the usage between landlord and tenant, he had shewn the apartments for the purpose of letting them, after the expiration of the lodger's tenancy. *Holder v. Soulby*, 29 Law J. Rep. (N.S.) C.P. 246; 8 Com. B. Rep. N.S. 254.

LUNATIC.

[The Lunatic Asylums Act amended by 19 & 20 Vict. c. 87.—The Acts relating to Lunatic Asylums in Ireland, so far as relates to Superannuations, amended by 19 & 20 Vict. c. 99.—The Care and Treatment of Lunatics, and the Maintenance and Regulation of Lunatic Asylums in Scotland, regulated and provided for by 20 & 21 Vict. c. 71.—The Act of the last session, for the Regulation of the Care and Treatment of Lunatics, and for the Provision, Maintenance and Regulation of Lunatic Asylums, in Scotland, amended by 21 & 22 Vict. c. 89.—Better Provision for the Custody and Care of Criminal Lunatics made by 23 & 24 Vict. c. 75.]

- (A) JURISDICTION.
- (B) CONTRACTS AND CONVEYANCES.
- (C) MAINTENANCE.
 - (a) *Application of Property for.*
 - (b) *Justices Orders for.*
- (D) COMMITTEE.
- (E) SUPERSEDING COMMISSION.
- (F) TRUSTEE.
- (G) COUNTY ASYLUM.
- (H) PRACTICE.

(A) JURISDICTION.

Several persons were joint tenants in tail in possession of an undivided share of lands. One of them was a lunatic. A suit was instituted for partition, in which the lunatic, by the committee of her estate, was a defendant and appeared. The chief clerk, by his certificate, allotted the lands in severalty, and one of the Vice Chancellors, at the hearing upon further consideration, decreed partition and made an order in the suit, and also under the Trustee Act, 1850 (13 & 14 Vict. c. 60), for the purpose of effectuating the decree, by which he declared the lunatic a trustee of certain hereditaments. Application by petition was made to the Lords Justices to enable the order of the Vice Chancellor to be carried into effect, and their Lordships, on the committee stating his opinion that the partition would be for the benefit of the lunatic, made an order, entitled in the suit, in the lunacy, in the matter of the Trustee Act, 1850, and of the Lunacy Regulation Act (16 & 17 Vict. c. 70.), directing the decree to be carried into effect, and that the committee should execute a conveyance of the land vested in the lunatic. *In re Bloomar*, 27 Law J. Rep. (N.S.) Chanc. 173; 2 De Gex & J. 88.

A lunatic being tenant in tail of an undivided share of an estate, a decree for partition was made,

which directed that the lunatic's costs should be raised by mortgage of the land allotted to her in severalty. On the completion of the partition the lands allotted to the lunatic were conveyed to her simply in tail, without any provision for raising the costs:—Held, by the Lords Justices sitting in lunacy, that they had no jurisdiction to authorize the committee to mortgage the land for the purpose of raising the costs. *In re Bloomar*, 2 De Gex, F. & J. 154.

Jurisdiction of the Court to entertain a suit instituted in the name of a person of weak mind by a next friend. *Light v. Light*, 25 Beav. 248.

Decree made in such a suit for the protection of the plaintiff's property, and liberty given to apply in lunacy as to its application. *Ibid.*

(B) CONTRACTS AND CONVEYANCES.

Under a commission of lunacy, A B was, in 1852, found lunatic since May 1846. In 1847 A B had, by attorney, surrendered copyhold lands, of which she was tenant in tail, and accepted an admittance in fee simple. In a creditors' suit to administer A B's estate after her death, one of the Vice Chancellors held that the entail was effectually barred, and that the lands were available for her debts; but, upon appeal, it was held, that the entail was not effectually barred by reason of the lunacy; that the finding under the commission was *prima facie* evidence of the lunacy, but that A B having, previous to her death, obtained leave to traverse the inquisition, the creditors were entitled to an issue to try the question of A B's competency when the entail was purported to be barred. *Elliott v. Ince*, 26 Law J. Rep. (N.S.) Chanc. 821; 7 De Gex, M. & G. 475.

(C) MAINTENANCE.

(a) *Application of Property for.*

An idiot, aged twenty-nine, not found lunatic by inquisition, lived with a brother and sister. The income of his property was about 220*l.* per annum. Of the capital a sum of 4,446*l.* 3*s.* per cent. consols had been paid by trustees into court under the Trustees' Relief Act. The brother, as the next friend of the idiot, petitioned for payment of the dividends of the fund to them (the brother and sister) so long as the idiot should reside with them. Their Lordships did not require a commission to be issued; but granted the prayer of the petition, the brother and sister giving an undertaking to apply the dividends for the benefit of the idiot. *In re Burke*, 29 Law J. Rep. (N.S.) Chanc. 608; 2 De Gex, F. & J. 124.

The Court ordered a sum of stock standing to the account of a woman, aged sixty-two, a lunatic, but not so found by inquisition, to be invested in the purchase of a government annuity in her name and for her life, and to be paid to a person named until further order, he undertaking to apply the same for her maintenance and support. *In re Ward: Schultes v. Ward. Vallance v. Ward*, 29 Law J. Rep. (N.S.) Chanc. 784.

An order cannot be made for the maintenance of a lunatic not found so by inquisition, unless proceedings have been taken for placing the property under the administration of the Court of Chancery. *In re Tayler*, 2 De Gex, F. & J. 125.

Where a person of unsound mind has been maintained in a lunatic asylum by his parish, a portion of the capital of a fund belonging to him which had been paid in under the Trustees' Relief Act, ordered to be applied in defraying the past charges of the parish. *Re Buckley's Trust*, Johns. 700.

Whether, under the above circumstances, Justices have jurisdiction to order seizure of capital or only of income—*Quære*. *Ibid*.

The Court has a discretion to order such repayment or not, as it may think most for the benefit of the lunatic. *Ibid*.

(b) *Justices Order for.*

The wife of a man who had a settlement in T, but who was resident in L, having acquired the status of irremovability by five years' residence there, being on a visit in W became insane, and was sent by the relieving officer of W to an asylum, and an order was subsequently made upon L as the parish from which she was irremovable, for the expenses of her conveyance to the asylum and maintenance therein:—Held, that the order was properly made under section 102. of the 16 & 17 Vict. c. 97, notwithstanding that the lunatic was not actually resident in L at the time when she was sent to the asylum. *The Guardians and Overseers of the Poor of Leeds v. the Guardians of the Wakefield Union and the Overseers of Wakefield*, 26 Law J. Rep. (n.s.) Q.B. 37; 7 E. & B. 258.

Where a statement of the grounds of adjudication required to be sent under the 16 & 17 Vict. c. 97. s. 107. omitted to give the description and address of all the guardians by whom it was signed,—Held, that this was such a defect as the Sessions had power to amend under the 11 & 12 Vict. c. 31. s. 4. *Quære*—whether lunacy is included in the term "sickness" in the 9 & 10 Vict. c. 66. s. 4, so as to throw on the common fund of the union (under 16 & 17 Vict. c. 97. s. 202.) the expenses of a pauper lunatic removed to an asylum who ultimately proved to be curable. *The Queen v. the Guardians of the Poor of the Township of Manchester*, 26 Law J. Rep. (n.s.) M.C. 1; 6 E. & B. 919.

Before the passing of the 9 & 10 Vict. c. 66. a pauper who had resided in A for upwards of five years, under such circumstances as to give the status of irremovability subsequently created, was taken to the workhouse of the union. When there the expense of his relief was charged to M, another parish in the same union, by the consent of the guardian of M, under the erroneous belief that he was settled in M. In 1847, after the passing of the 7 & 8 Vict. c. 101, he was removed, under an order signed by a Justice, to a lunatic asylum, where he remained, at the charge of M, until 1854, when the charge was transferred to the common fund of the union, and again re-transferred to M. No order adjudicating the settlement in M or elsewhere was ever obtained. The auditor charged the expense of the lunatic, as an irremovable pauper, under the 16 & 17 Vict. c. 97. s. 102, to the common fund of the union:—Held, that this decision was correct, notwithstanding the payment of the maintenance by M, and notwithstanding the 7 & 8 Vict. c. 101. s. 56, which enacts that, for the purpose of relief, settlement and removal, the workhouse of any union is to be considered as situate in the parish to which each poor

person therein is chargeable. *The Queen v. the Guardians of the Poor of the West Ward Union*, 26 Law J. Rep. (n.s.) M.C. 29; 7 E. & B. 21.

A lunatic pauper settled in I, but for more than five years resident in M, which was a township maintaining its own poor not in a union, was removed to a lunatic asylum. In September 1851 orders were made adjudicating the settlement of the pauper to be in I, and directing I to pay the expenses of maintenance. After the passing of the statute 16 & 17 Vict. c. 97, I refused to pay, and the Justices issued a distress warrant on the former order:—Held, that the warrant of distress was illegal, that the order of maintenance on I was annulled by the statute in question, and that it was not necessary for I to take any steps to get rid of the order of maintenance, or to fix the liability on M. *Knowles v. Trafford* (Ex. Ch.), 26 Law J. Rep. (n.s.) M.C. 188; 7 E. & B. 152: reversing the judgment below, 26 Law J. Rep. (n.s.) M.C. 51; 7 E. & B. 144.

Where the order of adjudication of the settlement of a pauper lunatic is obtained by the guardians of a union on behalf of a township, the proper persons to sign the statement of the grounds of adjudication, and of the particulars of settlement required by section 107. of the 16 & 17 Vict. c. 97, are the overseers of the township. *The Queen v. the Inhabitants of Heaton*, 28 Law J. Rep. (n.s.) M.C. 181.

Under section 98. of 16 & 17 Vict. c. 97. the parish of A obtained an order upon the county of M for payment of the expenses incurred in relation to a pauper lunatic, alleged by them not to be settled in the parish, and whose settlement they alleged could not be ascertained. The county having subsequently ascertained that the lunatic was settled in A, obtained an order of Justices adjudicating the settlement in that parish, and also an order for the future maintenance, &c.:—Held, that the first order was a mere interim order, and that those subsequently made at the instance of the county were not bad, by reason of the first having been made. *The Churchwardens and Overseers of All Saints, Poplar v. the Clerk of the Peace for Middlesex*, 29 Law J. Rep. (n.s.) M.C. 186.

A borough which has a separate Court of Quarter Sessions and a gaol and a lunatic asylum of its own, and does not contribute anything towards the county rate in respect of the county gaol and county lunatic asylum, or the maintenance of lunatics therein, but does, under the statute 5 & 6 Will. 4. c. 76. s. 117, contribute to the county rate for other purposes, is not chargeable, under the statute 18 & 19 Vict. c. 105. s. 14, with the maintenance of a lunatic pauper found in the borough, and sent to the borough asylum, and whose place of settlement cannot be ascertained. *The Queen v. Bacchus* (Ex. Ch.), 29 Law J. Rep. (n.s.) M.C. 56: affirming the judgment below, 27 Law J. Rep. (n.s.) M.C. 181; 8 E. & B. 870.

(D) COMMITTEE.

A committee of a lunatic has no special lien upon the estate, after the death of the lunatic, for money expended by him on his behalf, and a purchaser having notice of the claim of the committee is no more bound to see to the application of the purchase-money than if he bought with notice of simple contract debts. *Jones v. Noyes*, 28 Law J. Rep. (n.s.) Chanc. 47.

A power for the appointment of new trustees contained in a settlement became vested in a person who had been found lunatic by inquisition. The committee of the person and estate petitioned, under the 16 & 17 Vict. c. 70. for leave to exercise the power for him, and the same was ordered. *In re Bowmer*, 28 Law J. Rep. (N.S.) Chanc. 618; 3 De Gex & J. 658.

Form of order. *Ibid*.

A lady who had been found lunatic obtained leave to traverse, and no committee was appointed. Her husband, who had petitioned for the inquisition, having, before the trial of the traverse, become incapable of attending to business, the Court appointed interim committees of the lady's person, with liberty to take such proceedings with respect to the traverse as they should think fit. *In re Armstrong*, 2 De Gex & J. 123.

(E) SUPERSEDING THE COMMISSION.

A person had been duly found lunatic by inquisition, but before a committee of person or estate had been appointed, and before any report as to his estate had been made, he recovered his reason. A supersedeas of the commission was ordered. The Court has no jurisdiction to order the party who sued out the inquisition to be paid his costs out of the estate. *In re —, a lunatic*, 28 Law J. Rep. (N.S.) Chanc. 644; 4 De Gex & J. 103.

(F) TRUSTEE.

A new trustee was appointed under a power in a settlement in the place of a trustee, who was a lunatic. An order was made, under the 13 & 14 Vict. c. 60, for vesting the estate in the new trustees, but the committee of the lunatic's estate had not been served. The Registrar in Lunacy declined to draw up the order without such service, which the Court directed to be made. *In re Sawmores*, 25 Law J. Rep. (N.S.) Chanc. 575; 8 De Gex, M. & G. 390.

A settlement contained a power to appoint a new trustee in case any trustee should become incapable of acting. A trustee became of unsound mind. Upon petition, under the Trustee Act, 1850 (13 & 14 Vict. c. 60), the Court made an order for appointing a new trustee, and empowering the continuing trustee to transfer the trust fund. *In re Cooper's Settlement*, 25 Law J. Rep. (N.S.) Chanc. 685.

(G) COUNTY ASYLUM.

A contract for the sale of land to the committee of visitors of a lunatic asylum may be approved of by the Court of Quarter Sessions before being actually signed by the parties, if it can be identified as the contract which was afterwards entered into. The 36th section of the Lunatic Asylums Act, 1853, incorporating the clauses of the Lands Clauses Consolidation Act, 1845, with respect to the purchase of lands by agreement, and with respect to the purchase-money or compensation coming to parties having limited interests, enables the parties having limited interests to contract with the committee of visitors for the sale of land, although the committee of visitors have no compulsory powers of purchasing. *Devenish v. Brown*, 26 Law J. Rep. (N.S.) Chanc. 23.

(H) PRACTICE.

[See PRACTICE; SERVICE.]

A bill was filed by an English lunatic resident in

Scotland, and by his *curator bonis* duly appointed in Scotland, praying the transfer by one of two trustees into the name of the curator, who was the other trustee, of English government stock standing in the name of the curator and his co-trustee. The Court, upon motion that the defendant might be at liberty to make a transfer, after requiring the bill to be amended, by making the plaintiff sue by his "curator and next friend," made an order, by consent, as upon a motion for a decree. *Hessing v. Sutherland*, 25 Law J. Rep. (N.S.) Chanc. 687.

The priority of petition for a commission *de lunatico inquirendo* gives a *prima facie* right to the carriage of it when issued. *In re Wood*, 29 Law J. Rep. (N.S.) Chanc. 54; 1 De Gex, F. & J. 142.

MALICIOUS INJURIES.

[The Act relative to Malicious Injuries to Property amended by 23 Vict. c. 29.]

MALICIOUS PROSECUTION.

[See CONSPIRACY.]

(A) WHEN ACTION FOR MAINTAINABLE IN GENERAL.

(B) REASONABLE AND PROBABLE CAUSE.

(A) WHEN ACTION FOR MAINTAINABLE IN GENERAL.

In an action by an execution debtor against a creditor for maliciously arresting him for the whole amount recovered by the judgment, whereas part thereof had been previously satisfied, the declaration alleged as damage that the plaintiff was always, after he was taken, and during his detention, able and willing, and offered to pay, and was finally discharged from imprisonment, and discharged the judgment by paying the smaller sum, and by reason of the premises was put to expense for his maintenance during his detention and in obtaining his discharge:—Held, that special damage was sufficiently alleged. *Jenings v. Florence*, 26 Law J. Rep. (N.S.) C.P. 277; 2 Com. B. Rep. N.S. 467.

The rule, that in an action for a malicious prosecution the plaintiff is bound to shew a termination of the proceedings in his favour, does not apply where the proceedings, in respect of which the action is brought, are *ex parte*, and must of necessity terminate unfavourably to the plaintiff; as where the defendant maliciously exhibits articles or demands sureties of the peace against the plaintiff, in which cases the latter has no opportunity of controverting the oath of the defendant. *Steward v. Gromett*, 29 Law J. Rep. (N.S.) C.P. 170; 7 Com. B. Rep. N.S. 191.

A county court Judge believing that the plaintiff (one of the litigants in a cause before him) had sworn falsely, when, in fact, he had only spoken the truth, made an order, under the 14 & 15 Vict. c. 100. s. 19, directing him to be prosecuted for perjury, and bound the defendant (the other of such litigants) over to prosecute. In an action against the latter for malicious prosecution for having caused

such criminal proceedings for perjury to be taken against the plaintiff.—Held, by *Erle, C.J.* and *Williams, J.* (*Willes, J. dissentiente*) that the defendant was not liable, although he had by himself committing perjury led the county court Judge into the belief that the plaintiff had sworn falsely, and he had thereby been the cause of the prosecution. *Fitzjohn v. Mackinder*, 29 Law J. Rep. (N.S.) C.P. 167; 8 Com. B. Rep. N.S. 78.

The defendant's son, a youth about seventeen or eighteen, in his employ, caused a servant whom he suspected of obtaining money from him by false pretences, to be apprehended and taken before a magistrate, who remanded, but ultimately discharged him. After the remand, the son told his father what he had done; the latter did not prohibit his son from proceeding in the matter, but said, that as he (the son) had begun it he would not interfere:—Held, by *Erle, C.J.*, *Willes, J.* and *Byles, J.*,—*dubitante Williams, J.*,—no evidence for a jury of either previous authority or subsequent ratification by the father. *Moon v. Towers*, 8 Com. B. Rep. 611.

(B) REASONABLE AND PROBABLE CAUSE.

To constitute a person a rogue and vagabond within the meaning of the statute 5 Geo. 4. c. 83. s. 4, which enacts, that every person running away and leaving his wife or children chargeable, or whereby she or they shall become chargeable to any parish, shall be deemed a rogue and vagabond, it is necessary that the wife or children should have become actually chargeable; and it is not sufficient that the chargeability is merely imminent, and that actual chargeability subsequently ensues. *Heath v. Heape*, 26 Law J. Rep. (N.S.) M.C. 49.

In an action for maliciously, and without reasonable or probable cause, charging the plaintiff with and causing him to be apprehended on a warrant for unlawfully running away and leaving his wife and children chargeable to a parish, it appeared that the plaintiff had left his wife and children with her father, and went, as he alleged, in search of work. The defendant, the brother of the plaintiff's wife, at her request and with the consent of the father, who was unable to support his daughter, applied to the magistrate's clerk, and by his advice a warrant was issued, and the plaintiff apprehended, by the defendant's instructions. Before the hearing the defendant took the plaintiff's wife to the overseer and obtained some relief, and she was taken to the workhouse; but there was some evidence that this was a colourable chargeability, and was done with a view to support the information. The Justices dismissed the case, and thereupon the action was brought:—Held, that the Judge was right in telling the jury that there was no reasonable or probable cause for the arrest, and that although the defendant acted under a mistake, the jury might infer malice from his subsequently endeavouring to set up a colourable chargeability. *Ibid.*

There is a material distinction, as to liability for malicious prosecution, between the institution of the prosecution and its continuance, after it has been already instituted, without authority, by an agent. And the absence of reasonable and probable cause, which might be evidence of malice in the one case, will not be so in the other. *Weston v. Beeman*, 27 Law J. Rep. (N.S.) Exch. 57.

Where the party put in possession under a bill of sale had issued a summons against the assignor for feloniously stealing some of the chattels assigned, and the assignees attended the hearing and allowed the case to be opened on their behalf as prosecutors, —Held, that the absence of reasonable and probable cause would not be evidence of malice as against them; and, *quære*, whether there was such an entire absence of reasonable and probable cause as would in any case be evidence of malice. *Ibid.*

The plaintiff was employed by H to "dress" some timber on the defendant's premises, to be paid for by instalments as the work proceeded. Before it was completed H made an assignment of his effects to the defendant. Money being due to the plaintiff, he asked permission to take some pieces of timber away, and was informed that he could not do so. Early the next morning, and before any person was on the spot, he removed some of the timber, and placed it on his own premises, and in the course of the same day his attorney wrote to the defendant's attorney, stating that the plaintiff had a lien for work on the timber removed, and unless the amount due for work was paid, the timber would be sold. At a subsequent interview the plaintiff told the defendant he took the timber because he was afraid he should not be paid by H. The defendant afterwards laid an information against the plaintiff for stealing the timber, upon which the plaintiff was arrested and taken before a Justice, when he was discharged. The plaintiff having brought an action for a malicious prosecution, —Held, that there was evidence of want of reasonable and probable cause. *Huntlye v. Simson*, 27 Law J. Rep. (N.S.) Exch. 134; 2 Hurl. & N. 600.

The defendant, a miller, saw some sacks with his mark upon them on a wharf ready to be shipped. He opened one of them, and found pieces of new sacks with his mark on them. Having ascertained that the sacks had been brought to the wharf by the plaintiff, and were about to be loaded on board a vessel, he laid an information and complaint before a magistrate, that he had reason to suspect that some sacks, his property, had been stolen, and were then in the possession of the plaintiff. The magistrate thereupon issued a warrant to search for the goods, and for the apprehension of the plaintiff, to be dealt with according to law. The plaintiff being apprehended, the defendant appeared in support of the charge, and swore to the property being his; but he could not say when it was last in his possession, and he admitted that he lost a thousand sacks a year through his customers. The case was dismissed, and an action for malicious prosecution brought:—Held, that on the above facts there was no evidence of a want of reasonable and probable cause for laying the information. *Wyatt v. White*, 29 Law J. Rep. (N.S.) Exch. 193; 5 Hurl. & N. 371.

Held also, that the warrant, although for the plaintiff's apprehension as well as to search for the goods, was justified by, and was the result of the information; and that therefore, if there had been no reasonable and probable cause for laying the information, the defendant would have been liable for the damages occasioned by the plaintiff's apprehension. *Ibid.*

MANDAMUS.

[To examine Witnesses, see COLONY AND COLONIAL LAW, *Kelsall v. Marshall*, ante, p. 125.—To inspect Churchwardens' Accounts, see CHURCHWARDENS AND OVERSEERS, *Ex parte Briggs*, ante, p. 122.]

(A) WHEN IT LIES.

(a) *In general.*

(b) *To Public Bodies and Functionaries.*

(B) DECLARATION IN.

(A) WHEN IT LIES.

(a) *In general.*

It is an inflexible rule of law that where a person has been *de facto* elected to a corporate office, and has accepted and acted in the office, the validity of the election and the title to the office can only be tried by a proceeding on a *quo warranto* information. *Regina v. the Mayor, Aldermen and Burgesses of Chester*, 25 Law J. Rep. (N.S.) Q.B. 61.

A mandamus will not lie unless the election can be shown to be merely colourable. *Ibid.*

In case of overseers refusing to receive a pauper who has been removed under an order of Justices, the proper remedy is by indictment, and the Court will not grant a mandamus to compel the overseers to receive the pauper. *Ex parte the Overseers of Downton*, 27 Law J. Rep. (N.S.) M.C. 281; 8 E. & B. 856.

The mayor and assessors of the borough of R at the revision of the burgess-lists in October 1856, had wrongfully refused to entertain objections to certain persons being retained on the burgess-roll. In Hilary Term, 1857, a writ of mandamus was issued by the Court of Queen's Bench, directed to the new mayor and the old assessors, to hold a court to revise the burgess-roll for 1856, so far as related to the persons objected to:—Held, by the Court of Exchequer Chamber (*discontentiensibus Williams, J. and Crowder, J.*), that the Court of Queen's Bench has the power to compel the performance of a public duty by public officers, though the statutable time for performing the duty has passed, and to order the successor in office to perform the acts his predecessor has omitted to do; consequently, that a mandamus might issue in 1857, directing the mayor of 1857 and the old assessors of 1856 to revise the burgess-roll for 1856, though that roll, by the Municipal Corporation Act, ought to have been revised before the 15th of October 1856 by the mayor and assessors of that year. *The Mayor and Assessors of Rochester, in re the Parish of St. Nicholas, v. the Queen* (Ex. Ch.), 27 Law J. Rep. (N.S.) Q.B. 484; E. B. & E. 1024.

(b) *To Public Bodies and Functionaries.*

A local act of parliament (18 Geo. 3. c. lxxiv.) empowered the vestrymen of a parish, or the major part of them, to remove the poor-law collector of the parish from his office:—Held, (affirming the decision below, 26 Law J. Rep. (N.S.) M.C. 68; 7 E. & B. 409), that the majority must be an actual majority of the vestrymen assembled; and that it was not sufficient, at a meeting of thirty-five vestrymen, for sixteen to vote for the removal and eleven against it, the remaining eight abstaining from voting alto-

gether. *The Queen v. the Overseers of Christchurch* (Ex. Ch.), 27 Law J. Rep. (N.S.) M.C. 23.

Where it appeared that the poor-rate collector could not collect the rates without having the rate-books in his possession, and that it had been usual for the overseers of the parish to deliver the rate-books to him for such purpose, and that there was no legal impediment to their delivery to him, it was held, that he was entitled to have the temporary possession of them for such purpose as against the overseers: affirming the decision below. *Ibid.*

The 89th section of the 11 & 12 Vict. c. 63. empowers a local board of health to make and levy rates in order to raise money for the payment of charges and expenses which may have been incurred at any time within six months from the making of the rate. In 1854 the R local board of health entered into contracts with the prosecutors, for the performance of certain works necessary for carrying the above act into execution in the R district. The works having been performed, there was due to the prosecutors, on the 21st of June 1856, a balance of 1,013*l.* 16*s.* 8*d.*, for and in respect of the works and contracts, and an action was commenced to recover that sum. Thereupon an agreement was entered into between the prosecutors and the local board, by which the prosecutors agreed to receive 1,000*l.*, with certain interest and costs, and the local board agreed to consent to a Judge's order that immediate judgment should be had for the said sum of 1,000*l.* &c., and that payment should be made on the 27th of December 1856, in default whereof execution was to issue. The Judge's order was obtained to carry out the agreement. The local board failed to make the payment as agreed on, upon which the prosecutors put in an execution, which only realized 75*l.* 15*s.* 6*d.* They, therefore, on the 7th of May 1857, gave notice to the local board that they required them to make a rate for the purpose of raising the money so due to them, and further gave notice that an application would be made to the Queen's Bench for a mandamus. The local board refused to make the rate, and the prosecutors accordingly applied for a mandamus, which issued on the 12th of June 1857:—Held, that a new charge was created after the 27th of December 1856; that the case fell within the provision of the section above referred to, and that, therefore, the prosecutors were entitled to the mandamus. *The Queen v. the Rotherham Local Board of Health*, 27 Law J. Rep. (N.S.) Q.B. 156; 8 E. & B. 906.

By a charter of King George the Third, the College of Doctors of Law were empowered to hold real and personal property, and certain persons were appointed to act as visitors, with power and authority to compose and redress differences concerning the government or affairs of the college. Under the powers of the charter the members of the college were possessed of real and personal estate. By the 20 & 21 Vict. c. 77. power was given to the college to dispose of their real and personal estate to any person or persons whatsoever, whether members of the college or not; and it was enacted that at a meeting of the college the charter might be surrendered by a majority of the members present at such meeting, and that upon such surrender the said corporation should cease to exist, and that all real and personal estate should thenceforth belong to the president and fellows of the college in equal shares, &c.

At a meeting of the members of the college a majority resolved that a sum of money, parcel of a larger sum standing in the books of the Bank of England in the name of the college, should be transferred to every one of the members of the college, provided that such sum should not be transferred to those members who neglected or refused to signify their acceptance of the same, but should continue to be the property of the college. An appeal was made to the visitors to make an inquiry into the matter, and to restrain the alienation of the property. The visitors declined to interfere; and this Court refused a mandamus to oblige them to do so. *Ex parte Lee*, 28 Law J. Rep. (n.s.) Q.B. 114; E. B. & E. 863.

To a mandamus ordering the defendants (a local board of health) to cause compensation to be made out of the general or special district rate, to the prosecutor, for the damage sustained by him by reason of the exercise of the powers given to the defendants, the writ reciting that application had been made, and that the defendants denied all liability to make such compensation, it was returned that the defendants had never denied their liability to make such compensation; that they were ready and willing to do so, when the same had been duly determined and ascertained; that the prosecutor had taken no steps to have the same determined and ascertained; that he had given them no notice of his claim, or of the cause or amount thereof; that he had not appointed an arbitrator or given notice of his intention to do so; and that, therefore, they had not caused compensation to be made to him:—Held, upon demurrer, that the return was good. *The Queen, on the prosecution of Hans Ringland, v. the Burslem Local Board of Health*, 29 Law J. Rep. (n.s.) Q.B. 21.

(B) DECLARATION IN.

The 68th section of the Common Law Procedure Act, 1854, which enables a plaintiff to claim in his declaration in an action "a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested," does not extend to a duty arising out of a mere personal contract. The section only facilitates the mode of proceeding in cases in which, before the passing of the act, a writ of mandamus would have lain. *Benson v. Paul*, 25 Law J. Rep. (n.s.) Q.B. 274; 6 E. & B. 273.

Where a debt is of such a nature that a mandamus will be granted to enforce the payment, it is not necessary that the amount of the debt should have been previously ascertained; but such amount may be ascertained by the verdict of the jury in the action in which the writ of mandamus is claimed. *Ward v. Lowndes*, 28 Law J. Rep. (n.s.) Q.B. 265; affirmed 29 Law J. Rep. (n.s.) Q.B. 40.

Where a declaration in an action, consisting of two counts, the first, after stating the contract out of which the claim had accrued, and the circumstances under which the liability of the defendant arose, concluded by claiming 600*l.*; and the second, incorporating by reference the allegations in the first, and following the form required by the 69th section of the Common Law Procedure Act, 1854, concluded by claiming a writ of mandamus commanding the defendant to levy a rate "for the payment of the said debts and monies so due and owing to the plaintiffs as aforesaid,"—Held, after a verdict for the plaintiffs

for 351*l.* 10*s.*, that the omission in the second count of any specific sum as claimed was immaterial, for that even if it did not sufficiently appear by reference to the first count that a specific sum was claimed, the Court could amend by inserting a sum. *Ibid.*

Commissioners appointed and acting under the powers and provisions of the T Improvement Act, 1847, became indebted to the plaintiffs as architects for work, labour and plans done and provided between the years 1848 and 1853. Whilst that debt remained unsatisfied, the General Board of Health published a provisional order in pursuance of their powers under the Public Health Act, 1848, which provisional order was by the Public Health Supplemental Act, 1855, confirmed and made absolute. By that order the Public Health Act, 1848, was applied to the township of T, the powers of the T Improvement Commissioners were made to cease, and their property and estate transferred to the T Local Board of Health. And it was ordered that the debts contracted by the Commissioners should be satisfied by the Local Board out of such parts of the said transferred property as would have been chargeable therewith if the said order had not been made, and should be paid by the said local board as by the said Commissioners; provided that if such property were insufficient for that purpose, the deficiency should be charged upon the rates leviable under the Public Health Act, 1848. The plaintiff, having brought an action more than six years after the debt accrued, against the clerk to the local board, claiming a writ of mandamus to levy a rate for the payment of such debt,—Held, on demurrer to a plea of the Statute of Limitations, that such plea was bad. Held, also, on demurrer to a plea which stated that "the cause of claim for such writ did not accrue within six months before action brought, and that the said debts were not, nor are, a charge or expense incurred by the said local board within six months before suit, or within six months before demand for the said rate," and which plea professed to be founded on the 89th section of the Public Health Act, 1848—that such plea was bad. Held, also, that the 89th section does not apply to charges and expenses incurred by the Commissioners which were made a charge upon the rates, but prohibits only a retrospective rate for charges and expenses incurred by the local board more than six months before the rate. *Ibid.*

MANSLAUGHTER.

What constitutes murder when by design and of malice prepense, constitutes manslaughter when arising from culpable negligence. *The Queen v. Hughes*, 26 Law J. Rep. (n.s.) M.C. 202; Dears. & B. 248.

A banksman, whose duty it was to place a stage on the mouth of a shaft to receive a loaded truck run down to it on a tramway, and who neglected to place the stage, whereby the truck fell down the shaft and killed a workman, was held guilty of manslaughter. *Ibid.*

The prisoner made fireworks, and kept them for sale in a house in the Westminster Road. In his absence, by negligence or accident, a fire took place among the materials of the fireworks, which set light to a rocket and caused it to fly across the street and

set fire to a house in which a person was who was burnt to death:—Held, that as the death was not caused alone by the illegal act of the prisoner in keeping the fireworks, but by the superadded act of some one else in setting them on fire, the illegal keeping the fireworks was too remotely the cause of death to render the prisoner amenable to a charge of manslaughter. *The Queen v. Bennett*, 28 Law J. Rep. (n.s.) M.C. 27; Bell's C.C. 1.

The prisoner procured sulphate of potash and gave it to his wife intending her to take it for the purpose of procuring abortion; and she, believing herself to be pregnant, although in reality she was not, took the sulphate of potash in the absence of the prisoner, and died from its effects:—Held, that a conviction for manslaughter was right. *Regina v. Gaylor*, Dears. & B. 288.

MARKET CLAUSES ACT.

By a clause in a local improvement act, which closely followed the language of the Markets and Fairs Clauses Act, 10 & 11 Vict. c. 14. s. 19, it was enacted that "no person shall slaughter any cattle or dress any carcase for sale as human food, or food of man, in any places within the limits other than a slaughter-house":—Held, that to slaughter cattle on the private premises of an inhabitant of the town, unless for sale as human food, is no offence within this clause. *Elias v. Nightingale*, 27 Law J. Rep. (n.s.) M.C. 151; 8 E. & B. 698.

MARRIAGE.

[See titles **BARON AND FEME—DIVORCE AND MATRIMONIAL CAUSES.**]

[Certain Marriages in the Church at Coatham, in the parish of Kirk Leatham in the County of York, rendered valid by 19 & 20 Vict. c. 70.—The Law of Marriage in Scotland amended by 19 & 20 Vict. c. 96.—The Provisions of the Marriage and Registration Acts, amended by 19 & 20 Vict. c. 119.—Doubts as to the Validity of certain Marriages of British Subjects abroad removed by 21 & 22 Vict. c. 46.—Doubts as to the Validity of certain Marriages of British Subjects at Lisbon removed by 22 & 23 Vict. c. 64.—Certain Marriages in the Chapel of Saint Mary in Rydal, in the County of Westmoreland, made valid by 23 Vict. c. 1.—The Acts relating to Marriages in England and Ireland amended, by extending certain Provisions thereof to Persons professing with the Society of Friends called Quakers, by 23 Vict. c. 18.—Doubts as to the Validity of certain Marriages in Extra-parochial Places removed by 23 Vict. c. 24.—An Act to make Provision respecting the Marriage of British Subjects in the Ionian Islands, 23 & 24 Vict. c. 86.]

- (A) VALIDITY OF.
- (B) CONTRACT.
- (C) SETTLEMENT.
- (D) BREACH OF PROMISE OF.

(A) VALIDITY OF.

The act of parliament, 4 Geo. 4. c. 91, gives validity

to the marriage of a British Subject in the chapel of the British ambassador abroad, whether the other party to the marriage is a British subject or not. Therefore, where a British subject domiciled in France married a French subject at the British Ambassador's chapel in Paris, and afterwards went through the marriage ceremony with the same person according to the French form,—Held, that the second marriage was void, and an act performed at that time could not be accepted as having been performed at the marriage. *Re Wright's Trusts*, 25 Law J. Rep. (n.s.) Chanc. 621; 2 Kay & J. 595.

In June 1850, a widower and his deceased wife's sister, both English subjects, having an English domicile, intermarried during a temporary residence in Denmark, and afterwards had issue of the marriage. The legitimacy of the children of the marriage was questioned by the Crown in a suit (instituted after the deaths of both parents) for the administration of the father's estate:—Held, that the marriage was null and void by the statute 5 & 6 Will. 4. c. 54, and the children, therefore, illegitimate, although by the law of Denmark the marriage of a widower with his deceased wife's sister is held to be a valid marriage. *Brook v. Brook*, 27 Law J. Rep. (n.s.) Chanc. 401; 3 Sm. & G. 481.

A marriage valid according to the *lex loci contractus*, but violating, in respect of their personal capacity to contract the marriage, the *lex domicilii* of the contracting parties, held invalid by the law of the domicile. *Ibid.*

Statute 5 & 6 Will. 4. c. 54, prohibiting the intermarriage of a widower and his deceased wife's sister, is an integral part of the English law and public policy, and has, therefore, a paramount effect, not to be evaded by having recourse to foreign laws, but binding upon all English subjects, in whatever country they may be. *Ibid.*

(B) CONTRACT.

By marriage articles, reversionary real estate of the intended wife was agreed to be settled upon the intended husband for life, and the former had a testamentary power conferred upon her over part of her personal property. The lady was under age. The marriage took place. No settlement was ever executed. The reversion fell into possession. The wife lived thirty years, and then died, leaving her husband surviving. By her will, she executed the power reserved to her by the articles, and appointed a sum of stock among her nieces. The husband filed his bill against the heir-at-law of his wife and the appointees under her will, seeking to have the marriage articles carried into execution, and a life estate in the real estate secured to him, or that he might be declared entitled to be compensated for the value of such life estate out of the personality appointed by his wife, and that the appointment by the wife so far as it interfered with such compensation, might be declared void:—Held (affirming a decision of the *Master of the Rolls*), that, as it appeared in evidence in the Court of Appeal, which was not before the Court below, that the husband knew at the time of the marriage that his wife was an infant, and as there was no settlement executed, nor were the articles proved to have been recognized by her after she attained twenty-one, and as there was no evidence or allegation that she had ever refused to

concur in carrying the articles into effect, the real estate was not bound by them, but must pass to the heir-at-law of the wife; and that the husband could not be entitled to any compensation out of the appointed personalty, the real and personal estate not having been conveyed and assigned upon the trusts of the articles, being solely attributable to the negligence or indifference of the husband. *Campbell v. Ingilby*, 26 Law J. Rep. (N.S.) Chanc. 654; 1 De Gex & J. 393; 25 Law J. Rep. (N.S.) Chanc. 761; 21 Beav. 567.

Where a bill was filed on behalf of infants, against the devisees under the will of A, the reputed father of the infants' deceased mother, for the purpose of enforcing a representation alleged to have been made by A previous to the marriage of the infants' father and mother, that he had settled certain property on their mother and her children, the Court admitted parol evidence to show that such representation was actually made; and upon proof of that representation and of the marriage having taken place on the faith of it, a decree was made enforcing the alleged representation. *Prole v. Soady*, 29 Law J. Rep. (N.S.) Chanc. 721; 2 Giff. 1.

(C) SETTLEMENT.

[*Duncan v. Cannon*, 7 Law J. Dig. 465; 7 De Gex, M. & G. 78.]

(D) BREACH OF PROMISE OF.

Declaration for breach of promise to marry within a reasonable time, averring that a reasonable time had elapsed, and that the defendant refused to marry the plaintiff. Plea, that after the promise and before breach the defendant was and still is afflicted with a dangerous disease, by reason whereof the defendant became, and was, and thenceforth hitherto has been, and still is incapable of marriage, without danger to his life, and therefore unfit for the married state, whereof the plaintiff had notice before action. The jury found the plea proved, except the notice:—Held, by the majority of the Court (*Williams, J., Martin, B., Crowder, J. and Willes, J.*), and reversing the judgment below, 27 Law J. Rep. (N.S.) Q.B. 348; E. B. & E. 746, that a party cannot set up as an excuse for the breach of a promise to marry that the performance of the conjugal duties would be dangerous to his life, and that the plea disclosed no good defence to the plaintiff's claim for damages. Held, by the minority (*Pollock, C.B., Bramwell, B. and Watson, B.*), that there is an implied condition in a contract of marriage that the parties remain in sufficient health to undergo the excitement of the ceremony of marriage and to perform the functions of the marriage state without danger to life; that the circumstances set forth in the plea, as to the state of health of the defendant, were a bar to the plaintiff's claim to maintain an action for the alleged breach of contract; and that the averment of notice to the plaintiff was immaterial. *Hall v. Wright* (Ex. Ch.), 29 Law J. Rep. (N.S.) Q.B. 43; E. B. & E. 746.

To an action for breach of promise of marriage by a woman against a man, defendant pleaded that before and at the time of the plaintiff and the defendant so agreeing as in the declaration mentioned, the plaintiff and C Y had agreed to marry one another, which said agreement was then subsisting and in full

force, and the plaintiff then was actually engaged to marry the said C Y, as she then well knew, but of which the defendant was then wholly ignorant, and that, though the plaintiff ought to have fully disclosed the same to the defendant, before the making of the agreement, and though the defendant would not have made the said agreement had the same been disclosed to him by the plaintiff before the making thereof, yet the plaintiff, at the time of the making of the said agreement, withheld and concealed the same from the defendant, and procured the defendant to make, and the defendant did make, the said agreement on his part, whilst he was wholly ignorant of the same:—Held, a bad plea. *Beechey v. Brown*, 29 Law J. Rep. (N.S.) Q.B. 105; E. B. & B. 796.

MASTER AND SERVANT.

- (A) CONTRACT OF SERVICE.
 - (a) *Relation of Master and Servant.*
 - (b) *Determination of the Contract.*
- (B) RIGHTS OF THE MASTER AND SERVANT.
 - (a) *Dismissal.*
 - (b) *Wages.*
- (C) LIABILITY OF THE MASTER.
 - (a) *For Negligence of Servants.*
 - (b) *For Injuries to Servants.*
 - (1) *By his own Negligence.*
 - (2) *By Negligence of Fellow Servants.*
- (D) OFFENCES BY SERVANTS.
 - (a) *Not entering into the Service.*
 - (b) *Absenting from the Service.*
- (E) MOLESTING SERVANTS.

(A) CONTRACT OF SERVICE.

(a) *Relation of Master and Servant.*

[See SEDUCTION.]

By arrangement between the defendant, the registered proprietor, and the licensed driver of a hackney cab, plying for hire under the provisions of 1 & 2 Will. 4. c. 22. and the 6 & 7 Vict. c. 86, the driver paid 14s. 6d. each morning for the uncontrolled use of the cab and two horses during the day, and the fares earned each day belonged to the driver. The horses were fed at the expense of the defendant, and his name appeared upon a plate on the cab, as required by the 1 & 2 Will. 4. c. 22. s. 20:—Held, that, under the circumstances, and looking to the provisions of the above statutes, the driver was to be considered as the servant or agent of the defendant, with authority to enter into contracts for the employment of the cab, and that the defendant therefore was liable for a loss occasioned by the breach of a contract by the driver safely and securely to carry. *Powles v. Hider*, 25 Law J. Rep. (N.S.) Q.B. 331; 6 E. & B. 207.

G was employed by S, a master tailor, to make clothes as he should be required, each garment to be paid for according to an agreed list of prices. When engaged on a job, he was to work on the premises of S, and for him exclusively until the job was finished. At the end of each job G could leave if he chose, and S was not bound to find him more work:—Held,

that, as G, during any particular job, was to work exclusively for S, the relation of master and servant existed between them, and that he was liable under the statute 4 Geo. 4. c. 34. s. 3. to punishment by summary conviction for having neglected to complete a waistcoat which he had commenced to make for S. *Ex parte Gordon*, 25 Law J. Rep. (N.S.) M.C. 12.

(b) *Determination of the Contract.*

[See *Ryan v. Jenkinson*, title SCHOOL AND SCHOOLMASTER.]

An agreement in writing, by which the plaintiff agreed to serve the defendant as agent at a yearly salary, contained a proviso that the defendant would, at the end of the year, if he found the plaintiff had done sufficient business, give him 30*l.* more:—Held, that there was nothing in this agreement inconsistent with a custom in the trade to terminate the service, by either party giving to the other a month's notice. *Parker v. Ibbetson*, 27 Law J. Rep. (N.S.) C.P. 236; 4 Com. B. Rep. N.S. 346.

To an action for wrongfully dismissing the plaintiff from the defendant's service under the above agreement, the defendant pleaded that he determined the service by a month's notice, according to the custom. The Judge left it to the jury to say whether, looking at the proviso in the contract, they inferred that the parties meant to exclude the custom:—Held, a misdirection. *Ibid.*

By the agreement under which the plaintiff was employed by the defendants as their commercial traveller, at a yearly salary, payable quarterly, it was stipulated that the same should "be binding between the parties for twelve months certain from the date thereof, and to continue from time to time until three months' notice in writing be given by either party to determine the same":—Held, that the employment might be determined by a three months' notice expiring at the end of the first year. *Brown v. Symons*, 29 Law J. Rep. (N.S.) C.P. 251; 8 Com. B. Rep. N.S. 208.

Except in the case of menial servants, there is no inflexible rule with respect to the duration and mode of determining general contracts of service; but every case depends on its own peculiar circumstances, and is for the jury to determine. *Fairman v. Oakford*, 29 Law J. Rep. (N.S.) Exch. 459; 5 Hurl. & N. 635.

The plaintiff was engaged as a clerk by the defendant, a ship-broker, at a yearly salary of 150*l.*, and was paid his wages weekly; and, on leaving the service, at the defendant's instance, accepted a month's salary instead of notice. He subsequently re-entered the defendant's service at a yearly salary of 250*l.*, nothing being expressly said as to notice, and no time fixed for the duration of the service; but the plaintiff was paid weekly a sum equal to a week's salary. The plaintiff having been dismissed with a month's notice,—Held, that it was properly left to the jury to say whether the last hiring was on the same terms as the first, and whether the terms of the previous hiring were determined by the acceptance of a month's wages, instead of notice. *Ibid.*

(B) RIGHTS OF THE MASTER AND SERVANT.

(a) *Dismissal.*

An artisan who has been engaged for a term to

work in the art he practises, upon his representing himself to possess the requisite skill, may, upon his proving to be incompetent, be discharged by his employer before the end of the term for which he was so engaged. *Harmer v. Cornelius*, 28 Law J. Rep. (N.S.) C.P. 85; 5 Com. B. Rep. N.S. 236.

The plaintiff was employed by the defendant to serve him faithfully in the business of a certain manufacture, engaging to "bring all his knowledge to bear upon" it. Without the knowledge of his master, the plaintiff entered into a contract with a merchant (not dealt with by the defendant) for the supply of certain articles used in the manufacture, the result of which was a claim to a considerable amount by the merchant against the plaintiff's master, who thereupon dismissed him:—Held, in an action for the dismissal, plea that the plaintiff did not faithfully serve the defendant according to the agreement, that on these facts there was a defence to the action available on that plea; that the dismissal of the plaintiff was justifiable, and that a verdict for the defendant must be supported. *Horton v. M'Murtry*, 22 Law J. Rep. (N.S.) Exch. 260; 5 Hurl. & N. 667.

Quere—whether the plea would have been bad on motion for judgment *non obstante veredicto*. *Ibid.*

Semble—that it would have been bad on demurrer. *Ibid.*

(b) *Wages.*

By agreement, entered into between the plaintiff and the defendant, the plaintiff agreed to serve the defendant for ten years in the capacity of a brewer, and to do all the defendant's lawful commands; the defendant agreed to pay the plaintiff 20*l.* on the execution of the agreement, to find him a house, to supply him with coals, and to pay him the weekly sum of 2*l.* 10*s.* during the said term. The plaintiff entered upon the service of the defendant, did work for him in pursuance of the agreement, and was duly paid for such work; but falling ill he was unable to continue his work. After he recovered his health, he returned to the service of the defendant, who employed him, and paid him as before:—Held, that the plaintiff was entitled to recover his wages for the weeks during which he was unable to work, for as the contract was not rescinded, there was no suspension of the weekly payments. *Cuckson v. Stones*, 28 Law J. Rep. (N.S.) Q.B. 25; 1 E. & E. 248.

To a declaration in an action on the above agreement, to recover the wages which had not been paid, the defendant pleaded that the plaintiff was not during any part of the time for or in respect of which such wages were claimed ready, willing, or able to render, and did not in fact during any part of such time render the agreed or any service in manner and form, &c.:—Held, a good plea. *Ibid.*

A servant in hushandry being hired for a quarter of a year, entered the service, and was discharged before the end of the quarter; she immediately sued her master in the county court for discharging her without reasonable cause, and a verdict was given for the defendant. After the quarter had elapsed, she took out a summons before Justices against the defendant to recover the quarter's wages:—Held, that the question to be decided was essentially the same in the two courts, viz., whether the discharge

was wrongful, and that the decision in the county court was conclusive between the parties. *Routledge v. Hislop*, 29 Law J. Rep. (N.S.) M.C. 90.

(C) LIABILITY OF THE MASTER.

(a) *For Negligence of Servants.*

In an action for damage done by the negligent driving of the defendant's servant, the proper question to leave to the jury is, whether, at the time the act complained of, the servant was driving on his master's business and with his authority. *Patten v. Rea*, 26 Law J. Rep. (N.S.) C.P. 235; 2 Com. B. Rep. N.S. 606.

Where the general manager of the defendant, a horse-dealer, had a horse and gig of his own, which he used for the defendant's business as well as his own, and, in return, the horse was kept at the defendant's expense, and on one occasion the manager, on putting the horse into the gig, told the defendant he was going to S to collect a debt for him, and afterwards to see his own doctor, and before he got to S he ran his gig against and killed the plaintiff's horse:—Held, that there was abundant evidence to make the defendant responsible, although he had not expressly requested his manager to use the horse and gig on the particular occasion. *Ibid.*

A hired B to serve him as a thatcher for six weeks. During that time B hired himself to thatch for C, upon which A told C he should expect to be paid for giving up B as much as if B were thatching for him, to which C assented. B did a portion of the work negligently and left it, and A then sent another man at C's request to complete it, and afterwards sued C in the county court and recovered for the whole work done:—Held, that A was liable to C for B's negligent execution of the work. *Holmes v. Onion*, 26 Law J. Rep. (N.S.) C.P. 261; 2 Com. B. Rep. N.S. 790.

Quare—per *Cockburn, C.J.*, whether he would have been liable for B's incompetency. *Ibid.*

A master is not liable for the unauthorized negligent act of a competent servant, occasioning injury to a person voluntarily assisting another servant in the performance of his duty. Therefore, to an action by an administratrix under Lord Campbell's Act, against a railway company for damages occasioned by the negligence of the defendants, by their servants, in moving trucks against another truck, which the deceased was assisting in turning, and by such negligence causing the death of the deceased, it is a good defence that the deceased was voluntarily assisting servants of the defendants in turning the truck, and that the other servants, by whose negligence he was killed, were persons of ordinary skill, and competent to move trucks safely, and that their negligence was unauthorized by and without the knowledge of the defendants. Held, also, that such defence is admissible under "not guilty." *Degg v. the Midland Rail. Co.*, 26 Law J. Rep. (N.S.) Exch. 171; 1 Hurl. & N. 773.

The lessee of a ferry hired of the defendants for the day a steamer, with a crew, to carry his passengers across. The plaintiff, having paid his fare to H, passed across on the steamer, and while on board was injured by the breaking of a rope, owing to negligence of the crew in the manner of mooring:—Held, that the crew remained the servants of the defendants, who were, therefore, liable for their negli-

gence; and that, as the negligence was such as would have made the defendants liable to a mere stranger, and the plaintiff was on board with their consent, it was immaterial that he was a passenger under a contract with H. *Dalgell v. Tyrer*, 28 Law J. Rep. (N.S.) Q.B. 52; E. B. & E. 899.

The declaration alleged that the defendants were possessed of a steamer navigated by their servants; that the plaintiff was lawfully, and with the defendants' consent, a passenger for hire on board the steamer; that it was the duty of the defendants to navigate the steamer with reasonable care and skill, and to provide proper tackle, &c.; that the defendants did not navigate with reasonable care and skill, and did not provide proper tackle, whereby, and by the breaking of a rope, the plaintiff was injured. Pleas—not guilty; that the defendants were not possessed of the steamer navigated by their servants; that the plaintiff was not lawfully, and with the defendants' consent, a passenger for hire on board the steamer; and a traverse of the alleged duty of the defendants. A verdict having been found for the plaintiff:—Held, on a motion to enter the verdict on each or any of the pleas for the defendant, and in arrest of judgment, that the above facts sufficiently proved the allegations traversed; and that the declaration disclosed a sufficient cause of action. *Ibid.*

The plaintiff, a servant of J & Co., who were employed by the defendants to carry cotton from a warehouse, was receiving the cotton into his lorry when, in consequence of the negligence of the defendants' porters, in lowering the bales from the upper floor of the warehouse, a bale fell upon him:—Held, that the plaintiff and the defendants' servants, not being under the same control, or forming part of the same establishment, were not so employed upon a common object, as to deprive the plaintiff of a right of action against the defendants for such negligence. *Abraham v. Reynolds*, 5 Hurl. & N. 143.

(b) *For Injuries to Servants.*

(1) *By his own Negligence.*

Where a master builder personally interferes, and directs his workmen to make a scaffolding out of poles which he knows to be unsound, he is liable to make compensation if the scaffolding gives way and a workman upon it in his employ, who has no notice of the unsoundness, is injured thereby. *Roberts v. Smith* (Ex. Ch.), 26 Law J. Rep. (N.S.) Exch. 319; 2 Hurl. & N. 213.

Declaration, that the defendant was possessed of a ladder unsafe and unfit for use by any person carrying corn up the same, and the plaintiff was the defendant's servant, yet the defendant, well knowing the premises, wrongfully and deceitfully ordered the plaintiff to carry corn up the ladder, and the plaintiff, in obedience to the order, and believing the ladder to be proper for the purpose, and not knowing the contrary, did therefore carry corn up it for the defendant, but by reason of its being unsafe and unfit, the plaintiff fell from it and was injured:—Held (*Bramwell, B. dubitante*), that the declaration was sufficient without an averment that the plaintiff had no notice that the ladder was unsafe. *Williams v. Clough*, 27 Law J. Rep. (N.S.) Exch. 325; 3 Hurl. & N. 258.

The declaration stated that the defendant, engaged

in erecting a building, caused to be set up a hoarding which projected too far into the street, and to be put inside the hoarding a machine in an unsafe and dangerous position (of which he was personally aware), while the plaintiff was employed in his, the defendant's, service in working on the building, so that a vehicle, being lawfully driven along the street, accidentally, and without any fault on the part of the driver, ran against the hoarding, whereby and by reason of the premises, the machine was knocked down and fell upon the plaintiff. The evidence was that the hoarding projected further into the street than necessary, and so far that the vehicle had only room to pass and had not room to turn, and was turning when it struck against the hoarding; that the machine was between the building and the hoarding, and that there was so little space between the building and the machine that there was hardly room for a ladder, which the plaintiff had placed, and on which he was at work, and the result of the collision with the hoarding was that the machine fell upon the plaintiff and knocked him down:—Held, that the action was not maintainable; and that the plaintiff was rightly nonsuited, as there was a failure in proof upon the general issue, and therefore the objection was not merely in arrest of judgment. *Alsop v. Yates*, 27 Law J. Rep. (N.S.) Exch. 768: nom. *Alsop v. Yates*, 2 Hurl. & N. 768.

After the passing of the 18 & 19 Vict. c. 108, special rules were framed and approved for the regulation of a coal-mine, of which the defendant was the proprietor and manager; by one of these rules for the direction of enginemen and banksmen, every morning, before any one descended the shaft, the cage by which they were let down was to be twice run slowly up and down, loaded, in order to test the sufficiency of the rope and tackling; this rule had been habitually neglected for many weeks, to the defendant's knowledge. One night the rope by which the cage was suspended, being before in good repair, was (as it was afterwards discovered) injured by an accidental fire in the mine; the next morning A, who was a miner employed by the defendant in the colliery, and other miners, and who all knew of the rule for testing the rope, and of its being habitually violated, presented themselves at the pit to be let down to work, and there not having been any previous testing of the rope, &c., according to the rule, were told by the banksmen that they had better examine the rope before they went down; they, however, got immediately into the cage, and the rope breaking as they descended they were all killed. An action having been brought by A's representative against the defendant,—Held, that the action was not maintainable, for that the deceased's own negligence had materially contributed to the accident.

Semble—that, but for the deceased's negligence, the defendant, notwithstanding the deceased and the banksmen were both employed by the defendant in the colliery as fellow labourers, would have been liable by reason of his personal negligence in neglecting the rule and keeping in his employ a banksmen who he knew habitually violated it. *Senior v. Ward*, 28 Law J. Rep. (N.S.) Q.B. 139; 1 E. & E. 385.

A master is responsible to his servant for the injury received in the course of his service, if it be shewn to have been occasioned by the personal negli-

gence of the master. Such negligence may be brought home to the master by shewing either his personal interference to be the cause of the accident, or that he negligently retained incompetent servants, whose incompetency was the cause of the accident; but, in the absence of a special contract, the master is not liable for an accident not proved to have been occasioned by his personal negligence. *Ormond v. Holland*, E. B. & E. 102.

(2) By Negligence of Fellow servants.

It is a well-established rule of law that a servant cannot ordinarily sue his master for an injury sustained through the negligence of a fellow-servant; but the master is bound to use due care in the selection of competent servants, and is liable for negligence in employing incompetent persons. He is not bound to warrant the competency of his servants; and in an action against him for an injury done by one of his servants to another, the question for the jury is, not whether the servant was incompetent, but whether the master did not exercise due care in employing him. *Tarrant v. Webb*, 25 Law J. Rep. (N.S.) C.P. 261; 18 Com. B. Rep. 797.

The defendants, being the contractors for large works, employed M to do part of the works by the piece for a certain sum payable by monthly instalments according to the work done, the defendants finding the tools. W, who was then in the defendants' service, was taken by M from his work and put to assist in the piece-work at weekly wages, but, in accordance with the general regulations at the defendants' works, W was paid his wages weekly by the defendants with their other workmen, and M, who before the contract piece-work had also been in the defendants' employment at weekly wages, drew from the defendants' money in that character, the whole being charged against him and deducted from the amount of the instalments when payable. W having been killed while at work on the piece-work by the negligence of the defendants' servants,—Held, that W and M were both the servants of the defendants, and therefore that the administratrix of W could not maintain an action against the defendants for the negligence of the defendants' other servants, who were reasonably fit and competent for the service in which they were employed. *Wiggitt v. Fox*, 25 Law J. Rep. (N.S.) Exch. 188; 11 Exch. Rep. 832.

Where the plaintiff was, with other workmen in the employ of the defendant, engaged in sinking a mine, and was at the bottom of the pit, and assisted in filling a tub with water, which was drawn up to the top to be emptied, and through something occurring at the top, where his fellow-workmen were employed to empty it, it fell down upon the plaintiff and injured him,—Held, that he could not sue the defendant for the injury. *Griffiths v. Gidlow*, 27 Law J. Rep. (N.S.) Exch. 404; 3 Hurl. & N. 648.

(D) OFFENCES BY SERVANTS.

(a) Not entering into the Service,

A having bound himself to work for P as an artificer for five years, entered into his service, and while this contract was subsisting agreed in writing with H to serve him for the same period. Complaint was made before Justices, under the 4 Geo. 4. c. 34. s. 3, against A for not entering into H's service:—Held,

that as A could not enter into the service without subjecting himself to penal consequences for absenting himself from P's employ, he had a lawful excuse, and could not be convicted. *Ashmore v. Horton*, 29 Law J. Rep. (N.S.) M.C. 13.

(b) *Absenting from the Service.*

Under the Master and Servant's Act, 4 Geo. 4. c. 34, an artificer who has been convicted and imprisoned under the act for absenting himself from his master's service, and who, after his discharge from imprisonment, refuses to return to the same service, may again be convicted and imprisoned for the offence of absenting himself from the said service. *Ex parte Baker*, 26 Law J. Rep. (N.S.) M.C. 193; 7 E. & B. 696.

A warrant of commitment under the act adjudged the complaint to be true, it appearing to the Justice "as well upon the examination on oath of, &c. as otherwise, that the said W B having contracted as aforesaid to serve, &c., and the term of his contract being unexpired, did, on &c., misdeemean and misconduct himself in his said service by neglecting and absenting himself from his said master's service without the leave," &c.:—Held, first, that it sufficiently appeared on the face of the warrant that W B had entered the service. Secondly, that the words "as otherwise" did not import that the Justice had adjudicated upon evidence not on oath, or not in the presence of the party. Thirdly, that the warrant only charged one offence under the act, namely, the absenting from the service. *Ibid.*

By section 3. of stat. 4 Geo. 4. c. 34, if any servant in husbandry, or any artificer, &c., shall contract with any person to serve him, and shall not enter into or commence his or her service according to his or her contract (such contract being in writing and signed by the contracting parties), or having entered into such service, shall absent himself or herself from his or her service before the term of his or her contract shall be completed, it shall be lawful for a Justice of the Peace of the county, &c. to issue his warrant, &c., and to commit such person to the house of correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months, &c.:—Held, that before an artificer can be convicted of so absenting himself, the Justice ought to be satisfied that he had absented himself without lawful excuse, and that he knew he had no lawful excuse. *Rider v. Wood*, 29 Law J. Rep. (N.S.) M.C. 1.

(E) *MOLESTING SERVANTS.*

By the 6 Geo. 4. c. 129. s. 3, if any person shall, by violence to the person or property, or by threats or intimidation, or by molesting another, force, or endeavour to force, any workman hired in any trade to depart from his hiring, he shall be liable, on conviction, to imprisonment. A conviction under the act, by one of the metropolitan police magistrates, stated that the defendant was convicted of having unlawfully, by threats, endeavoured to force W J, who was then a workman hired by T P, to depart from his hiring:—Held, that the conviction stated the offence in the words of the act declaring the offence, and was sufficient by reason of the Metropolitan Police Act, 2 & 3 Vict. c. 71. s. 49. *Semble*—that the conviction was valid irrespective of the

latter statute. *Ex parte Perham*, 29 Law J. Rep. (N.S.) M.C. 31.

The 6 Geo. 4. c. 129. s. 3. makes it an offence to endeavour by threats to force any workman hired for any work to leave his hiring; and the Metropolitan Police Act, 2 & 3 Vict. c. 71, provides that a conviction in the words of any statute declaring the offence shall be sufficient. A conviction by a Metropolitan Police Magistrate stated that the defendant did by threats endeavour to force one W J to leave his hiring:—Held, that the conviction was sufficient; that the nature of the threats need not be shown, nor the threats set out, the essence of the offence being the endeavour to force a workman to depart from his employ, and that the threats were matter of evidence only. *Ex parte Perham*, 29 Law J. Rep. (N.S.) M.C. 33; 5 Hurl. & N. 30.

Held, also, for the same reason, that neither the conviction nor the information need allege that the threats were to any particular person. *Ibid.*

MEDICINE AND SURGERY.

[See PHYSIC.]

MERCANTILE LAW AMENDMENT ACT.

[The laws affecting trade and commerce amended by (England and Ireland) 19 & 20 Vict. c. 97.—(Scotland) 19 & 20 Vict. c. 60.]

The provision in section 1. of the Mercantile Law Amendment Act, 1856, that no writ of *fi. fa.* shall prejudice the title of any person to goods acquired *bond fide* and for a valuable consideration before actual seizure under the writ, does not apply to protect a *bond fide* purchaser of goods against a writ of *fi. fa.* issued against the vendor and delivered to the sheriff before the statute passed. *Williams v. Smith* (Ex. Ch.), 28 Law J. Rep. (N.S.) Exch. 286; 4 Hurl. & N. 559.

The Court has no power under section 5. of 19 & 20 Vict. c. 97. to enforce by order the remedy there given. *Phillips v. Dickson*, 29 Law J. Rep. (N.S.) C.P. 223; 8 Com. B. Rep. N.S. 391.

A and B, two of the managing committee of a mining association, were sued, in separate actions, by the solicitor to the association for 581*l.* 15*s.*, the balance of his bill of costs. In the action against A, a verdict was taken by consent for 500*l.* payable by instalments; judgment not to be entered up by plaintiff unless A made default in payment of the instalments. A having made default, judgment was entered up, when he paid the debt and costs. The action against B was stayed by a Judge's order, on payment by B of 550*l.* by instalments, "without prejudice to any rights the plaintiff might have against any other person in respect thereof." A having applied under section 5. of 19 & 20 Vict. c. 97. to have the Judge's order assigned to him, the Court held that they had no power to make an order under that section. *Ibid.*

MERCHANT SHIPPING ACT.

[See SHIP AND SHIPPING.]

MERGER.

A tenant in tail in remainder expectant upon a prior estate tail took a transfer to himself of a mortgage term affecting the estate. He afterwards became tenant in tail in possession, and, after remaining in possession five years, died a bachelor and intestate, without having barred the entail, and without having indicated any intention as to whether the charge should merge or not. Upon a bill by his administrator against the remainderman,—Held, that the charge was a subsisting charge. *Horton v. Smith*, 27 Law J. Rep. (N.S.) Chanc. 773; 4 Kay & J. 624.

Charges paid off by a person having only a partial interest in the estate,—Held, not to have merged. *Pitt v. Pitt*, 22 Beav. 294.

In 1824 A purchased an estate, and he mortgaged it to raise part of the purchase-money. In February 1840 the mortgage was paid off and transferred to B, who, in April 1840, executed a declaration of trust in favour of A. A died in 1848,—Held, that the charge had merged. *Ibid*.

The owner in fee bought up an existing building lease of the property, and had it assigned to a trustee in trust for him, "his executors, administrators and assigns."—Held, that the presumption was that the lease had not in equity merged in the inheritance, but that it passed as part of his personal estate.—Held, also, that the burden of proof was on those who asserted the contrary. *Gunter v. Gunter*, 23 Beav. 571.

METROPOLIS LOCAL MANAGEMENT ACTS.

[The Act of 18 & 19 Vict. c. 120, for the better Local Management of the Metropolis, amended by 19 & 20 Vict. c. 112.—The Metropolis Local Management Act (1855) altered and amended, and the Powers of the Metropolitan Board of Works for the Purification of the Thames and the Main Drainage of the Metropolis, extended by 21 & 22 Vict. c. 104.]

(A) ELECTION, POWERS AND PROCEEDINGS OF VESTRYMEN.

(B) RATES.

- (a) *Collection of Arrears of Rate made under the Highway Act.*
- (b) *Power of New Vestry to make Poor Rates.*
- (c) *Distinctive Rates: Lighting and Sewers Rates.*
- (d) *Scale of Rateability.*
- (e) *Special Benefit Rate.*

(C) OTHER MATTERS.

- (a) *Jurisdiction and Powers of the Metropolitan Board of Works.*
- (b) *Liability on Contracts made before the Act passed.*
- (c) *Party liable for Drainage Works.*
- (d) *Recovery of Costs or Expenses.*
- (e) *"Street."*
- (f) *"Regular Line of Buildings."*
- (g) *"Sewer."*

(A) ELECTION, POWERS AND PROCEEDINGS OF VESTRYMEN.

The inspectors of votes for the election of vestry-

men, under the Metropolis Local Management Act, have authority to inquire into the qualification of candidates, and are not to return as elected any person, who, although he may have a majority of votes, was not qualified at the time of the election. *Ex parte Ross, in re the Vestry of St. Pancras*, 26 Law J. Rep. (N.S.) Q.B. 312; *nom. R. v. St. Pancras*, 7 E. & B. 954.

Under a deed for the foundation of a charity, the right of electing alms-people was vested "in the minister, churchwardens, overseers of the poor and such of the parishioners as should pay taxations to the poor, and should not keep inmates or poor lodgers":—Held, that this was not "a duty, power, or privilege relating to the management and relief of the poor, or the administration of any money or other property applicable to the relief of the poor," within the meaning of the 3rd section of the Metropolis Local Management Act, 19 & 20 Vict. c. 112, and that the right of electing alms-people was not transferred to the new vestry appointed under that act. *Attorney General v. the Drapers' Company*, 27 Law J. Rep. (N.S.) Chanc. 542; 4 Drew. 299.

The defendants, in exercise of the powers given to them by the 76th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, served the plaintiff with a notice requiring him, in the construction of the drainage to certain houses then building by him in their district, to use pipes of stoneware of the best quality. The plaintiff proposed to use pipes of Aylesford manufacture as coming within the description of stoneware mentioned in the notice. To this the defendants objected, who required pipes of Lambeth manufacture, or of manufacture similar to that of Lambeth, to be used, and they refused, unless this were complied with, to make an opening into the main sewer for the plaintiff's drainage. The plaintiff thereupon made the opening himself, and completed his drainage by means of Aylesford pipes:—Held, the evidence of scientific men as to the comparative merits of the two manufactures being conflicting, that the act gave the vestry the right to determine which of the two materials should be used; and the Court therefore refused a motion by the plaintiff for an injunction to restrain the defendants from entering upon the plaintiff's premises for the purpose of taking up the drainage works constructed by him with the Aylesford pipes. *Austin v. the Vestry of the Parish of St. Mary, Lambeth*, 27 Law J. Rep. (N.S.) Chanc. 388, 392, 677.

By the 28th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, the duties of vestries are to be performed by the majority present. By a by-law made pursuant to the 202nd section, it was provided that "all questions shall be determined by a show of hands, or by a division, if demanded, with the names recorded":—Held, that the division or poll might take place after a show of hands. *Tear v. Freebody*, 4 Com. B. Rep. 228.

(B) RATES.

- (a) *Collection of Arrears of Rate made under the Highway Act.*

Under the General Highway Act, 5 & 6 Will. 4. c. 50. s. 18, a board was elected, on the 26th of March 1855, to serve the office of surveyors of the highways in a parish for the year ensuing. On the 23rd of

November 1855 they made a highway rate. In August 1855 the Metropolis Local Management Act (18 & 19 Vict. c. 120.) passed; and, by section 251, it came into operation on the 1st of January 1856. On the 28th of November 1855, under sections 31 and 32, a district board of works was elected for the district comprehending the parish, which was included in Part I. of Schedule (B). After the 25th of March 1856, application was made, on the part of the late highway board, to a party rated to the said highway-rate, for payment of arrears of the rate, under section 97. of the statute 18 & 19 Vict. c. 120. Payment not having been made, a summons was taken out against the party; but the magistrate refused to issue a warrant for levying. Afterwards the party paid the arrear to the district board of works. A rule having been obtained for an order directing the magistrate to issue the warrant, this Court discharged the rule, on the ground that the collection of such arrears was not, under section 97, to be made by the late highway board. *Regina v. Hingham*, 7 E. & B. 5.

(b) *Power of New Vestry to make Poor Rates.*

By a local act, making the hamlet of Spitalfields a distinct parish, the rector of the church, the churchwardens and overseers of the poor, and all other persons possessing certain specified qualifications, were constituted the vestrymen of the parish. By another local act power was given to them to make poor-rates. By the 18 & 19 Vict. c. 120. s. 2, the new vestry of certain parishes, including the parish of Spitalfields, was ordered to be elected in a certain specified manner, and the incumbent and churchwardens were to constitute part of such vestry, and were to vote therein, in addition to the elected vestrymen; and by section 8. it was enacted, that "such vestrymen with such persons as hereinbefore mentioned, shall forthwith be deemed to constitute the vestry of such parish, and shall supersede any existing vestry therein, and exercise the powers and privileges held by such existing vestry." Under the above provisions a vestry was elected for the parish of Spitalfields, and made poor-rates, the overseers taking no part in making them:—Held, that the powers of making poor-rates possessed by the old vestry were transferred to the new vestry, and that the rates were lawfully made, the overseers not being entitled to vote. *Vaughan v. Imray*, 28 Law J. Rep. (N.S.) M.C. 78; 1 E. & E. 633.

(c) *Distinctive Rates: Lighting and Sewers Rates.*

Under the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 161, no rates, except the lighting and sewers rate, need be kept distinct from the general rate. *The Queen v. the Great Western Rail. Co.* 28 Law J. Rep. (N.S.) M.C. 59; E. B. & E. 600.

By section 158. of the 18 & 19 Vict. c. 120, it is enacted, that "every such vestry and board shall distinguish in their orders sums required for defraying expenses connected with sewerage, and also, where the 3 & 4 Will. 4. c. 90, or any other act by virtue whereof land is rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted from being rated in respect of such expenses, is in force in any parish, or any part of any parish, at the

time of the passing of this act, distinguish, as regards such parish or part, the sums required for defraying the expenses of lighting their parish or district from sums required for defraying other expenses of executing this act"—Held, that every such vestry and board are thereby by implication directed to distinguish the sum required for lighting the whole parish, and to order a separate sum to be levied for defraying such expenses, which must be by a lighting rate over the whole parish. *The Overseers of the Parish of St. James, Westminster, and the Overseers of the Parish of St. Mary, Battersea*, 29 Law J. Rep. (N.S.) M.C. 26.

Therefore, the overseers of the parish of M (the respondents) having made a lighting rate in compliance with an order of the Board of Works of the W District, within which district the parish of M was situate, for carrying into effect the purposes of the 18 & 19 Vict. c. 120, and of a local act in force in a district called the "Out-District," in which premises occupied by the overseers of J (the appellants) were situate, in which district neither the 3 & 4 Will. 4. c. 90. nor any other act by virtue whereof land is rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted from being rated in respect of such expenses was in force at the time of the passing of the 18 & 19 Vict. c. 120, though the said act 3 & 4 Will. 4. c. 90. was at that time in force in two other districts, and a similar act in a third district of the said parish of M for which lighting rates were at the same time made in compliance with the aforesaid order,—Held, that the said order and rate on the said out-district were valid and enforceable. *Ibid.*

The Court has no power to give an opinion on a question asked by the parties to the case, but which the magistrates by whom the case is stated have not submitted for the opinion of the Court. *Ibid.*

By the 165th section of the 18 & 19 Vict. c. 120. it is provided that "in every parish or part of a parish in which, under any other act, land is now rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is now wholly exempted from being rated in respect of such expenses, such land shall continue to be rated to every lighting-rate made under this act at such less amount, or where such land is now wholly exempt as aforesaid, shall be wholly exempted from such rate." The appellants were rated under section 161. of the above act in respect of the mains and other pipes, plugs and apparatus fixed in the ground for the conveyance of water, and for the land occupied by them by means of their said mains, &c. Before the passing of the above act the lighting of the hamlet of the respondents was regulated by the local act, 1 & 2 Geo. 4. c. lxxii., and by section 30. of that statute the necessary sums of money were ordered to be raised by rates "laid upon all and every person and persons who do or shall inhabit, hold, use, occupy, be in possession of, or enjoy any messuages, tenements, coach-houses, stables, cellars, vaults, houses, shops, warehouses, or other buildings, tenements or hereditaments, situate or being in any of the streets," &c. "within the said hamlet," &c. Under this act the appellants had been assessed to a lighting-rate, but having appealed against it, this Court had held that they were not

rateable:—Held, therefore, that, by the terms of the 165th section of 18 & 19 Vict. c. 120, they were exempt from liability to be rated under the provisions of that section. *The East London Waterworks Company v. the Overseers of the Poor of the Hamlet of Mile End Old Town*, 29 Law J. Rep. (N.S.) M.C. 66.

(d) *Scale of Rateability.*

By a local act for the parish of P, all hereditaments whatever were made rateable to all the parish rates; but certain classes of property, such as unoccupied or unfinished buildings, were to be rated to certain rates (the poor-rate not being one) on a different scale from other property:—Held, that by the 161st section of the Metropolis Local Management Act, all property must be rated to the general rate under that act on the same scale as to the poor-rate in the parish, without any reference to these distinctions. *R. v. the Great Western Rail. Co.*, 28 Law J. Rep. (N.S.) M.C. 59; E. B. & E. 600.

(e) *Special Benefit Rate.*

Where, under the Metropolis Local Management Act, 18 & 19 Vict. c. 120, parishes have been united in a district, the expense of keeping the pavements in repair and every other expense of cleansing and lighting ought to be charged on each parish in proportion to its rateable value. If some portions of the district are not paved at all, or are insufficiently paved, the expense of putting them into as good condition as the sufficiently paved portions ought to be borne by those parishes in which those unpaved or insufficiently paved portions are situate. *The Overseers of the Poor of St. Botolph, Without Aldgate, v. the Board of Works for the Whitechapel District*, 29 Law J. Rep. (N.S.) M.C. 228.

By section 159, where it appears to any vestry or local board that all or any part of the expenses have or has been incurred for the special benefit of any particular part of their parish or district, or not for the equal benefit of the whole, such vestry or board may direct the sum or sums necessary for defraying such expenses or any part thereof, to be levied in such part, or exempt any part of such parish or district from the levy, or require a less rate to be levied thereon, as the circumstances of the case may require:—Held, that if the vestry or board take into consideration the special circumstances which, in raising the required sum of money, might call for the application of the provisions of the above section, this Court will not interfere with the exercise of their discretion as to what amount they shall direct the overseers of the parishes to levy. *Ibid.*

(C) OTHER MATTERS.

(a) *Jurisdiction and Powers of the Metropolitan Board of Works.*

A *certiorari* issued to bring up an order of the Metropolitan Board of Works made, under the statute 18 & 19 Vict. c. 120. s. 214, on an appeal from a decision of the district board, by which an order for compensation was granted to D as an officer to certain Commissioners. The *certiorari* is taken away by section 230. The *certiorari* was issued on affidavits by which it appeared that D was not an officer, and that consequently the order was made without jurisdiction. On shewing cause against the

rule to quash this order,—Held, that the Board of Works had jurisdiction on the appeal to decide whether D was an officer or not; and that, even assuming that their decision was wrong in fact, the order was not without jurisdiction. The rule to quash the order was discharged, and the writ of *certiorari* quashed, *quia improvidè emanavit*. *Regina v. St. Olave's District Board*, 8 E. & B. 529.

The powers conferred upon the Metropolitan Board of Works by the 135th section of the 18 & 19 Vict. c. 120, of carrying their sewers and works into, through or under any lands, making compensation for any damage done thereby, may be exercised without purchasing such lands, or any easement in them; and the 150th, 151st and 152nd sections of the act, enabling them to purchase any land, or any right or easement in or over any land which they may deem necessary or expedient for the formation or protection of their works, are not to be read as restricting such exercise of those powers. *The North London Rail. Co. v. the Metropolitan Board of Works*, 28 Law J. Rep. (N.S.) Chanc. 909; Johns. 405.

In the construction of powers conferred by act of parliament upon public bodies, acting for the public benefit alone, the intention of the legislature is not to be measured by the more guarded powers given to public companies established for trading purposes. *Ibid.*

(b) *Liability on Contracts made before the Act passed.*

By the 90th section of the Metropolis Local Management Act, (18 & 19 Vict. c. 120), all the duties and powers as to cleansing, &c. any parishes, within any district mentioned in Schedule (B.) vested in any Commissioners or other body, shall cease to be so vested, and become vested in and exercised by the Board of Works for the district under the act. The 94th section provides that all contracts, &c. entered into with such Commissioners or body shall remain as valid and effectual, and shall be proceeded on and enforced as if that act had not passed; and no actions shall abate or be discontinued, but they shall continue as if the act had not passed; and all monies or liabilities which such Commissioners or body would have been liable to discharge out of rates levied under their powers, shall be paid out of rates to be levied by the new board or vestry under the act:—Held, that on a reasonable construction of these provisions, an action commenced after the passing of the act upon a contract for cleansing entered into, before the passing of the act, with trustees appointed under a local act for a parish within Schedule (B.), was correctly brought against the new Commissioners under the Metropolis Local Management Act, they being the parties having control of the funds which were ultimately liable, although there is no express provision that actions on old contracts, of which the validity is preserved by section 94, shall be brought against the new body instead of the old. *Sinnott v. the Commissioners of Works for the Whitechapel District*, 27 Law J. Rep. (N.S.) C.P. 177; 3 Com. B. Rep. N.S. 674.

(c) *Party liable for Drainage Works.*

A held premises under a building lease, with a covenant to pay, bear, and discharge "all such par-

liamentary, parochial, and county, district, and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burthens, duties, and services whatsoever, as during the term should be taxed, assessed, or imposed upon or in respect of the premises, or any part thereof." He granted an underlease (at a rack-rent) to B, the latter covenanting "that the several covenants, conditions, and agreements contained in the original lease on the lessee's part to be performed and observed (except the covenants to pay rent and to insure), should during the continuance of the demise be performed and observed by him":—Held, that B was liable for the expense of drainage works done upon the premises under the authority of the Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120. *Sweet v. Seager*, 2 Com. B. Rep. N.S. 119.

(d) *Recovery of Costs or Expenses.*

[See title ACTION (A) (c), *The Vestry of St. Pancras v. Batterbury*, ante, p. 5.]

(e) *"Street."*

In a public road in the metropolis there is a continuous line of houses on both sides; immediately in front of the houses on either side is a paved footway from 10 to 15 feet wide, and between each footway and the carriage-way an intermediate space from 33 to 58 feet wide; the occupants of the houses on either side have always used so much of this space as is opposite to their respective houses in such manner as suits their respective trades,—as for placing carriages for repair, sawing stone, &c.,—paying a small yearly rent to the lord of the manor to whom the soil belongs: subject to this use of it by the occupants, the public have always passed over this intermediate space, where and when these obstructions would permit, as of right. On the space opposite his house a publican erected a moveable shed on fixed sockets, with forms for his customers to use. The erection caused no obstruction to the paved footway:—Held, that this space was not part of a "street" within the meaning of the Metropolis Local Management Act, 1855; and that the shed was not an obstruction which might be removed by the district board within the meaning of sections 19. and 20. of that act. *Le Neve v. the Vestry of the Hamlet of Mile End Old Town*, 27 Law J. Rep. (N.S.) Q.B. 208; 8 E. & B. 1054.

Semble—that there had been a partial dedication of this space to the public; and that it could not be considered private property, without any public easement, that might be inclosed by the lord of the manor. *Ibid.*

An unfinished road (in a parish mentioned in Schedule (A.) of the Metropolis Local Management Act, 18 & 19 Vict. c. 120), containing inhabited houses along part of it, communicated, at one end only, with another road containing houses placed singly at long intervals. The soil of such unfinished road was private property; and the road itself had not been dedicated to the public. The vestry of the parish refused to light the road under sect. 130. On a motion for mandamus to compel them to do so, this Court discharged the rule, on the ground that the vestry were not bound to treat the road as a street under sects. 130, 250. *Regina v. St. Mary, Islington*, E. B. & E. 743.

(f) *"Regular Line of Buildings."*

By the 143rd section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, after the 1st of January 1856, no building is to be erected beyond "the regular line of buildings in the street in which the same is situate":—Held, that this does not mean a strict mathematical line, but a substantially regular line. *Tear v. Freebody*, 4 Com. B. Rep. 228.

(g) *"Sewer."*

A marsh wall or embankment that keeps back the river Thames at high water from inundating the Isle of Dogs, and through which sewers pass which drain the isle at low water, is "a sewer" within the meaning of the 204th section of the 18 & 19 Vict. c. 120, which gives power to the district board of works in whom any sewer is vested to remove any building erected thereon without their consent. *The Poplar District Board of Works v. Knight*, 28 Law J. Rep. (N.S.) M.C. 37; E. B. & E. 408.

Quære—whether the marsh wall was vested in the district board under section 68. and Schedule A, or in the Metropolitan Board of Works under section 135. and Schedule D; but the latter never having exercised any jurisdiction over it, and the district board being *de facto* in the exercise of that jurisdiction.—Held, on a complaint by them against persons who had treated with them as having jurisdiction, that the marsh wall was vested in the district board. *Ibid.*

Semble—that a house, built with foundations placed on the surface, without any digging out, is within section 76, which enacts, "that before beginning to lay or dig out the foundation of any house seven days' notice shall be given to the district board." *Ibid.*

METROPOLITAN BUILDING ACTS.

["The Metropolitan Building Act (1855)," altered and amended by 23 & 24 Vict. c. 52.—See CONTRACT (B) (c), *Stevens v. Gourley*, ante, p. 163.]

- (A) BUILDING EMPLOYED FOR HER MAJESTY'S SERVICE.
- (B) DANGEROUS STRUCTURES.
- (C) STREET.
- (D) NOTICES; WHEN NECESSARY.
- (E) SURVEYOR'S FEES.

(A) BUILDING EMPLOYED FOR HER MAJESTY'S SERVICE.

A building intended to be the depôt for the arms, &c. of the London Militia (which are the property of the Crown), belonging to and erected by the Commissioners of Lieutenancy for London under the Militia Acts, and paid for pursuant to those acts by the trophy-tax, is exempt from the operation of the Metropolitan Building Act, 1855, by the 6th section, as a "building employed for Her Majesty's service." *Jay v. Hammon*, 27 Law J. Rep. (N.S.) M.C. 25; nom. *R. v. Jay*, 8 E. & B. 469.

(B) DANGEROUS STRUCTURES.

By the Metropolitan Building Act, 1855 (18 & 19

Vict. c. 122), s. 78, all expenses incurred by the Commissioners in respect of any dangerous structure shall be paid by the owner; and by section 103, all expenses, to be recovered in a summary manner, may be recovered as directed by the 11 & 12 Vict. c. 43, by section 11, of which complaint must be laid within six months from the time when the matter of such complaint arose. The owner of a dangerous structure not having taken it down, as required pursuant to the former act, the Commissioners took it down; and the amount of the expenses incurred was demanded of the owner, and refused. A complaint was laid before a magistrate, for the non-payment of the expenses, within six months of the demand and refusal, but beyond six months from the completion of the works:—Held, that the matter of complaint was the non-payment of the expenses, and that the time of limitation ran from the demand, and not from the completion of the works; therefore that the complaint was in time. *Labalmondiere v. Addison*, 28 Law J. Rep. (N.S.) M.C. 25; 1 E. & E. 41.

An order made by a Justice, under section 73. of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), requiring the owner of a structure to take down and repair such structure, ought to shew upon the face of it that the owner had been summoned to answer the complaint upon which the order was issued, and it ought also to shew that the Justice making such order adjudicated the complaint to be true. *Labalmondiere v. Frost*, 28 Law J. Rep. (N.S.) M.C. 155; 1 E. & E. 527.

When proceedings are taken before a Justice to recover the expenses incurred by the Commissioners, in consequence of the disobedience of such order by the owner of the structure, it is lawful for such last-mentioned Justice to consider the validity of the said order, and to hold that it is bad, for the reasons above mentioned. *Ibid.*

(C) STREET.

A magistrate having, upon the construction of the 5th rule of section 26, of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), decided that a certain place, being a row of houses forming part of a line of thoroughfare, was a street,—this Court declined to interfere with his decision. *Newman v. Baker*, 8 Com. B. Rep. N.S. 200.

(D) NOTICES; WHEN NECESSARY.

Where an owner of two houses within the limits of the Metropolitan Building Act, 18 & 19 Vict. c. 122, occupies one and lets the other to a tenant from year to year, he is justified in entering the house let to the tenant against the will of the latter, for the purpose of doing necessary repairs to the party-wall between the houses. It is not a condition precedent to the exercise of this right that notice should be given under section 38, to the district surveyor. Nor is it necessary that the landlord should give any notice, under section 85, where he fills the two characters of building owner and adjoining owner. *Wheeler v. Gray* (Ex. Ch.), 28 Law J. Rep. (N.S.) C.P. 200; 6 Com. B. Rep. N.S. 606: affirming the judgment below, 27 Law J. Rep. (N.S.) C.P. 267; 4 Com. B. Rep. N.S. 584.

The 108th section provides, that no writ shall issue "against any district surveyor or other person for anything done or intended under the provisions

of this act," until after notice of action, and that such action shall be brought within six months after the accrual of the cause of action. *Quære*—whether the defendant was entitled to notice of action under that section, as answering the description "other person." *Seemle*, per *Cockburn, C.J.*, that he was. *Ibid.*

(E) SURVEYOR'S FEES.

A complaint was made to Justices at Quarter Sessions against C B, a district surveyor, under the Metropolitan Buildings Act, 7 & 8 Vict. c. 84, which makes it an offence, by section 79, "if any surveyor demand or wilfully receive any higher fee than he shall be entitled to under this act, or if in his capacity of surveyor he receive a fee for any act or omission in respect of which he is not entitled to any remuneration." The complaint alleged that three dwelling-houses of the fourth rate were covered in by the 29th of November; and that three privies attached and belonging one to each of the said houses were carried up at the same time with the houses, and covered in by the 2nd of December, within twenty-one days after the said houses had been covered in; that in December C B delivered to complainant an account claiming a fee of 2*l.* 2*s.* in respect of each of the said houses, which was paid in January; that in February C B delivered another account to complainant, claiming a fee of 10*s.* in respect of each of the privies, and demanded payment of the same, and did in his capacity of surveyor wilfully receive the same from the complainant, not being entitled thereto under the act. Upon hearing this complaint the Quarter Sessions made an order, under section 79. of the said act, stating the complaint to be well founded, and discharging C B from his office of surveyor forthwith. The complaint and order had been removed by *certiorari*, upon affidavits tending to shew that C B had claimed and received the fees in respect of the privies, on the assumption of fact that they had not been carried up and covered in within twenty-one days of the covering in of the dwelling-houses, and that this fact was the question raised before the Sessions. The *certiorari* was taken away by section 104. of the act:—Held (*Lord Campbell, C.J.* differing), that the Sessions, under section 79. of the 7 & 8 Vict. c. 84, had no jurisdiction to make the order, and that it must, therefore, be quashed. By *Erle, J.*, that it appeared from the complaint, or, if that were doubtful in its meaning, from the affidavits, which might then be looked at, that the fees were claimed and received on the assumption of fact that the privies were not carried up and covered in within the twenty-one days; and that the 79th section did not extend to a fee so claimed and received, though the assumption were found by the Sessions to be mistaken. By *Cole-ridge, J.*, that under section 79. the jurisdiction of the Sessions was confined to the case of the receiving a fee for an act or the omission to do an act, for which, even if done or omitted to be done, as alleged, no fee is authorized by the act; and that the complaint, after reference to the affidavits, which were admissible to disprove jurisdiction, shewed that the question tried and decided at the Sessions had reference to facts which, if the surveyor were correct, entitled him to the fee claimed. By *Lord Campbell, C.J.*, that the affidavits could not be looked at. That

the whole proceeding upon the face of it appeared to be regular; and that as the complaint, which was found to be true, charged that the surveyor wilfully demanded and received a fee for an act in respect of which he was not entitled to receive any remuneration, the Sessions appeared to have jurisdiction to make the order; and that the *certiorari*, therefore, ought to be quashed. *Regina v. Badger*, 25 Law J. Rep. (N.S.) M.C. 81; 6 E. & B. 137.

A railway was constructed upon a viaduct formed of arches of brickwork, standing upon ground belonging to the company, forming an essential part of the viaduct, and used for the purposes of the railway. The company erected at each end of three of the arches a brick wall, with doors and other openings therein, thus inclosing spaces which were divided into two stories, and which P occupied as stables, by permission of the company. On the 1st of January 1856, certain alterations were made in the brick walls erected at the ends of the arches, and the respondent, the surveyor appointed under the Metropolitan Building Act, 1855, claimed to be entitled to certain fees as such surveyor. Section 6. of the same act exempts from liability to such fees the buildings belonging to any railway company, and used for the purposes of such railway under the provisions of any act of parliament. The company having refused to pay the fees claimed, were convicted by a magistrate for such refusal:—Held, upon appeal against this decision, that these inclosed arches fell within the above exemption, and, therefore, that the conviction was wrong. *The North Kent Rail. Co. v. Badger*, 27 Law J. Rep. (N.S.) M.C. 106; *nom. Re Badger*, 8 E. & B. 728.

E, the owner in fee of land, agreed to let it to S on a building lease for eighty-one years, at a peppercorn rent for the first year, 6l. the second, and 12l. per annum for the remainder of the term. S entered under the agreement and commenced building houses, in respect of which, during the first year of the tenancy, certain fees became payable to the district surveyor under section 51. of the Metropolitan Building Act, 1855, (18 & 19 Vict. c. 122.) from the "builder, owner, or occupier of the buildings":—Held, that E was not liable, for that he was not "owner" within the meaning of sections 3. and 51. *Evelyn v. Whichcord*, 27 Law J. Rep. (N.S.) M.C. 211; E. B. & E. 126.

METROPOLITAN POLICE.

[Acts relating to the Metropolitan Police amended and Provision made for appointing one Commissioner and Assistant Commissioners by 19 & 20 Vict. c. 2.—Stations of the Metropolitan Police improved, and the Acts concerning the Metropolitan Police amended, by 20 & 21 Vict. c. 63.]

METROPOLITAN ROADS.

[See TURNPIKE.]

MIDDLESEX.

[The Act for the better Administration of Criminal Justice in Middlesex amended by 22 & 23 Vict. c. 4.]

MILITIA.

[The making of Lists and the Ballots of the Militia of the United Kingdom, suspended by 19 & 20 Vict. c. 52. and 20 & 21 Vict. c. 21.—The Embodiment of the Militia authorized by 20 & 21 Vict. c. 82, and continued by 21 & 22 Vict. c. 86.—The Charge of the Pay, Clothing, and contingent and other Expenses of the Disembodied Militia in Great Britain and Ireland defrayed; and Allowances in certain Cases to Subaltern Officers, Adjutants, Paymasters, Quartermasters, Surgeons, Assistant Surgeons, and Surgeons Mates of the Militia granted; and the Employment of the Non-commissioned Officers authorized by 20 & 21 Vict. c. 65; 22 & 23 Vict. c. 54; and 23 & 24 Vict. c. 138.—The Act to enable Her Majesty to accept the Services of the Militia out of the United Kingdom continued by 21 & 22 Vict. c. 85.—Further amendment of the Laws relating to the Militia by 22 & 23 Vict. c. 58. and 23 & 24 Vict. c. 94.—Suspension of the making of Lists and the Ballots for the Militia of the United Kingdom by 22 & 23 Vict. c. 15.—The Laws relating to the Ballots for the Militia in England amended, and the making of Lists and Ballots for the Militia of the United Kingdom, suspended by 23 & 24 Vict. c. 120.]

MINE.

[Right to Mines and Minerals, see INCLOSURE ACTS.—The Regulation and Inspection of Mines provided for by 23 & 24 Vict. c. 151.]

- (A) GRANT.
- (B) LEASE.
- (C) WRONGFUL WORKING.
- (D) SUPPORT OF SOIL.
- (E) "SURFACE DAMAGE."
- (F) DIVERTING WATER.
- (G) SHARES.
- (H) COST-BOOK SYSTEM.
- (I) BILLS ACCEPTED BY PURSER.
- (K) INSPECTION OF, BY ADJOINING OWNER.
- (L) NOTICE TO INSPECTOR OF THE DISTRICT OF ACCIDENTS.

(A) GRANT.

Grant by letters patent by the Crown as lord of the manor of E, of "all those coal-mines found, or to be found, within the commons, waste grounds or marshes within the said lordship of E," &c., with a proviso that the grant should be construed strictly against the Crown, and most strictly and beneficially for the grantees,—Held, to pass coal lying under the foreshore of the estuary of the river Dee, between high and low water marks, and forming part of the manor of E. *Attorney General v. Hammer*, 27 Law J. Rep. (N.S.) Chanc. 837.

The coal under parts of the glebe of a vicarage had, at different times since 1756, with the consent of the vicars for the time being, been gotten by the persons working adjoining collieries, and royalties had been paid to the vicars for the time being, the working being conducted solely by underground passages from the adjoining collieries without entering on the surface of the glebe:—Held, that no presumption could be drawn from these facts that there had been any grant authorizing the vicars to open mines. *Bartlett v. Phillips*, 4 De Gex & J. 414.

(B) LEASE.

A power was reserved in a deed of settlement to a tenant for life, to lease collieries and coal-mines, "together with all such powers, authorities, accommodations, liberties and privileges as shall be necessary, or are usually contained in leases of collieries or mines in the county, place or neighbourhood where the collieries or mines are situate, for seeking, winning, working, drawing, taking and carrying away the coals within and under the same." The lessees were not, except in the cases provided for, to be made dispensable for waste by any express words. A mining lease granted in pursuance of this power authorized the lessee to build and erect all such engines, &c., workmen's cottages, &c., as should be necessary and proper for the carrying out the works, and also to dig and take building materials for buildings required for the purposes of the colliery. The lessee built several cottages for workmen. It was found by a jury that the power to build cottages in places convenient to the works of the mine was a necessary and usual power in mining leases:—Held, that the lease was valid. *Morris v. the Rhydyfed Colliery Company* (Ex. Ch.), 28 Law J. Rep. (n.s.) Exch. 119; 8 Hurl. & N. 885: affirming the judgment below, 27 Law J. Rep. (n.s.) Exch. 480; 3 Hurl. & N. 473.

There is a *prima facie* inference at common law upon every demise of minerals or other subjacent strata where the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support. In the absence of express words shewing clearly that he has waived or qualified his right, the presumption is that what he retains is to be enjoyed by him *modo et forma*, and with the natural support which it possessed before the demise. *Dugdale v. Robertson*, 8 Kay & J. 695.

Inquiry directed upon this principle with a view to an injunction. *Ibid.*

The lessee of a mine covenanted by his lease at the end of the term, if the lessor should require it, to leave him all the engines, machinery, things and materials which should have been used in and about the working of the mine, upon receiving twelve months' notice from the lessor and being paid for the same according to a valuation. In a subsequent part of the lease it was provided that it should be lawful for the lessee at any time or times during the term or within twelve months after its expiration to remove all the machinery, engines, things and materials which should be erected or brought by him upon the premises, unless the lessor should be minded to purchase the same, which he should have liberty to do upon giving the notice thereinbefore mentioned,

and upon paying the price estimated. The deed also contained a covenant by the lessee not to do any act which might occasion or tend to produce the drowning of the mine. Fourteen years before the expiration of the term of the lease the lessee became insolvent and assigned everything he had brought upon the premises to trustees, who gave notice to the lessor of their intention to remove the same unless he should be minded to purchase. To a bill by the lessor averring that such removal would occasion or tend to produce the drowning of the mine, and praying for an injunction to restrain the same until the end of the term, and until the plaintiff had the opportunity of exercising his option to purchase, a demurrer was allowed, the Court being of opinion that according to the true construction of the lease the lessee was to be at liberty to reserve all the property in question, unless the lessor gave notice of his intention to purchase, and paid for the same. *Rollston v. New*, 4 Kay & J. 640.

In contracts for the lease of working mines, time, though not named, is, from the fluctuating nature of the property, considered as of the essence of the contract, and the intended lessee may therefore fix a reasonable time for completion, and on the lessor's default may rescind the contract. *Macbryde v. Weekes*, 22 Beav. 533.

A, on the 4th of October, contracted to grant a mining lease to B, and no time was mentioned for completion. On the 10th of December B gave notice to A that unless he completed the contract within a month he would rescind the contract:—Held, on A's default, that B was justified in giving the notice; that the time was reasonable, and a bill by A for specific performance was dismissed, with costs, although there were matters essential for the completion which did not depend on A, but on third parties. *Ibid.*

A agreed to grant a lease to B; after considerable delay on the part of A, B gave A notice that unless he completed within a month, he would rescind the contract. The day before the expiration of the time thus limited, A forwarded to B the drafts, but he furnished no abstract, nor shewed that he was in a situation to complete. B rescinded the contract:—Held, that it was effectual, and the Court dismissed A's bill for specific performance, with costs. *Ibid.*

(C) WRONGFUL WORKING.

Where by underground working the defendant had taken the coal of his neighbour, the Court limited the account to six years, but intimated that the amount wrongfully abstracted being proved, the onus of proof would lie on the wrongdoer to shew that it was not taken within the six years. *Semble*—the account would not be so limited if the coal had been abstracted intentionally, and steps had been taken to conceal the fact and prevent discovery. *Dean v. Thwaite*, 21 Beav. 621.

(D) SUPPORT OF SOIL.

[*Smart v. Morton*, 5 E. & B. 30; 6 Law J. Dig. 474.]

In an action for undermining the foundations of a house, by digging under them, the declaration is sufficient (at all events, after verdict) if it, in substance, alleges, that the owner, by reason of his possession of the house, was entitled to the

support of the subjacent soil for its foundations, although it does not shew how the right was acquired. And, *semble*, that the right to such vertical support is a natural and common-law right, to be presumed from the possession of the surface, in the absence of anything to take it away; and that it therefore does not require any express evidence of prescriptive right as a mere easement. But even if it does, then evidence that the house has stood more than twenty years, even although during that time the diggings have been carried on and have been gradually undermining the foundations of the house and driving away the tenants, will be sufficient to sustain a verdict for the plaintiff, if the jury expressly find that the support to the foundations was enjoyed as of right. *Rogers v. Taylor*, 27 Law J. Rep. (N.S.) Exch. 173; 2 Hurl. & N. 828.

The plaintiff's house was built (more than twenty years ago) upon land under which coal-mines had been worked, according to the custom of the country, leaving the soil weaker than it would otherwise have been. The defendant, knowing this, worked his coal-mines under land adjacent (but not immediately adjoining), so as to cause the soil intervening to give way, and thus to cause the soil under the foundations of the plaintiff's house also to give way:—Held, that the defendant was liable; and, *semble*, that after twenty years a house acquires a right to the lateral support of the soil around it. *Browne v. Robins*, 28 Law J. Rep. (N.S.) Exch. 250; 4 Hurl. & N. 186.

Although as between conterminous owners the lateral support of a neighbour's soil can only be claimed for the surface of the land in its natural state, yet where a person sells land to another, to be used for an express purpose, he will not be allowed to derogate from his own grant by doing anything in the adjacent soil which unites the land sold for the purpose for which it was sold; and it makes no difference that the land so sold was taken under compulsory powers. But the purchaser is not entitled to any additional support afforded by the accidental state in which the adjacent soil happens to be at the time of the purchase, however long it may have been in that state prior to the purchase. Thus, where the owner of a drowned mine sold land to a railway company for the purpose of building a bridge, and the land sold derived additional support from the water in the mine, it was held that the railway company were not entitled to restrain him from pumping out the water, and restoring the mine to a working condition, although the mine had continued in its drowned state, and the works had been abandoned for a period of forty years prior to the purchase. *The North Eastern Railway Company v. Elliott*, 29 Law J. Rep. (N.S.) Chanc. 808; 1 Jo. & H. 145.

(E) "SURFACE DAMAGE."

The hundred of St. Briavels, in the county of Gloucester, includes the Forest of Dean, the soil of which is vested in the Crown, subject to common rights. By the statute 1 & 2 Vict. c. 43, "for regulating the opening and working of mines and quarries in the Forest of Dean and hundred of St. Briavels," section 67, a moiety of the full rent or royalty for minerals raised or gotten within inclosed lands of the hundred, not within the forest, is payable to the

owner of the inclosed lands. Section 68. provides that every person "entitled to any gale, pit, level or work, within any inclosed lands of the said hundred shall and he is hereby required to pay to the owner of any such inclosed lands a full and fair compensation in money for any surface damage which may be done or occasioned to any of such inclosed lands by reason or means of the opening or working any gale, pit, level or work therein or thereon," such compensation to be ascertained and awarded by the deputy gaveler:—Held, that "surface damage" did not include damage to buildings on the lands by reason of subsidence occasioned by underground workings. *Allaway v. Wagstaff*, 29 Law J. Rep. (N.S.) Exch. 51; 4 Hurl. & N. 307, 681.

A house, yard and outbuildings were built on uninclosed land within the limits of the forest. The house was not fenced in from the common, but there was a wall round the yard:—Held, that the premises were situate within the hundred of St. Briavels, within the meaning of section 68; but, *quære*, whether they were "inclosed lands" within the meaning of that section. *Ibid*.

The award of the deputy gaveler recited that application had been made to him to ascertain the damage alleged to have been done to certain lands, mill, house and premises, that is to say, a certain parcel of land, with a dwelling-house and two outbuildings erected and being upon the same land, by reason of the working of a gale, and awarded that surface damage had been done, as alleged in the application, to the said land, and to the said mill, house and premises by reason of the working of the said gale in and under the said land, mill, house and premises; and awarding a sum as the amount of compensation for such surface damage so done to the said land and mill, house and premises by reason or means of the working of the said gale therein and thereunder, but concluding, "but whether the said land, mill, house, and premises are or are not inclosed lands of the said hundred within the meaning of the statute 1 & 2 Vict. c. 43, I do not make or give any award or opinion whatsoever":—Held, that the award was good on its face, it not being impossible for surface damage to be done to a house by works therein and thereunder. *Ibid*.

(F) DIVERTING WATER.

The plaintiff, in an action for diverting the water of springs used in bleaching-works, claimed under a lease of certain closes, with "all streams that might be found" in certain of the closes; there being in the lease an exception of mines and quarries, with power to the lessor and he assigns to enter on the premises and search for minerals, and divert or alter the course of any brook or spring. The defendant justified under a subsequent demise of mines under the demised premises:—Held, that the rights of the parties were regulated by the prior lease; and that upon its construction, springs, the water of which was collected in reservoirs and used in the works at the time of the demise, passed to the lessee, as well as streams (there being only one above-ground stream at the time of the demise); and that under the exception, as it did not comprise, in its terms, springs or streams, the lessor, or his subsequent lessee, could not interfere, by mining, with the springs found under the demised premises. *Whitehead v. Parks*,

27 Law J. Rep. (N.S.) Exch. 169; 2 Hurl. & N. 370.

(G) SHARES.

The plaintiff was owner of shares in a mine worked upon the cost-book principle according to certain rules, which subjected the person registered as owner of shares to the payment of calls in respect of the shares so long as he remained registered as owner of them in the cost book. The plaintiff agreed to sell his shares to the defendant, and delivered to him a document addressed to the secretary of the mine, and requesting the secretary to enter on the cost book a transfer of the shares and all benefit thereof out of his (the plaintiff's) name into the name of — (leaving a blank for the name of the transferee), subject to the rules under which the plaintiff held them. The document contained at the foot an agreement to take and accept the shares, subject to the rules. The name of the party agreeing to take was also left in blank. The defendant did not cause the shares to be registered in his own name or in that of any other person, and the plaintiff consequently was compelled to pay calls made on the shares subsequent to the agreement with the defendant:—Held, that the defendant was not bound to cause the shares to be registered in his own name as owner, since the leaving the name of the transferee in blank shewed that it was the intention of the parties that the defendant might have the power of transferring his right in the shares to any other person. But, held also, that there was an implied contract by the defendant to indemnify the plaintiff against the consequences of suffering the plaintiff's name to remain on the register after the plaintiff had done all in his power to convey a perfect title in the shares to the defendant. *Walker v. Bartlett*, 25 Law J. Rep. (N.S.) C.P. 263; 18 Com. B. Rep. 845; in the Court below, 25 Law J. Rep. (N.S.) C.P. 156; 17 Com. B. Rep. 446.

L, a shareholder in a cost-book mining company transferred by deed certain shares therein to C to hold in trust for him, and upon the express understanding (but which was not communicated to the company) that C was not to be responsible for the payment of calls upon the shares, and that the transfer was not to be registered unless L went abroad. L did not go abroad, but, without the authority or the knowledge of C, registered the transfer, which, by the rules of the company, was necessary to be done before the transferee could take any interest in the mine:—Held, that this did not make C liable as a shareholder to the creditors of the company. *Thomas v. Clark*, 25 Law J. Rep. (N.S.) C.P. 309; 18 Com. B. Rep. 662.

After the transfer of shares in a company has been made, and after the recognition of the transferee by the company, they cannot make any claims for calls which ought to have been paid by the previous owner; neither can the company declare such shares forfeited on the refusal of the transferee to satisfy such demand, though he was only a mortgagee of the shares. *Watson v. Eales*, 26 Law J. Rep. (N.S.) Chanc. 361; 23 Beav. 294.

(H) COST-BOOK SYSTEM.

An allottee of shares in a mine worked on the cost-book principle was held to be entitled to recover

back deposits paid by him on the shares, where the working of the mine was abandoned before all the shares mentioned in the prospectus were subscribed for, or the amount of deposits on all the shares paid up; the deposits not being proved to have been spent upon liabilities incurred with the plaintiff's authority. A cost-book mine does not differ in this respect from any other joint-stock company. *Johnson v. Goslett*, 25 Law J. Rep. (N.S.) C.P. 274; 18 Com. B. Rep. 728; affirmed, 27 Law J. Rep. (N.S.) C.P. 122; 3 Com. B. Rep. N.S. 569.

Where deposits were paid, according to a rule of the company, to certain bankers, and the account with the bank was kept in the name of five directors, —Held, that other directors who had interfered in the management were liable in an action for money had and received, along with those five. *Ibid*.

If it had been necessary, the Court would have amended the record by striking out the names of two directors who were sued along with the five, under the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76. s. 37, although one of the other five had allowed judgment to go by default against him. *Ibid*.

Shareholders in a cost-book mining company cannot, by agreement amongst themselves "that calls in arrear shall be considered to be debts due from defaulting shareholders to the purser," empower him to recover such calls from such shareholders in an action at law. *Hybart v. Parker and Hybart v. Evans*, 27 Law J. Rep. (N.S.) C.P. 120; 4 Com. B. Rep. N.S. 209.

Quære—whether a mining company on the cost-book principle is a "public company" within the meaning of the 1 & 2 Vict. c. 110. s. 14, so as to make shares therein liable to be charged with a judgment-debt. *Nicholls v. Rosewarne*, 5 Com. B. Rep. 480.

A B was the holder of shares in a mining company established on the cost-book principle. In accordance with one of the rules of the company, he gave notice, in April 1857, to relinquish his shares, but he had not then paid all his arrears, and the purser declined to take the relinquishment. In May the arrears were paid, and on the 4th of June his solicitor applied to the purser to know why the name was retained on the list. On the 26th of June the company was registered as a limited company under the 19 & 20 Vict. c. 47, and A B's name was then returned as a shareholder. The company being in July ordered to be wound up, A B's name was placed by the Commissioner on the list of contributories. On appeal, it was considered that the proper course was for A B to apply to have his name removed from the list of shareholders, and, the petition of appeal being agreed to be treated as such application, the name was removed from the list. *In re Welsh Potosi Lead and Copper Mining Company (limited)*, ex parte Birch, 27 Law J. Rep. (N.S.) Bankr. 4; 2 De Gex & J. 10.

A shareholder in a cost-book mining company filed his bill against the managing committee and against a creditor of the company, to restrain an action at law brought against him by the creditor at the instigation of the managing committee. The bill also asked for an account as to the amount of the plaintiff's liability to the company. The Court granted an injunction to restrain the action by the

creditor, but dismissed the bill as against the managing committee, on the ground that as the company was a simple partnership, formed under no act of parliament, it was necessary, in order to have an account, that all the members should be made parties to the bill. *Sibley v. Minton*, 27 Law J. Rep. (n.s.) Chanc. 53.

In mines worked on the cost-book system there is no custom to forfeit shares for non-payment of calls, without special stipulation. *Clarke and Chapman v. Hart*, 27 Law J. Rep. (n.s.) Chanc. 615; 6 H.L. Cas. 633: affirming 24 Law J. Rep. (n.s.) Chanc. 187; 6 De Gex, M. & G. 232; 19 Beav. 349.

Assuming such a custom to exist, it must be strictly followed. *Ibid*.

A, B and C joined in a mining adventure on the cost-book principle, as recognized in Devonshire and Cornwall. A fell into arrear with his calls. Notice was given him of a meeting to declare his shares forfeited. The meeting was held, but instead of his shares being declared forfeited, a resolution was passed granting him an extension of time, "such extended time to cease on," &c. No payment was made and no further notice was given; but a fortnight after the extended time had expired the shares were declared forfeited:—Held, that such declaration of forfeiture was invalid. *Ibid*.

(I) BILLS ACCEPTED BY PURSER.

A bill of exchange, purporting to be "for value received in machinery supplied to the H Mining Company," was directed to the defendant, as an individual. The defendant wrote across the bill the words "Accepted for the company. A B, purser." The defendant was the purser of the mine, but was not a member of the company:—Held, that he was personally liable as acceptor. *Mare v. Charles*, 25 Law J. Rep. (n.s.) Q.B. 119; 5 E. & B. 978.

(K) INSPECTION OF, BY ADJOINING OWNER.

A leaseholder of a mine will on motion be allowed to inspect an adjoining mine, to ascertain that his own interest in the demised property is kept intact. *Bennett v. Whitehouse*, 29 Law J. Rep. (n.s.) Chanc. 326; 28 Beav. 119.

(L) NOTICE TO INSPECTOR OF THE DISTRICT OF ACCIDENTS.

By the 9th section of the 18 & 19 Vict. c. 108, the owner or agent of a coal-mine or colliery, who, in case of loss of life to any person employed in such coal-mine or colliery by reason of any accident, or in case of serious personal injury arising from explosion therein, does not send notice of such accident to the inspector of the district within twenty-four hours next after such loss of life, is to be liable to a penalty. The appellants were owners of a coal-mine in which serious personal injury arose from explosion. They did not give notice to the inspector, and were convicted for not doing so under the above section:—Held, that words had been omitted which were necessary to create the offence which the appellants were supposed to have committed, and that as those words could only be supplied by the legislature, the appellants were not liable to the penalty. *Underhill v. Longridge*, 29 Law J. Rep. (n.s.) M.C. 65.

MONEY COUNTS.

(A) MONEY HAD AND RECEIVED.

- (a) *When maintainable generally.*
- (b) *Upon Failure of Consideration.*
- (c) *When Money paid under a Mistake.*

(B) MONEY PAID.

(C) MONEY LENT.

(A) MONEY HAD AND RECEIVED.

- (a) *When maintainable generally.*

[See BILLS OF EXCHANGE AND PROMISSORY NOTES: *Nicholson v. Ricketts*, ante, page 88. And see PAYMENT INTO COURT: *Goldy v. Goldy*.]

Conduct money received with a subpoena to give evidence may be recovered back, by the party who paid it, as money had and received to his use, where the attendance of the witness becomes unnecessary, and no expenses have been incurred under the subpoena. *Martin v. Andrews*, 26 Law J. Rep. (n.s.) Q.B. 39; 7 E. & B. 1.

And in an *indebitatus* action, the plea being never indebted,—Held, that it was no objection to the right to recover, that the plaintiff had obtained the Master's *allocatur* for an amount of costs including the conduct money, and had issued execution and recovered part satisfaction. *Ibid*.

The plaintiff became a purchaser of shares in a mining company which carried on business upon the cost-book principle, and he paid deposits upon the shares. The mine was worked, dividends were declared, and he received additional shares as an equivalent for such dividends as were due to him. Afterwards, and while he continued to hold the shares, the company was registered as a company with limited liability, and was subsequently wound up under an order of the Court of Chancery. While the proceedings for winding up were going on, the plaintiff discovered, as he alleged, that he had been deceived by the fraudulent representations of the defendants, who were three of the directors of the company, and who by fraud had induced him to become a shareholder, and he therefore brought an action to recover back the money which he had paid on account of the shares which had been allotted to him, claiming to recover it as money received by the defendants for his use:—Held, that he could not maintain the action. *Clarke v. Dickson*, 27 Law J. Rep. (n.s.) Q.B. 222; E. B. & E. 148.

Where the acceptor of a bill paid money to his bankers, the defendants (at whose correspondents' house it was payable), for the purpose of taking that and other bills up, and they promised him to apply it to such purposes, and entered the particular bill to their credit in their books, but it did not appear that they had advised their correspondents to pay it,—Held, that the drawer, the holder of the bill, could not sue the bankers for the amount of the bill, there being no privity to sustain the action. *Moore v. Bushell*, 27 Law J. Rep. (n.s.) Exch. 8.

Where, after a wrongful sale of goods, the owner claims the proceeds of the sale as money received to his use, and the wrongdoer thereupon pays, and the owner accepts, part of the proceeds as money received to his use, the tort is waived, and the owner's remedy for the residue of the amount of

the sale is by an action for money had and received to his use. *Lythgos v. Vernon*, 29 Law J. Rep. (N.S.) Exch. 164; 5 Hurl. & N. 180.

W & Co., having warrants in the hands of the plaintiffs, got them to give them bills to be discounted by the defendants, and to hand over to the defendants the warrants as a collateral security. The arrangement for discount was made between W & Co. and the defendants; but as between W & Co. and the plaintiffs, the plaintiffs were to have the money, and applied for it to the defendants, who required an order from W & Co. Part of the money the defendants at once paid to W & Co., who on the same day sent an order to the defendants to pay the residue to the plaintiffs. On the same day one of the plaintiffs presented the order, which was received and retained by the defendants, and he said he should call next day for the money:—Held, that there was evidence of an assent on the part of the defendants to the transfer of the debt to the plaintiffs; and the jury having found in their favour, the Court declined to disturb the verdict. But, *semble*, that there was no right to interest. *Noble v. the National Discount and Banking Co.*, 29 Law J. Rep. (N.S.) Exch. 210; 5 Hurl. & N. 225.

A person who has authorized the application of his money to an illegal purpose can recover it before it has been paid over, or applied to such purpose. *Bone v. Ekless*, 29 Law J. Rep. (N.S.) Exch. 438; 5 Hurl. & N. 925.

The defendant had employed the plaintiff to sell a ship to a foreign government, authorizing him to employ a part of the proceeds in bribing its officials. The plaintiff sold the ship to the government for a certain sum, and informed the defendant that he had sold it for a certain sum "net"; that the difference was to be applied in bribing the officials, as agreed. This the defendant ratified; and the whole of the purchase-money having been paid to the plaintiff as the defendant's agent, the plaintiff paid to the defendant the sum mentioned between them as "net"; paid a part of the difference to the officials, and retained the rest:—Held, that the defendant had a right to set off this latter sum in an action brought against him by the plaintiff; as the defendant in claiming it was not setting up or relying on the illegal arrangement, and he would have a right to recover it as received to his use. *Ibid.*

A employed B, a broker at Liverpool, to purchase a security for him, for which purpose he remitted him a letter of credit for 2,010*l.* on a bank there, payable to B or order. C, who had had dealings with B, in the course of which the latter had become indebted to him in 1,940*l.* under pretence of borrowing the money for a few days, and knowing that it was A's money, induced B to part with it, and then insisted upon applying it in discharge of B's debt to him:—Held, that A might recover the amount from C in an action for money had and received. *Litt v. Martindale*, 18 Com. B. Rep. 314.

(b) Upon Failure of Consideration.

Action for money had and received. Plea on equitable grounds, that the said money was money bequeathed by will to the separate use of G C, the plaintiff's wife, and was paid by the executors of the will to the defendant on the separate receipt of G C, and that the said G C disposed of the said

money, independently of her husband and in such manner that he took no interest therein, by directing it to be paid to the defendant as aforesaid, to be held by him on certain trusts in which the plaintiff took no interest, and that the having and receiving of money by the defendant in the declaration mentioned was such receipt of the said money from the said executors under the said disposition, and that the defendant never received any money to the plaintiff's use, except as aforesaid:—Held, to be a good defence on equitable grounds. *Sloper v. Cottrill*, 26 Law J. Rep. (N.S.) Q.B. 7; 6 E. & B. 497.

To this plea the plaintiff replied, also on equitable grounds, that while the said G C was entitled to receive the said money so bequeathed to her, and before any receipt by the defendant from the executors, and before any direction by the said G C that the said money should be held by the defendant upon the said trusts, and before such trusts were created, the said G C disposed of the said money by appointing it, and all her rights therein, to the plaintiff; and that, when the defendant first received the said money from the executors, the said trusts had not been created, and that the direction by the said G C that the defendant should hold the money on such trusts was not given until after the defendant had received the said money from the executors; that the defendant received the said money from the executors, as the agent of the said G C, for the purpose of the due payment by the executors, and giving them a valid discharge, and not upon the alleged trusts; and that, up to the time of such receipt by the defendant, the said appointment by the said G C to the plaintiff continued in force, and that the said G C directed the defendant to receive the said money from the executors for the purpose of such valid payment by them, and of giving such valid discharge to them, and not with the intent of annulling the said appointment to the plaintiff, but for the purpose of getting in the said money as the money of the plaintiff; that immediately upon such receipt, and before the existence of the alleged directions, the said money became money had and received to the plaintiff's use; and that there never was any value or consideration for the said disposition or direction, or for the creation of the said trusts; and that by reason of the premises, all the interest of the said G C was, from the time of the said appointment, vested in the plaintiff:—Held, a good answer to the plea upon equitable grounds. *Ibid.*

Semble—that the replication also shewed that the receipt of the money by the defendant was to the use of G C, and therefore to the use of the plaintiff, her husband, so as to give him the legal as well as the equitable right to the money. *Ibid.*

The defendant also pleaded, on equitable grounds, that, by a settlement previous to the marriage of the plaintiff with G C, the plaintiff covenanted with the defendant, as trustee, to assign to him any personal estate acquired after the marriage by G C or the plaintiff in her right, during her coverture, over and above the value of 100*l.*; and that the defendant should hold such personal estate upon certain trusts, for the benefit of the said G C, the plaintiff, and the children of the marriage, of whom there were four living. That the money in the declaration mentioned was above the value of 100*l.*, and was bequeathed by will to the said G C, while she was the

wife of the plaintiff, for her own separate use, and that the plaintiff acquired the same by the said G C receiving it during her coverture from the executors, and that the having and receiving by the defendant to the use of the plaintiff was the receipt by the defendant as such trustee; and that if the plaintiff were to recover the said money, the defendant would be entitled to call upon him to pay it to the defendant under the said covenant:—Held, not an answer to the action. *Ibid.*

The plaintiff had employed one P as his agent to purchase goods, which P bought in his own name of W & Co. and others, and invoiced in his own name to the plaintiff, taking from him his acceptances in payment. One of these acceptances, partly for goods which had been purchased of W & Co., remained in the hands of P until his bankruptcy, when it was taken possession of by the defendant as official assignee, and the amount received and carried to the credit of the estate. Before the bankruptcy W & Co. had applied to the plaintiff for payment, and after the bankruptcy, and after payment of the bill by the plaintiff, they sued him, and he settled their claim:—Held, that he was not entitled to recover the amount of the bill from the defendant, as, even assuming that he was liable to W & Co. for the goods bought of them, there was only a partial failure of consideration, and the payment to them was voluntary, with full knowledge of the facts. *Quære*—whether he was liable to W & Co. *Barber v. Pott*, 28 Law J. Rep. (n.s.) Exch. 381; 4 Hurl. & N. 759.

The plaintiff, through his brokers, T & A, bought of the defendant, who was also a broker on the Stock Exchange, twenty shares in a joint-stock bank, by the rules of which the shares were transferable by the holders, with the consent of the directors. The purchase was for the 15th of September, and by the rules of the Stock Exchange T & A were bound to give the plaintiff's name on that day, and pay for the shares. The defendant had contracted with W and with L & C for the purchase of twenty shares; and on the 18th of September, in due time, according to the rules of the Stock Exchange, he tendered the transfers and the share certificates to T & A, and required them to pay for the same, which accordingly they did, and afterwards compelled the plaintiff to repay to them the amount which they had so paid to the defendant. All such transfers require execution by the purchaser before registration; and, by the practice of the Stock Exchange, the purchaser requiring registration and new certificates ought, after paying his broker, to execute the transfer and leave it, with the then existing certificates, at the office of the company, for registration, and then new certificates are granted to him in his own name. On the 3rd of September the assets of the bank were far short of the liabilities, so that to become a member was to incur a responsibility, and on the 11th of September the plaintiff informed T & A that he would not accept any of the shares, and instructed them not to pay for the same. On the 15th of September W applied to the bank for a transfer to the defendant, and the application was refused on the 17th. Between the 15th and 17th an application was made by W, in the presence of one of the plaintiff's bank, but the only result was that one of the officers handed a blank transfer to

him, and desired him to prepare it himself. No consent of the directors was ever obtained for the transfer of the shares to the plaintiff. Subsequently, T & A handed over the share-certificates and the transfers to the plaintiff, who kept them; but, before that time, the bank had been closed, and he was never registered as a shareholder:—Held, in an action brought to recover from the defendant the money which T & A had paid on his behalf, that the plaintiff could not recover as for a total failure of consideration, because he himself was in fault for not taking the proper steps to obtain a transfer of the shares. Held, also, upon a special count, charging that the defendant had not caused the shares to be transferred to the plaintiff, that no contract had been entered into by the defendant to that effect. Held, also, that the plaintiff was not ready and willing to accept the shares. *Stray v. Russell* (Ex. Ch.), 29 Law J. Rep. (n.s.) Q.B. 115: affirming the judgment below, 28 Law J. Rep. (n.s.) Q.B. 279.

Defendant, being possessed of shares in a joint-stock banking company, instructed his broker to sell them. Plaintiff instructed his broker to purchase shares in the said company. The two brokers agreed with each other to sell and buy respectively. Both brokers were members of the Stock Exchange; and, according to the custom of the Stock Exchange, the names of the principals are not mentioned at the time of such contract, but are communicated on the day preceding the day on which the sale is made; and, on the day last mentioned, the parties executed the contract. By the rules of the company, transfers could not be made without the consent of the directors; and seven days' notice of transfer must be given to them; but, in practice, the rules of the company in this respect were not strictly enforced. In this case no notice was given. On the day for which the sale was made, defendant's broker obtained a blank form of transfer from the company, which defendant executed three days afterwards. On the following day, defendant's broker delivered the transfer to the plaintiff's broker. On that day the company had stopped payment, and plaintiff's broker refused to accept the transfer, or to pay the purchase-money. The company never consented to the transfer, nor resumed business, and ultimately became bankrupt. Plaintiff desired his broker not to pay for the shares; but the broker, in obedience to the decision of the Committee of the Stock Exchange, before whom the question had been brought, paid the purchase-money to defendant's broker, who paid it over to defendant. Afterwards plaintiff paid the sum to his own broker, who had threatened to enforce payment by proceedings at law. Plaintiff having sued defendant for money had and received, on the ground of failure of consideration,—Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the action did not lie. *Remfry v. Butler*, E. B. & E. 887.

(c) *When Money paid under Mistake.*

In January 1846, one Edwin C bequeathed the residue of his real and personal property to certain parties, of whom George C was one. In April following he made another will, whereby he bequeathed to George C an annuity of 100*l.* until he should become insolvent or bankrupt, or do any

other act which would have the effect of giving his annuity to any other person. The testator died in 1847, and shortly after his death his will of January 1846 was duly proved. In 1850 one S advanced 200*l.* to George C, taking from him as security a bond which contained an equitable charge of the interest of George C under the will of January 1846. A banking company, represented by the plaintiff, having afterwards advanced money to George C, the latter conveyed to them all his share and interest under the will of January 1846, subject to the claim of S, which the company afterwards discharged by paying the amount to the defendant, the widow and executrix of S. The will of Edwin C of April 1846 was shortly afterwards discovered:—Held, that, under the above circumstances, the plaintiff was not entitled to recover the money paid to the defendant, such money not being money paid under a mistake of facts. *Aiken v. Short*, 25 Law J. Rep. (N.S.) Exch. 321; 1 Hurl. & N. 210.

Where a tenant *pour autre vie* pays rent by mistake after the life has dropped, he may recover back the amount in an action for money had and received, the action not being brought for the purpose of trying the title to the land. W L being possessed, in 1811, of premises for terms expiring at Midsummer, 1854, granted an annuity to T and another to E for three lives, and to secure such annuities demised the premises to T and E, separately for forty-three years, if the lives should last so long. In 1827, the residue of the terms granted to W L became vested in the plaintiff, subject to the annuities and underleases to T and E. In 1825, W L having died, his executors let T and E into possession, and they covenanted by deed to pay off certain arrears of ground rent and other charges, and made the same chargeable on the premises. The plaintiff, in 1830, became tenant to T and E of the premises at a rent payable to them in moieties. T was the survivor of the *cestui que vie*; he died in 1851, and the defendants were his executors. From his death till Midsummer 1854, W E, as agent for E and the defendants, demanded and received the rents, and paid over one moiety to E and the other to the defendants, deducting payments in respect of ground-rent, rates, taxes, insurance, repairs, and commission. The plaintiff did not know of T's death:—Held, that he was entitled to recover back the amount of rent after T's death in an action for money had and received; that the plaintiff must be taken to have had notice of the deed of 1825 and to be bound by it; that the sums mentioned in it must be taken to have been paid; but that the plaintiff must be taken to have sanctioned the continued payment of the ground-rent, rates, and taxes, and that a set-off to that amount must be allowed. *Barber v. Brown*, 26 Law J. Rep. (N.S.) C.P. 41; 1 Com. B. Rep. N.S. 121.

Upon the dissolution of the partnership between the plaintiff and the defendant, the latter sold to the plaintiff his share in the business, upon the terms that the plaintiff should, on the 30th of June 1858, pay him the sum of 450*l.*, but that if a moiety of the profits for three years ending the 31st of December 1857 should not amount to 1,800*l.*, then that the plaintiff should be entitled to deduct the difference between 1,800*l.* and the actual amount of the moiety of such profits, and that the balance only,

after such deduction, should be payable. In June 1858 the plaintiff investigated the partnership accounts, for the purpose of ascertaining the profits in the three years preceding December 1857, and the result of this investigation showed that a moiety of such profits exceeded 1,800*l.*; and under the impression and belief that such moiety amounted to 1,800*l.*, he then paid the defendant 450*l.* as agreed, who afterwards invested it in the purchase of land. Subsequently, in December 1858, the plaintiff made a fresh investigation of the accounts, when he discovered that he had made a mistake in his former calculation as to the amount of profits, and that he was therefore entitled to have deducted a considerable sum from the 450*l.*:—Held, that he could recover back from the defendant the sum he might so have deducted, as he had paid it under a mistake of facts. *Townsend v. Crowdy*, 29 Law J. Rep. (N.S.) C.P. 800; 8 Com. B. Rep. N.S. 477.

(B) MONEY PAID.

[See PARTNERS.]

The right to enforce contribution between joint makers of a promissory note by an action at law is not affected by the fact that the makers were co-partners together with others, and that the note was given to secure money raised for the purposes of the partnership. Therefore, where A, B and C, being shareholders with other adventurers in a Cornish mine, conducted on the cost-book principle, for the purpose of raising money for carrying on the mine, joined in a joint and several promissory note for 500*l.*, and which being discounted the proceeds were applied to the working of the mine, A having subsequently paid the amount to the holder of the note,—Held, that an action for money paid was maintainable by him against the other makers of the note, this not being a partnership transaction. *Sedgwick v. Daniell*, 27 Law J. Rep. (N.S.) Exch. 116; 2 Hurl. & N. 319.

The plaintiff having an estate for sale, which it was considered might be more advantageously disposed of if it was connected with a right to use a patent of which the defendant was the proprietor, an arrangement was made by which the plaintiff was to be at liberty to use the defendant's patent right in the advertisements for sale of the estate, upon the condition that, if the latter was sold, the defendant was to receive 1,000*l.*, and such further royalty, for an exclusive licence to work his patent, as might be agreed on. The plaintiff at first acted on this arrangement, but he subsequently declined to have anything further to do with the patent, and he ultimately sold the estate without reference to the patent. At the time of making the said arrangement, the defendant applied to the plaintiff to be surety to one S, for his advancing the defendant 50*l.* to stamp the patent, upon which the plaintiff wrote to say, that if the defendant would get S to advance the 50*l.* for the completion of the patent, he would give the defendant or S 50*l.* on the patent being handed over to him, as the plaintiff preferred this to being surety. S accordingly advanced the 50*l.* for the stamp duty, but the plaintiff refused to pay it, although the patent was tendered to him. The plaintiff being afterwards compelled to pay S the 50*l.* he had so advanced, sued the defendant to recover the same as money paid for his use:—Held,

that this was a payment by the plaintiff for the use of the defendant, which the plaintiff was entitled to recover in such action, and that it was, therefore, immaterial whether the money was advanced by S for the joint purpose of the plaintiff and the defendant. Held, also, that the meaning of the arrangement between the plaintiff and the defendant was, that the defendant was to receive the 1,000*l.* only in the event of the estate being sold with the patent right annexed to it, and that as it was not so sold, the event had not happened on which the defendant's right to the 1,000*l.* depended. *Pelly v. Sidney*, 28 Law J. Rep. (n.s.) C.P. 182; 5 Com. B. Rep. N.S. 679.

(C) MONEY LENT.

The defendant, being devisee in trust of certain mortgaged premises for the sale thereof and the payment of the debts of the mortgagor, borrowed the sum of 200*l.* of the plaintiff for the purpose of paying off a portion of the debts of the mortgagor; and by an indenture between him and the plaintiff, reciting the above facts, charged the premises with payment of that amount, and covenanted that he and his heirs should out of the money that should come to his hands as such trustee, or out of the personal estate, if any, of the mortgagor, pay to the plaintiff the principal and interest secured by the indenture:—Held, that the plaintiff was not entitled to sue the defendant in an action for money lent, but that his remedy was upon the covenant in the indenture. *Mathew v. Blackmore*, 27 Law J. Rep. (n.s.) Exch. 150; 1 Hurl. & N. 762.

A husband is not liable for money lent to his wife, though it be afterwards applied by her in procuring necessities, for the supply of which he would have been liable. *Knox v. Bushell*, 3 Com. B. Rep. N.S. 334.

MORTGAGE.

[Trustees, Mortgagees, and others given certain Powers now commonly inserted in Settlements, Mortgages and Wills, by 23 & 24 Vict. c. 145.]

- (A) CONSTRUCTION, AND EXTENT OF.
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(A) CONSTRUCTION, AND EXTENT OF.

J B and G B, carrying on business in co-partner-

ship as copper-roller manufacturers, executed a mortgage of the land, mills or factories on which the business was carried on, and of which they were seised in fee, and all and singular the steam-engine, steam-boilers, mill-gear, millwright work and machinery then or thereafter to be fixed to the said lands, hereditaments and premises, together with all out-houses, edifices, fixtures, &c. J B and G B having become bankrupts,—Held, that the mortgagees were entitled as against the assignees to all machinery which was fixed to the freehold. *Mathew v. Fraser*, 25 Law J. Rep. (n.s.) Chanc. 361; 2 Kay & J. 536.

A mortgage of trade fixtures, together with the freehold, by the owner of the freehold, does not require to be registered as a bill of sale under the 17 & 18 Vict. c. 36. *Ibid.*

Traders had two manufactories: the one they mortgaged to S to secure 1,000*l.* and interest; the other they mortgaged to J F E to secure 800*l.* and interest. They then mortgaged the machinery fixed to the buildings mortgaged to S, and also some moveable machines standing on the same premises to J F E to secure 700*l.* and interest. A further charge, to secure 400*l.* and interest, was made upon the premises mortgaged to J F E; and, subsequently, both the manufactories were mortgaged to J F E as a further security for the 700*l.* advanced upon the machinery. The traders afterwards became bankrupt:—Held, that no severance of machinery fixed and attached to buildings could be assumed, though the deed gave the mortgagee a power to sell in default of payment of the principal or interest. *Whitmore v. Empson*, 26 Law J. Rep. (n.s.) Chanc. 364; 23 Beav. 813.

Held, also, that fixed machinery so assigned was not in the order and disposition of the traders, though they continued in possession, and used it until their bankruptcy, and though the assignment secured them the quiet enjoyment thereof until they made default in payment of the principal or interest, and that it would not pass to the bankrupts' assignees. *Ibid.*

Held, also, that the moveable machines remained in the order and disposition of the traders, and on their bankruptcy passed to the assignees. *Ibid.*

A testator gave all his real estates to three trustees, of whom his brother J C was one, upon trust, amongst other things, to pay to each of his brothers the annual value of 100*l.* during his life, or until he should take the benefit of any act for the relief of insolvent debtors, or become bankrupt, or do any act which, but for that condition, would have the effect of giving the benefit of his annuity to any other person, and in the event of either of such last-mentioned events happening, then his annuity should from thenceforth cease; and upon trust, after paying certain other annuities, for the benefit of the testator's sisters, to pay the whole of the surplus rents and profits to J C for his life, with remainders in trust for the children of J C, and in default of such issue, upon trust to pay the same unto and equally between such of the testator's brothers and sisters as might be then living, and the survivors and survivor of them during their respective lives, but subject to the same restrictions respecting bankruptcy and insolvency and against alienation as thereinbefore contained with reference to the annuities. This will not having been discovered for several years after

the death of the testator, another will was acted on in the mean time, whereby the testator had given all his real estates equally amongst his brothers and sisters; and acting on the belief that this was his last will, J C joined some of his brothers in mortgaging all their interest in the testator's estate:—Held, first, that the whole interest given by the last will passed by the mortgage; and, secondly, that the annuities given by the will to such as joined in the mortgage, ceased upon the execution of the mortgage. *Carter v. Carter*, 27 Law J. Rep. (N.S.) Chanc. 74; 3 Kay & J. 617.

The doctrine of estoppel by deed only applies between the parties to the deed and to matters arising out of the deed. In collateral matters, the deed would be evidence, but no estoppel. *Ibid.*

A purchaser for valuable consideration, without notice, getting in the legal estate from a trustee, takes it subject to all those trusts upon which the trustee held it, and appearing upon the face of the instrument under which the trustee takes: *Faussett v. Carpenter* observed upon. *Ibid.*

J C, being a trustee of real estate under a will, and being also beneficially interested in the same estate under the same will, mortgaged his interest and delivered the title-deeds to the mortgagee. The mortgagee afterwards handed back the title-deeds to J C, who executed other mortgages, delivering the deeds to the subsequent mortgagees:—Held, that the first mortgagee had not lost his priority, the deeds having been properly delivered up to J C as a trustee. *Ibid.*

A solicitor having by misrepresentation procured his client to sign a deed of mortgage of certain estates, which the latter had purchased by auction, afterwards assigned the mortgage so obtained to another client to secure a sum of money advanced, the assignee taking the assignment without notice of the fraud, but without the concurrence of or communication with the mortgagor. The solicitor subsequently absconded, and was declared bankrupt. The Court, on bill filed by the mortgagor, and supported by his own personal evidence only of the particulars of the fraud by which his signature to the deed had been obtained, directed the deed to be delivered up to be cancelled, the defendant, the assignee of the mortgage, having declined to cross-examine the plaintiff, and the collateral facts bearing on the case tending to corroborate rather than impeach the plaintiff's evidence. *Vorley v. Cooke and Cooke v. Vorley*, 27 Law J. Rep. (N.S.) Chanc. 185; 1 Giff. 230.

In November 1817 a married woman suffered a recovery of real estate belonging to her, the uses being declared to be as the husband and wife should jointly appoint, with remainder to husband for life, remainder to wife for life, and an ultimate remainder to the wife in fee. Two days afterwards the husband and wife jointly appointed to A and B upon such trusts as the husband should appoint, and in default, upon trusts similar to the uses before mentioned. In March 1818 the husband appointed, and A and B conveyed the estate to C upon trust to sell, and to pay a sum advanced to the husband, and to pay the residue to the husband, his executors, administrators or assigns, and to convey the unsold estate to the husband, his heirs or assigns, or as he or they should direct:—Held (overruling the decision of the Master

of the Rolls), that the deeds of 1817 and 1818 could not be regarded as one transaction; and that the deed of 1818 was not merely a mortgage, but that the ulterior uses of the deed of 1817 were completely changed thereby. *Heather v. O'Neill*, 27 Law J. Rep. (N.S.) Chanc. 512; 2 De Gex & J. 399.

A father purchased a piece of land, and took an agreement that the vendors would convey it to him. He afterwards built a granary, and allowed his sons to occupy the premises for their business. They supplied goods to their father to the amount expended by him in building the granary, and they erected other buildings on the land of greater value. The father, pending these transactions, became surety for his sons to certain bankers for 10,000*l.* The sons afterwards surreptitiously obtained possession of the agreement; and one of them, representing that his father had given the land to them, signed his father's name on the blank leaf of the agreement, and deposited it with the plaintiffs, who were bankers, to secure their cash credit. The sons afterwards became bankrupt; the son depositing the agreement was, upon several indictments, convicted of forgery; and the father was required to pay the 10,000*l.* for which he was surety. Upon a bill, by the plaintiffs, to obtain the benefit of the deposit made with them,—Held, that the sons had a lien on the land to the value of the goods supplied to the father and the money expended by them in building; that the deposit of the agreement, though made under false representations, was good to the extent of that lien; that the plaintiffs had no notice of the father's interest; that the father, as against the plaintiffs, was not entitled to any set-off in respect of his subsequent liability as surety; and a decree was made to foreclose the security in favour of the plaintiffs as against the sons, with costs, and as against the father, without costs. *The Unity Banking Assoc. v. King*, 27 Law J. Rep. (N.S.) Chanc. 585; 25 Beav. 72.

A lessee of steel and iron works assigned, by way of mortgage, the land, with the appurtenances, and also the machinery specified in the schedule, "and all engines, machinery, fixtures and things which might thereafter be fixed and fastened in or upon the said premises, whether in addition to or substitution of the several fixtures, machinery, articles and things specified in the schedule":—Held, that these words referred not merely to additions to existing machinery, but also to any new machinery fixed or fastened to the mill. *The Metropolitan Counties Assur. Soc. v. Brown*, 28 Law J. Rep. (N.S.) Chanc. 581; 26 Beav. 454.

The construction of the words "fixed and fastened," as applied to machines, their adjuncts and removable parts. *Ibid.*

A wife agreed to join her husband in the mortgage of her real estate. She acknowledged the mortgage-deed, which reserved the equity of redemption to the husband and his heirs:—Held, in the absence of any agreement to vary the estate, rights and interest of the wife, that she had no intention of altering the descent, and that the husband, on paying off the mortgage, was not justified in taking a reconveyance of the real estate to himself and his heirs; and a reconveyance, by his heir-at-law, was directed to the wife and her heirs. *Stansfield v. Hallam*, 29 Law J. Rep. (N.S.) Chanc. 173.

A sum of 15,000*l.* was paid to the solicitors of the

defendants, who desired to invest it. The solicitors did invest 10,000*l.* on a valid security, and they appropriated the remaining 5,000*l.* to their own use. They afterwards obtained from the plaintiff, another client, upon a representation that they were for the purpose of a suit to which he was a party, two deeds, mortgaging his estate, to secure to the defendants a sum of 5,000*l.* These deeds they handed to the defendants. The solicitors afterwards became bankrupt. Upon a bill by the plaintiff to set aside those deeds,—Held, that the money was paid to the solicitors as the agents of the defendants, and that they were bound to ascertain that they were the duly constituted agents of the plaintiff, and that they were authorized to receive the money for him; and that as no money was paid or credit given to the plaintiff for any money, the fraud committed by the solicitors must fall upon the defendants, and the deeds must be given up to be cancelled. *Wall v. Cockerell*, 29 Law J. Rep. (n.s.) Chanc. 816; reversed 30 Law J. Rep. (n.s.) Chanc. 417.

A conveyed a life estate to B in consideration of 4,739*l.* By a deed of even date, B contracted that if A should at any time desire to repurchase the life estate for 4,739*l.*, B would convey it to him for that sum. All the expenses of this transaction were paid by A. B took possession, insured A's life for 4,739*l.*, and after payment of premium, the surplus rent was between 6*l.* and 6*l.* 10*s.* per cent. on the purchase-money. B left a will by which he spoke of the life estate as redeemable on payment of 4,739*l.* and interest, and spoke of his interest as a security. A, after the lapse of nearly thirty years, and many years after the death of the solicitor, who understood the transaction, filed a bill to redeem, and failed in proving by direct evidence that the parties intended a mortgage:—Held, reversing the decision of the Court below, that the transaction was to be treated as a conditional sale and not as a mortgage, and that A had no right to an account of rents and profits. *Alderson v. White*, 2 De Gex & J. 97.

Semble—that his right to repurchase on the payment of the full sum of 4,739*l.* was not barred by the Statute of Limitations. *Ibid.*

Whether the Statute of Limitations was not an answer to the claim to redeem, on the footing of the transaction being a mortgage, *quære*. *Ibid.*

Held, that if the transaction considered as a purchase had been so grossly oppressive that the Court would on that ground have treated it as intended to be a mortgage, the right to have it so treated would not have been enforced after such a lapse of time, and after the death of the other parties concerned in the transaction. *Ibid.*

A mortgaged to B his reversionary interest in a sum of 3,681*l.* stock, which the deed represented as standing in the name of two executors of a testator to secure three annuities. A gave notice to the executors. There was no such sum standing in the name of the executors, but there was one sum of 2,080*l.* standing in the name of the testator, and a second sum of 2,451*l.* in the name of one of the executors, to answer the annuities. A subsequent incumbrancer on the whole fund also gave notice to the executor:—Held, that A's security was limited to 3,681*l.* stock. *Woodburn v. Grant*, 22 Beav. 483.

Notwithstanding payment for twenty-three years

by a widow of the interest on a void mortgage, created by her while covert, it was held that her representatives were not precluded from disputing its validity. *Blandy v. Kimber*, 24 Beav. 148.

The defendants who were entitled to the equity of redemption of leaseholds charged with a mortgage, attempted to get rid of it by fraudulently incurring a forfeiture which they induced the lessor to take advantage of. They afterwards obtained a new lease from him, which they sold:—Held, that the new lease was subject to the mortgage, notwithstanding the 15 & 16 Vict. c. 76. s. 210, and a decree was made for payment by the defendants of the mortgage with costs. *Hughes v. Howard*, 25 Beav. 575.

(B) EQUITABLE MORTGAGE.

It is not necessary, for the purpose of effecting an equitable mortgage, that all the title-deeds relating to the property should be deposited; and where a mortgagor had previously borrowed money upon copyhold property by depositing the conveyance to himself, it was held, that a subsequent deposit of the remaining documents in the mortgagor's possession constituted a good equitable mortgage. *Lacon v. Allen*, 26 Law J. Rep. (n.s.) Chanc. 18; 8 Drew. 579.

A, to secure a loan, deposited with B title-deeds relating to an estate, but not the deed of conveyance to himself, and signed a memorandum of deposit, which represented that these were all the deeds. A afterwards deposited with C, who had no notice of B's claim, the conveyance to himself, and duplicates of some of the earlier deeds, and also signed a memorandum of deposit as to this loan:—Held, that B was entitled to priority. *Roberts v. Craft*, 27 Law J. Rep. (n.s.) Chanc. 220; 2 De Gex & J. 1; 24 Beav. 223.

A memorandum charging a leasehold estate in the county of Middlesex with the payment of a sum of money, retains its priority over a subsequent mortgage duly registered under the 7 Anne, c. 20; and in a suit by the equitable mortgagee,—Held, that he was entitled to a foreclosure. *Wright v. Stansfield*, 28 Law J. Rep. (n.s.) Chanc. 183; 27 Beav. 8.

Where an assignee of a lease, upon the occasion of the assignment, made *bond fide* inquiries for the deeds, and a reasonable excuse was given for their not being produced, he was held to be entitled to the benefit of the assignment, free from a previous equitable charge which had been made by the assignor by deposit of the deeds. *Expin v. Pemberton*, 28 Law J. Rep. (n.s.) Chanc. 308, 311; 3 De Gex & J. 547; 4 Drew. 333.

A second mortgagee, who registers his mortgage in Middlesex, under the 7 Anne, c. 20, is entitled to priority over a memorandum of further charge of prior date given by the mortgagor to the first mortgagee, who omitted to register the same in Middlesex. *Moore v. Culverhouse*, 29 Law J. Rep. (n.s.) Chanc. 419; 27 Beav. 639.

A house in Middlesex was mortgaged to R, who subsequently took a memorandum of further charge. The house was then mortgaged to M, without notice of R's further charge, and he registered his mortgage in Middlesex, under 7 Anne, c. 20:—Held, that M had obtained priority over R's subsequent charge, which was not registered. *Ibid.*

An equitable mortgagee, by deposit of title-deeds,

coming to a Court of equity to realize his security, is entitled to a sale, and not a foreclosure only; and where such mortgagee, after the death of the debtor, instituted a general administration suit, and the mortgaged premises were ordered to be sold, and the mortgagee offered to buy the estate, if he were allowed to deduct his principal, interest and costs,—it was held, that he was entitled (the estate being insolvent) to his principal, interest and costs (except costs of sale) out of the proceeds, in priority to all the other costs of the suit. On appeal, an order was made (but by consent) that the sale should be confirmed; and that after payment of principal and interest the balance of the purchase-money should be brought into court without prejudice to any question of costs, the same to be left to be disposed of on further consideration; the rest of the order of the Court below to be discharged. *Tuckley v. Thompson*, 29 Law J. Rep. (n.s.) Chanc. 548; 1 Jo. & H. 126.

One of two executors and trustees, who had in their possession title-deeds of an estate of which their testator and a debtor to the estate were tenants in common, requested the debtor to allow the executor to retain the title-deeds as a security for the debt. The debtor wrote an answer, saying that the executors might retain the deeds till the debtor got the whole of his affairs settled with the executors, and that he was endeavouring to arrange so as to buy or sell the property:—Held, a good equitable mortgage for the debt. *Fenwick v. Potts*, 8 De Gex, M. & G. 506.

An equitable mortgage, by deposit and memorandum, is within the statute 17 & 18 Vict. c. 113. *Pembroke v. Friend*, 1 Jo. & H. 132.

A direction in a will that "all just debts be paid as soon as may be," followed by a devise in fee of a freehold house (which was subject to an equitable mortgage):—Held, not to be such an expression of contrary intention as to bring the case within the saving clause of the statute:—Held, consequently, that the devisee took *cum onere*. *Ibid*.

A husband having by purchase with his own money obtained a conveyance to himself of freehold lands, to which his wife had an incomplete equitable title, deposited the title-deeds to secure a loan to himself, and died, having by his will given all his real and personal estate to his wife, who, after his death, purchased a judgment debt against her husband's estate, prior in date to the deposit by way of mortgage. On a bill by the mortgagee,—Held, that his title was paramount to that of the wife, both in her own right and as judgment creditor. *Cheshyre v. Biss*, 2 Giff. 287.

Adjoining premises (X and Y) were respectively conveyed to a testator by deeds in 1840 and 1843, and then united. He devised them to his sons, who made an equitable mortgage by deposit of the deeds of Y and the probate of the will. The mortgagee believed from the sons' statement that the whole property was comprised:—Held, that the property X was not comprised in the equitable mortgage. *Jones v. Williams*, 24 Beav. 47.

A mortgagee, who is informed that there are "charges" affecting the property, and is cognizant of two only, cannot claim to be a purchaser without notice of other charges, because he believes that the two, which satisfy the word "charges," are all the

charges upon it. He is bound to inquire whether there are any others. *Ibid*.

Where a contest existed between equitable mortgagees as to priority, and a question arose whether one who had the title-deeds would be bound to give them up, the difficulty was removed by ordering a sale, and all parties to concur therein, reserving the rights of the parties as against the purchase-money. *Langstaff v. Nicholson*, 25 Beav. 160.

(C) COPYHOLDS.

The 17 & 18 Vict. c. 113. applies to copyholds. *Piper v. Piper*, 29 Law J. Rep. (n.s.) Chanc. 719; 1 Jo. & H. 91.

By a mortgage, dated prior to 1855, the equity of redemption was reserved to the mortgagor, his heirs and assigns. The mortgagor died in 1858, intestate:—Held, that the heir was entitled by descent from the mortgagor, and not by purchase under the mortgage deed, and therefore the proviso at the end of 17 & 18 Vict. c. 113. did not apply. *Ibid*.

(D) MORTGAGOR AND MORTGAGEE.

The assignee of a mortgagor, who has let a tenant into possession after the mortgage, can sue such tenant for use and occupation, notwithstanding notice from the mortgagee to pay rent. *Hickman v. Machin*, 28 Law J. Rep. (n.s.) Exch. 310; 4 Hurl. & N. 716.

A mortgagor in possession had agreed to grant a lease to the defendant with the privity of the mortgagees, who, however, were no parties to the agreement; the defendant was let into possession under the agreement, and paid rent to the mortgagor. The mortgagor then assigned to the plaintiff, who sued the defendant, after notice to him from the mortgagees to pay them the rent, for use and occupation:—Held, that the action was maintainable. *Ibid*.

P, a solicitor employed both by a mortgagor and mortgagee, received the interest on the mortgage debt regularly. After a time he fraudulently obtained from the mortgagor a portion of the principal. At first the mortgagee received his interest regularly from P at his office; but ultimately P allowed the interest to fall into arrear till a large sum became due to the mortgagee. During this time the mortgagee made no application to the mortgagor in consequence of the irregularity in payment. In September 1853 the mortgagor paid the mortgagee 48l. 18s. 9d., as a half-year's interest on the principal remaining due; that led to an explanation and the discovery of the fraudulent receipt of the principal by P. The mortgagee did not repudiate the payment at the time. On the 24th of February, the mortgagor wrote to inquire in what way he should pay the half-year's interest just due, expressing his fear that P would not be able to make good his defalcations to the mortgagee. On the 26th the mortgagee wrote requesting payment by cheque; and on the 4th of March the mortgagee again wrote, saying that he believed that P was hopelessly involved, and suggesting that the loss should be divided between them:—Held, that P was the agent of the mortgagee to receive the interest but not the principal; and that in order to bind the mortgagee by the acts of P in receiving the principal, it was necessary to shew either that what he did was with the intention of adopting the acts of P, that the position

of the mortgagor was altered. *Kent v. Thomas*, 1 Hurl. & N. 473.

(E) RIGHTS OF THE MORTGAGEE AND OTHERS CLAIMING UNDER HIM.

[*Langton v. Langton*, 7 Law J. Dig. 481; 7 De Gex, M. & G. 80.]

The mortgagee of tenant's fixtures has a right or interest in the land, which the tenant, who has mortgaged, cannot defeat by a subsequent surrender of his lease to his landlord, and if he does so surrender, the mortgagee has a right to enter and sever such fixtures, and may maintain an action against an incoming tenant who has prevented him from exercising that right, in which action he may recover the value of the fixtures as severed. *The London and Westminster Loan and Discount Co., (Limited), v. Drake*, 28 Law J. Rep. (N.S.) C.P. 297; 6 Com. B. Rep. N.S. 798.

Where a mortgagor is a solicitor and prepares the mortgage-deed, no other solicitor being employed in the transaction, the mortgagor will not be considered as the solicitor for the mortgagee, so as to affect the mortgagee with notice of facts within the mortgagor's knowledge, unless there be some consent on the part of the mortgagee to constitute the relation. *Espin v. Pemberton*, 28 Law J. Rep. (N.S.) Chanc. 808, 311; 3 De Gex & J. 547; 4 Drew. 335.

The statute against clandestine mortgages (4 & 5 W. & M. c. 16.) applies only to cases of actual mortgage. Therefore, a deed simply charging money on land, but containing a covenant to execute a mortgage when required to do so, although a mortgage in equity, is not a mortgage within the meaning of that statute, nor is a deed of further charge without a proviso for redemption. *Kennard v. Feutroye*, 29 Law J. Rep. (N.S.) Chanc. 553; 2 Giff. 81.

The remedy given by the statute is entirely negative, and simply deprives the mortgagor of his right to relief, or the equity of redemption, against the second mortgagee, and therefore it is not competent for such mortgagee to come to the Court to put the statute in force against a fraudulent mortgagor. *Ibid.*

The statute does not take effect against a fraudulent mortgagor until the expiration of the period of redemption. *Ibid.*

Where a trespass was committed on plaintiff's mine, and an air-course and level roads made through it underground to connect adjoining collieries in mortgage to defendants, and large quantities of plaintiff's coals were thereby fraudulently gotten and removed without their knowledge,—Held, first, that the defendants, the mortgagees, could not be made accountable for any portion removed by their mortgagor while they allowed him to remain in possession, notwithstanding the proceeds of the coal so wrongfully removed by him had found their way week by week, but without notice of the fraud, into defendants' hands, and notwithstanding they continued the air-course and roads after taking possession, and retained in their employment as manager of the collieries the person by whose agency the fraud had been perpetrated; secondly, that this Court had no jurisdiction to give the plaintiffs compensation in respect of consequential injury, by reason of large portions of their coal being rendered unworkable and useless to them; but held, thirdly,

that defendants, the mortgagees, could not be allowed to retain the user of the air-course or road, although the continuance of that user might be no special injury to the plaintiffs; but, fourthly, that not having themselves made such apertures, they could not be allowed to fill them up. Fifthly, that all the proceeds having been traced to the mortgagees, and no portion retained by the agent, the latter could not, in this court, be made personally chargeable for the value of the coal removed, notwithstanding his own fraudulent conduct in the transaction. *Powell v. Aiken*, 4 Kay & J. 343.

Form of order under such circumstances, and of decree for an account against the mortgagor and mortgagees, and as to the allowance to be made to defendants in respect of the coal for which they were held accountable. *Ibid.*

If won by defendants in such a manner as seriously to injure the rest of the plaintiff's coal, defendants would be entitled to no allowance for winning such coal—*semble*. *Ibid.*

Whether under such circumstances as the above the onus is not upon persons in the position of the mortgagees to shew how much coal had been abstracted by themselves, and how much by others, before they took possession—*quære*. *Ibid.*

Distinction as regards the jurisdiction of this Court between damages as such, and wrongs attended with profit to the wrong-doer. *Ibid.*

An owner of a leasehold house mortgaged to first and second and third mortgagees. He then sold it, subject to the first two incumbrances only, to a purchaser who paid for it in the cheque of his trading firm; but owing to misgiving he countermanded payment of the cheque, and then for the first time received notice of the existence of the third mortgage; being however threatened with a summons in bankruptcy, he withdrew his countermand, and the cheque was paid:—Held, that he was not a purchaser for value without notice, but was bound to redeem the third incumbrance. *Tildesley v. Lodge*, 3 Sm. & G. 543.

A mortgagor died, and a bill was filed by the mortgagee for the administration of the estate and payment of the mortgage. The mortgaged property was sold, and the produce paid into court to a general account and accumulated for a series of years:—Held, that the mortgagee had no right to treat the fund as appropriated to the mortgage and take the accumulations. *Irby v. Irby*, 22 Beav. 217.

If a mortgagee so deals with the mortgaged estate as to render it impossible for him to restore it on full payment, this Court will prevent his suing at law to recover the mortgage money. *Palmer v. Hendrie*, 27 Beav. 349.

A mortgagor having transferred the equity of redemption, the transferee and mortgagee joined in a partial alienation of the property, but the money was received by the transferee alone:—Held, that the mortgagee could not afterwards sue the mortgagor on his covenant to pay. *Ibid.*

A mortgagee concurred with the transferee of the equity of redemption in selling the property, and he allowed such transferee to receive the purchase-money:—Held, that the mortgagee could not afterwards sue the mortgagor for the debt, and he was perpetually restrained from doing so, and ordered to pay the costs of the suit. *Palmer v. Hendrie* (No. 2), 28 Beav. 341.

(F) POSSESSION OF MORTGAGEE.

A mortgage was made of mines, and the mortgagee entered into possession. He expended large sums in working the mines, which by the terms of the deed he was entitled to work:—Held (overruling a decision of one of the Vice Chancellors), that the mortgagee was entitled not only to the repayment of such sums, but to interest for the same. *Norton v. Cooper*, 25 Law J. Rep. (N.S.) Chanc. 121.

A first mortgagee in possession of a livery stable-yard and premises let the same to a tenant. He afterwards distrained for rent, taking possession under such distress of divers horses and carriages standing at livery on the premises. On being threatened with legal proceedings by the owners of the chattels at livery so seized, he restored such chattels to them:—Held, that in taking the accounts in a suit by a second mortgagee to redeem the premises, the first mortgagee was not answerable as for wilful neglect and default in not realizing the chattels which he had seized and afterwards restored to the owners. *Cocks v. Gray*, 26 Law J. Rep. (N.S.) Chanc. 607; 1 Giff. 77.

A mortgagor filed a bill for redemption against a mortgagee in possession, and the usual decree for accounts was directed, but no direction was given as to annual rests. After the decree annual rests were directed under the above-mentioned section and order, but, upon appeal, the decision was reversed. *Nelson v. Booth*, 27 Law J. Rep. (N.S.) Chanc. 782; 8 De Gex & J. 119.

The rule as to the directing of annual rests against a mortgagee in possession stated by Lord Justice Turner. *Ibid.*

Liability of a mortgagee who gives notice to the tenants to pay him their rents, but does not take possession, whereby a loss is occasioned. *Heales v. M'Murray*, 23 Beav. 401.

(G) PRIORITY.

Notice of an assignment upon the purchase of a part of a fund, to which the vendor was contingently entitled, is not notice of a covenant by the vendor in the same deed to pay the premiums for keeping up a policy of assurance, or of a declaration that any payment which may be made by the purchaser shall be a charge upon the entire fund. The vendor of part of a fund, to which he was contingently entitled, covenanted in the deed of assignment to insure his life against that of the tenant for life, and to keep the policy on foot; but it was declared that, in case of default, the purchaser might pay the premiums, and that such payments should be a charge on the entire fund. The purchaser gave notice to the trustees of the assignment made to him, but he omitted all notice of the policy or the possibility of his having to pay the premiums. The vendor afterwards mortgaged the remainder of his interest in the fund to other persons. The mortgagees gave notice of their securities, and, after the death of the tenant for life, the purchaser gave notice of his claim, including in it the sums he had paid for premiums upon the policy:—Held, that the first notice was insufficient to give the purchaser a priority for the premiums paid, and that, so far, he must be postponed to the mortgagees. *In re Bright's*

Trusts, 25 Law J. Rep. (N.S.) Chanc. 449; 21 Beav. 430.

J P mortgaged real estate to S J W in fee simple. J P mortgaged the equity of redemption (subject to the original mortgages) to J L, a solicitor. J L assigned this mortgage (together with other sums due to him) to J D, F A and T J for securing 1,000*l.* and interest. S J W, the original mortgagee, with the concurrence of J P (the mortgagor), assigned the original mortgage, and J L released to a new mortgagee. In this last deed no mention was made of the assignment by J L to J D, F A and T J, and the mortgage to J L was not given up. The new mortgagee had no solicitor nor any other professional advice than that of J L. The personal representatives of F A, the survivor of J D, F A and T J, filed their bill against the new mortgagee to redeem his mortgage, on payment of what was due on the original mortgage:—Held (upon appeal, overruling a decision of the Master of the Rolls), that the new mortgagee not having required the original mortgage deed to be delivered up, was negligence so great as to postpone him to the plaintiff's security; that J L must be considered as having acted as the solicitor of the new mortgagee; and that J L, having fraudulently concealed from the new mortgagee the fact of the assignment made by himself did not prevent the new mortgagee being affected with constructive notice of it. *Atterbury v. Wallis*, 25 Law J. Rep. (N.S.) Chanc. 792; 8 De Gex, M. & G. 454.

A became mortgagee of a portion of certain lands charged under a will with debts and legacies. The mortgagor was devisee of the lands, and likewise one of the executors of the will. The same person acted as solicitor for the mortgagor and mortgagee. The latter received the mortgage, and some (but not all the material) title-deeds of the mortgaged estate came into his possession. The mortgagor afterwards mortgaged this and the other portion of the lands to B, and finally sold the first portion of the lands to pay the legacies which were charged on the whole. B became the purchaser. Both A and B acted in ignorance of each other's rights:—Held, that the first mortgagee, not having been guilty of either fraud or gross negligence in leaving the deeds in the hands of the mortgagor, or of the solicitor, who in this matter had acted as solicitor for himself as well as the mortgagor, was entitled to a foreclosure of the lands which had been mortgaged to him. *Colyer v. Finch*, 26 Law J. Rep. (N.S.) Chanc. 65; 5 H.L. Cas. 905; 19 Beav. 500.

Held, also, that as against the mortgagor, he was, in equity, entitled to throw on the other portion of the estate the debts and legacies; and that the purchaser, not having obtained the legal estate in the property, was affected by this equity. *Ibid.*

An agreement was made that a fund charged with the payment of several sums of money to different persons should be paid to C for the benefit of all the incumbrancers. C had previously advanced to M, one of the incumbrancers, a sum of 400*l.*, upon a guarantee that it should be repaid out of the money coming to him under the agreement. M afterwards assigned to another person the whole amount due to him to secure a sum of money for which he was liable. The assignee gave notice of the assignment to the parties who had to pay the money as well as to C, who had to receive it for the benefit of the

incumbrancers:—Held, that the claim of the assignee must be preferred to that of C, as the agreement under which C was to receive the fund contained nothing to prevent M from dealing with it. *The Commissioners of Public Works v. Harby*, 26 Law J. Rep. (N.S.) Chanc. 472; 23 Beav. 508.

A father and son entered into an arrangement by which the father contracted to sell to his son three different estates, all of which were subject to mortgages, one of these mortgages being for 880*l.*, which was also secured by a judgment confessed by both father and son. Upon the sale of the estate all the mortgages were paid off, and the son mortgaged the purchased property to three other persons for the purpose of raising the purchase-money. There was a further mortgage by the father of other property not included in the sale, to C, out of which the 880*l.* was paid off, and the judgment was assigned to C by the mortgagee. Some time after the purchase the third mortgagee and the son gave six months' notice to the first mortgagee to pay off the mortgage. Before the expiration of the notice the first mortgage was assigned to C, who then claimed priority in respect of his judgment, and refused to be paid off unless the 880*l.* were also discharged; and he advertised the property for sale. The same solicitors were employed in negotiating the whole transaction, and it was the understanding of all parties that the purchaser's three mortgagees were to take the property unaffected by any prior incumbrance. Upon a bill filed by the third mortgagee and the son to restrain the sale by C, and for redemption of the first mortgage, it was held, that C was not justified in claiming priority for his judgment over the three mortgages, and he must pay the plaintiff's costs. Decree to restrain the sale and for redemption. *Cannock v. Jaunoy*, 27 Law J. Rep. (N.S.) Chanc. 57.

If a person seeking a legal mortgage chooses to leave the title-deeds with the mortgagor, not through negligence or through fraud, but intentionally, to enable him to raise a definite sum which should take precedence, the mortgagee cannot complain if, instead of the definite sum, the mortgagor raises a sum of much larger amount, because he puts it in his power to raise any sum he pleases. *Perry-Herrick v. Atwood*, 27 Law J. Rep. (N.S.) Chanc. 121; 2 De Gex & J. 21; 25 Beav. 205.

Semble—that if the meaning of a transaction between a mortgagor and mortgagee is that the mortgagee should have his security, but that the mortgagor should have the title-deeds, and be enabled therefrom to deal with third persons, that is within the principle of the Statute of Elizabeth. *Ibid.*

A mortgaged to B to secure present and future advances, and afterwards executed a similar mortgage of the same property to C. B and C had mutually notice of each other's deeds. B made advances after the date of C's mortgage; and it was held, affirming the decision of the Master of the Rolls, that C was, in respect of his advances, entitled to priority over B, on account of such subsequent advances made by him. The case of *Gordon v. Graham* overruled. *Rolt v. Hopkinson*, 28 Law J. Rep. (N.S.) Chanc. 41; 3 De Gex & J. 177; 25 Beav. 461.

A trustee (J A) of a deed of settlement, who was also uncle of two female infants, obtained possession

of funds belonging to that settlement, and of funds given by a will for the benefit of the same infants, he well knowing that the money was trust-money. By deeds, dated the 28th of January 1841 and the 25th of March 1843, he covenanted to convey a competent part of his lands and tenements to his co-trustees to secure the repayment of the monies, and to indemnify them in respect of any breaches of trust in permitting him to have possession of the money. At the respective times of executing these two deeds the trustee, J A, was seized of an estate (partly freehold and partly copyhold) called the "Hylands Estate." During the infancy of the *cestuis que trust*, and after their brother, also a *cestuis que trust*, had attained twenty-one, the trustees brought actions against J A to recover the trust funds he had so obtained, whereupon, in April 1848, a compromise was effected, by the terms of which J A agreed to pay over the third share to the nephew, and to execute to the trustees a mortgage of the Hylands estate to secure the two-thirds to the nieces, and that, in the mean time, he should deposit the title-deeds with a firm of solicitors, G, P & B, the London agents of R W G, his, J A's, solicitor (which firm very soon afterwards became, or had actually then become, the solicitors of J A), that such security should continue until the nieces should attain the age of twenty-one years, and that judgment should be signed in the actions, but no execution should issue until default made by J A. The deeds were deposited with G, P & B, and the title of the Hylands estate was submitted to the solicitor of the trustees. The title was approved, and a draft deed to effect the mortgage was prepared, and was approved by G, P & B, on behalf of J A, and the deeds were also perused by R W G, "an old friend of the family," and assented to by him as the solicitor of the nieces, but denied by them to be so. The nephew was settled with. In June 1850, M L A, the eldest niece, attained the age of twenty-one, and in August following she was on a visit to J A, and an account between herself and J A (stated to have been approved by R W G on her behalf, which was denied) was presented to her, stating a certain sum to be due to her, to which she assented, and agreed to take security for the amount from J A, and thereupon signed receipts. In March 1852 M A, the other niece, also attained twenty-one, and she received a similar account, made the same agreement to accept security, and signed similar receipts, and the solicitors for the trustees and for J A arranged that the nieces should execute releases to them. Mortgages were executed by J A of the Hylands estate to the trustees to secure the money acknowledged to be due to the nieces, and on the next day, the 16th of June 1853, they executed releases to the trustees, in which the mortgages of the previous day were recited. In the previous month J A executed a deed of inspectorship for the benefit of his creditors, and went abroad. The nephew and nieces gave authority to the trustees to deliver the deeds to J A's solicitors, G, P & B. The mortgage-money not being paid, the trustees filed their bill against J A and his several mortgagees (*Lloyd v. Atwood*) to enforce the before-mentioned securities, praying that those deeds might be declared a first charge on the Hylands estate. One of the Vice Chancellors decided that

the plaintiffs had lost their right to relief, either by abandonment or laches or delay, and dismissed the bill, whereupon they appealed. The two nieces filed their bill (*Attwood v. Lloyd*) against J A and the trustees, seeking relief against the receipts and releases, on the ground of ignorance and undue influence by J A; that they had no independent professional advice or assistance, and were ignorant of the contents of the deeds; and praying that the releases might be declared void, and that the trustees might be declared liable for the shares of the plaintiffs in the trust funds. This suit was heard originally by the Lords Justices in conjunction with the appeal in *Lloyd v. Attwood*:—Held, by the Lords Justices (overruling the *Vice Chancellor*), that the plaintiffs in *Lloyd v. Attwood* had not lost their right to relief by abandonment or laches, and that they were entitled to hold the securities, given to the nieces by J A for their own benefit; that in *Attwood v. Lloyd* the nieces could not be bound by the receipts they had given or the releases they had executed, which must accordingly be set aside and the trustees be declared personally responsible for the breaches of trust; that the agreements of 1848 and the deposit of the title-deeds with G, P & B created a good equitable charge upon the Hylands estate, G, P & B, although the solicitors for J A, being thereby constituted the agents for the mortgagees. *Lloyd v. Attwood*; *Attwood v. Lloyd*, 29 Law J. Rep. (N.S.) Chanc. 97.

As to the priorities, &c. In January 1848 J A demised the Hylands estate to his sisters, for a term of 200 years, by way of mortgage, to secure a debt. The sisters allowed J A to retain the title-deeds, in order to enable J A to give a first mortgage to secure another debt due to the trustees for his nieces, he being then sued for the same. Then the compromise transaction of 1848 referred to above took place. No legal mortgage was ever executed to the trustees. In 1850 J A made a legal mortgage of the Hylands estate to Perry-Herrick, who had no notice of the demise of 1848, and the title-deeds were delivered over to him. It appeared from the evidence that the mortgage for 200 years was executed by J A to his sisters for his own personal use, and to be enforced by him against other claimants if need were. It was accordingly held, that (as before stated) the deposit of the title-deeds with G, P & B, by way of security until a mortgage could be prepared, constituted G, P & B trustees for the trustees of the nieces, and created an equitable charge in favour of such trustees; that the mortgage by J A in favour of his sisters was void, under the statute 27 Eliz. c. 4, as against such trustees, who, consequently, had priority over the sisters, but that as Perry-Herrick had the legal estate without notice of the previous incumbrances, he was entitled to priority over the trustees for the nieces. *Ibid*.

The void term for 200 years having been assigned to third parties, without notice of incumbrances, the assignees of that term were held to be in no better position than the sisters in whose favour the term was professed to be created. It was also held, that a legal mortgagee, acquiring a subsequent equitable interest, was entitled to tack the subsequent equitable interest to the legal mortgage, so as to exclude an intermediate equitable charge, if he had not notice of that intermediate equitable charge. *Ibid*.

DIGEST, 1855—60.

A, being entitled to a reversionary interest in the proceeds of real and personal estate, directed by the will of a testator to be sold on the death of his widow, mortgaged the same, first to B, and afterwards to C. C gave notice of his mortgage to the testator's widow, who was one of the trustees for sale, and she communicated such notice to the other trustees for sale, but B gave no notice of his mortgage to the trustees for sale or either of them:—Held, that the notice which had been given by C was, under the circumstances, sufficient, and that C was entitled to priority over B. *The Consolidated Investment and Insur. Co. v. Riley*, 29 Law J. Rep. (N.S.) Chanc. 123; 1 Giff. 371.

S, the owner of a piece of land, agreed with a builder upon his completing divers houses to grant him a lease, or to allow him to purchase the land. S advanced monies to the builder for the erection of the houses. He afterwards applied for advice to a solicitor; but finally, being dissatisfied, he ceased to make further advances. The solicitor and P, with a knowledge of these circumstances, made advances to the builder out of funds of which they were trustees. The solicitor then obtained a conveyance of the land from S to the builder, who mortgaged the land and houses to the solicitor and P, to secure the advances made by them; the builder then became insolvent, and the solicitor afterwards became bankrupt:—Held, that the conveyance was executed upon the faith of representations made by the solicitor, that S should be first paid his purchase-money and advances; that P was no party to such representations; that the conveyance was made to the builder to enable him to secure the advances made by the solicitor and P; and that the mortgage so made gave a priority to the solicitor and P over the lien of S for his unpaid purchase-money and advances. *Smith v. Evans*, 29 Law J. Rep. (N.S.) Chanc. 531; 28 Beav. 59.

In 1829 H de C secured an annuity on trust funds; and in 1841 he, for valuable consideration, assigned his interest in the same funds, in trust to raise 1,100*l.* and redeem the annuity, and hold the residue on trusts for his family. The trustees accordingly raised the 1,100*l.* by mortgage, and redeemed the annuity, and the trust-funds were assigned to the mortgagees; but no transfer was made of the annuity. The mortgage-deed stated the consideration to have been "for the repurchase and extinction of the annuity." The annuity had originally priority over certain claimants, but the deed of 1841 had not:—Held, that, to the extent of the monies paid for the repurchase of the annuity, the mortgagees had priority over those claimants. *Irby v. Irby* (No. 3), 25 Beav. 632.

Policy holders, whose claims for payment were disputed by the insurance company, deposited the policy as a security. The depositors brought an action in the name of the depositors against the company, and pending the action sub-mortgaged the policy with other securities. Afterwards, the depositors gave notice to the sub-mortgagee to hold at the disposal of a bank any "balances" which might be due from the sub-mortgagee to the depositors, and the bank at the same time wrote a letter to the sub-mortgagee, who sent an answer, and both the letter and the answer referred to the policy-monies as being part of the "balances" mentioned in the

notice:—Held, that the notice created a valid security on the insurance money in favour of the bank, being, with the letters, sufficiently definite, and the pendency of the action not creating any objection on the ground of maintenance. *Myers v. the United Guarantee, &c. Co.*, 7 De Gex, M. & G. 112.

The attorneys acting in the prosecution of the action requested the bank, if interested in the result of the pending proceedings, to see that funds were supplied for their prosecution, stating at the same time that similar applications had been ineffectually made to the depositors. The bank took no notice of the application, and afterwards a purchaser of the equity of redemption supplied the requisite funds, by means of which the insurance money was recovered:—Held, by *Turner, L.J.*, confirming the decision below, *dissentiente Knight Bruce, L.J.*, that the bank had not lost their priority over the purchaser, and that in order to have produced this result, the bank ought at least to have been apprised of the purchase and of the purchaser's advances. *Ibid.*

Held, by both the Lords Justices, that the purchaser was entitled to be repaid all the sums which he had expended in the action, and to be paid his costs of a suit instituted by the bank disputing his title to such repayment. *Ibid.*

After an award in the action the insurance company received notice of an assignment by the plaintiffs of all their property, together with a demand by the assignees for payment of the money recovered in the action. *Semble*—that they were not entitled to file a bill of interpleader, as they might safely have paid the money to the plaintiffs' attorneys. *Ibid.*

A subsequent mortgagee of an equitable interest in a share of residuary real estate, without notice of the prior mortgage, does not obtain priority over the former mortgagee, by first giving notice of his security to the trustee in whom the legal estate is vested; notwithstanding that by a deed of arrangement made previously to the mortgages, between the mortgagor and the other persons interested in the real estate, their interests were treated as personal estate. *Lee v. Howlett*, 2 Kay & J. 531.

But it is otherwise if the estate is vested in the trustee by a devise to him in trust to sell and to divide the proceeds among several persons, of whom the mortgagor is one, and the mortgages are of the mortgagor's share in such proceeds; because then, although the mortgages may have been made before any sale took place, the subject of them could only, as regarded the mortgagor's interest therein, be considered a chose in action. *Ibid.*

(H) TACKING.

G A bequeathed (*inter alia*) all his furniture, plate, pictures and books (subject to his debts) to his wife, S A, for life, remainder to his son, H A, and appointed them his executrix and executor. With the sanction of the Court of Chancery, which had made a decree for sale, and directed the purchase-money to be paid into court, H A agreed to purchase and became the purchaser of the books and paintings at a valuation of 2,050*l.* 15*s.*, and for the purpose of paying the amount and to supply the other wants of H A, he and his mother, S A, by deed, assigned (*inter alia*) to M, by way of mortgage, the furniture, plate, pictures and books for 2,800*l.*, and both jointly

covenanted for payment. H A afterwards became the purchaser of the plate and furniture, with the sanction of the Court of Chancery, at a valuation of 706*l.* 8*s.*; and to enable him to make the purchase M advanced him 600*l.*, secured by deed of H A, executed after the death of his mother, S A, whereby he covenanted that the furniture, plate, pictures and books assigned by the first deed should stand charged with and be a security to M for payment of the 600*l.*, and should not be redeemable until payment of that sum, as well as of the 2,800*l.* The 600*l.* was paid into the hands of H A's solicitor, but the purchase-money for the plate and furniture was never paid into the Court of Chancery. M having sold the furniture, plate, pictures, and books under a power of sale contained in the first deed,—Held, in an action by him against the executor of S A on her covenant for payment, that although M as against S A's representatives, could not, by force of the second deed, in equity, deduct the 600*l.* out of the monies so raised, yet that he was entitled to deduct the unpaid purchase-money of 706*l.* 8*s.*, as he could not sell the whole of the mortgaged property without satisfying the lien of the Court of Chancery to that extent. *Maroon v. Bloam*, 25 Law J. Rep. (N.S.) Exch. 198; 11 Exch. Rep. 586.

A mortgagee or his transferee, under the 3 & 4 Will. 4. c. 104, may tack his simple contract debt to his security against an heir or devisee. *Rolfe v. Chester*, 25 Law J. Rep. (N.S.) Chanc. 244.

A simple contract creditor, though a mortgagee, has no right as against an heir or devisee to tack his simple contract debt to his mortgage where there is personal estate unadministered. *Ibid.*

A mortgagee of freehold estate may, as against an heir, tack his simple contract debts to his security, and that in the absence of the personal representative of the ancestor. *Thomas v. Thomas*, 25 Law J. Rep. (N.S.) Chanc. 391; 22 Beav. 341.

C borrowed 5,000*l.* of the Norwich Life Assurance Company. This was advanced in two sums, the one of 2,000*l.* and the other of 3,000*l.* Each sum was separately secured upon different property and by different sets of deeds. F became surety for payment of the 2,000*l.* and interest only. C afterwards made default in payment of the 2,000*l.* and interest. The company then sued F at law upon his bond to obtain payment of the 2,000*l.* and interest. F offered to pay the sum due on having the securities assigned. The company, however, refused to give up the deeds securing the 2,000*l.*; and upon a bill by F as surety to restrain the proceedings at law, and asking that the deeds might be delivered to him upon payment of the 2,000*l.* and interest,—Held, that the company had a right to retain the securities relating to the 2,000*l.*, and that the property was not redeemable even by F without payment of the 3,000*l.* for which he was not surety, as well as the 2,000*l.* for which he was surety. *Farebrother v. Wadehouse*, 26 Law J. Rep. (N.S.) Chanc. 81, 240; 23 Beav. 18.

A mortgagee of an equity of redemption without notice of prior equitable charges, is entitled, even after a foreclosure bill, filed by the intervening incumbrancer, to get in the legal estate and tack his mortgage. *Bates v. Johnson*, 28 Law J. Rep. (N.S.) Chanc. 509; Johns. 304.

T E B, by ante-nuptial settlement, covenanted to

convey certain freehold hereditaments of which he was seised in fee, to trustees, upon trust for the benefit of himself and his wife and the children of the marriage. No conveyance was ever made, and T E B afterwards, in fraud of the settlement, executed a mortgage of the premises, and subsequently mortgaged the equity of redemption, none of the mortgagees having notice of the trusts of the settlement. The first mortgagee having afterwards received notice of the trusts of the settlement, it was held, that, notwithstanding such notice, he was at liberty to transfer the legal estate to any person who would pay off his incumbrance, being in a different position from a dry trustee or a satisfied mortgagee. *Ibid.*

A mortgagor died, having made his real estate equitable assets. Defendants, who were both mortgagees and bond creditors, were held not entitled to tack. *Irbeys v. Irbeys*, 22 Beav. 217.

The owner mortgaged first to A, secondly to B, and he then conveyed to C "in trust" to sell and pay A, and a debt due to D, and another due to C, and the residue to the owner. C, who had no notice of B's mortgage, afterwards got a transfer of A's mortgage, and with it the legal estate.—Held, that C was entitled to tack the third charge to the first mortgage, and exclude B. *Spencer v. Pearson*, 24 Beav. 266.

(I) POWER OF SALE.

A first mortgagee having sold the mortgaged property under a power of sale, gave notice to the subsequent mortgagees that he was ready to pay over the balance, after satisfying his own mortgage. The second mortgagee required that the money should not be parted with until certain disputes between the incumbrancers should have been settled. The money was thereupon paid by the first mortgagee into his bankers, and was allowed to remain unproductive for several years.—Held, that the first mortgagee could not, under the circumstances, be charged with interest upon the money. *Mathison v. Clark*, 25 Law J. Rep. (N.S.) Chanc. 29.

A mortgaged certain property to B with power of sale. B sub-mortgaged the property to C, and it was declared that in default of payment of principal and interest C should be at liberty to exercise the power of sale contained in the original mortgage. The property was afterwards sold by B to C under his power of sale. C died, and upon this estate being sold there was a condition that the purchaser should admit that the sale to C was well made under the power in the mortgage deed, although A, the mortgagor, did not concur therein.—Held, that there was considerable doubt whether the power of sale subsisted in B when he sold to C, but that the condition was not expressed in such terms as to shew what the purchaser was to admit. He must, therefore, be discharged from his purchase. *Cruise v. Novell*, 25 Law J. Rep. (N.S.) Chanc. 709.

A mortgage was made containing a power of sale, and the estate was afterwards mortgaged to a second mortgagee. The power of sale having been *bona fide* exercised, and the mortgagor having purchased the contract of the highest bidder at the sale, and taken a conveyance to himself, the purchase-money, being the full value of the estate and being less than the money due on the first mortgage, it was held, that

the mortgagor did not obtain a title to the estate freed from the second mortgage. *Otter v. Lord Fauz*, 26 Law J. Rep. (N.S.) Chanc. 128; 6 De Gex, M. & G. 638: affirming 25 Law J. Rep. (N.S.) Chanc. 734; 2 Kay & J. 650.

Lands were mortgaged in fee, with power of sale by auction or private contract in case of default in payment of the mortgage-money. The mortgagee sold part of the property by private contract, containing an agreement that more than half of the purchase-money might remain on mortgage of the land sold, for four years, if interest should be regularly paid, and that if a stated sum were laid out on the land in the erection of houses within a specified time, the mortgage-money might remain for a longer stated period. On a bill filed by the owner of the equity of redemption to redeem and to set aside the sale,—Held, that (there being no fraud nor inadequacy of price) the transaction could not be impeached, and the bill was dismissed with costs. *Davey v. Durrant, Smith v. Durrant*, 26 Law J. Rep. (N.S.) Chanc. 830; 1 De Gex & J. 536.

A mortgagee with power of sale is not bound to wait till a more advantageous sale can be effected; neither is he bound to advertise before proceeding to a sale. *Ibid.*

An institution was incorporated by royal charter and deed of settlement, authorizing the council or managing body to hold land, tenements or hereditaments, and to sell, grant, demise, exchange and dispose of the same; but no sale, mortgage, incumbrance, or other disposition of any such lands, tenements or hereditaments to be made except with the approbation and concurrence of a general meeting of the proprietors of the said corporation. At a general meeting of the proprietors the council were authorized to mortgage the property of the corporation for 25,000*l.*:—Held, that the council had no power to grant a mortgage with a power of sale. *Clarke v. the Royal Panopticon*, 27 Law J. Rep. (N.S.) Chanc. 207; 4 Drew. 26.

By indenture, dated the 27th of October 1851, J R conveyed freeholds to and to the use of W T B and C A M, their heirs and assigns for ever, by way of mortgage, for securing the repayment of 3,000*l.* and interest, and the said indenture contained a power to the mortgagees, after six months' notice, to sell the mortgaged premises, and to hold the monies arising thereby upon the trusts therein mentioned for better securing the repayment of the mortgage monies. J R died on the 1st of April 1856, having devised and bequeathed all his real and personal property for the benefit, as to the real estate, of his wife for life; and, after her decease, upon trust, as to both the real and personal estate, for the benefit of his twelve nephews and nieces. The mortgagees, on the 18th of October 1856, in conformity with the terms of the power, gave notice of their intention to exercise the power of sale at the expiration of six months, if their debt were not previously paid. On the 10th of December 1857, the mortgagees, instead of selling under the power pursuant to their notice, filed their bill against the widow of the mortgagor and his devisees in trust, praying an account of the mortgage debt, and that the mortgaged premises might be sold under the direction of the Court, and the sum found due to the plaintiffs in respect of their mortgage debt paid out of the proceeds of sale, together with the

costs of suit; and it was decreed accordingly. *Hutton v. Sealy*, 27 Law J. Rep. (N.S.) Chanc. 263.

A mortgagee of freeholds with power of sale, and, by deposit of deeds, of leasehold premises, having failed after repeated trials to sell under his power, filed his bill for foreclosure, or for a sale of the mortgaged property, against the executors and devisees in trust of the mortgaged premises under the will of the mortgagor. The plaintiff also went in and proved his debt in another suit, which had been instituted for the general administration of the mortgagor's estate. The fund, realized under a decree for sale made in the suit, was insufficient to pay the mortgage debt:—Held, nevertheless, that the defendants were entitled to their costs out of the fund. *Macrae v. Ellerton*, 27 Law J. Rep. (N.S.) Chanc. 777.

A testator directed his estates to be sold, and after the decease of his wife gave 14,000*l.* out of the proceeds to different legatees, including 8,000*l.* to be divided between his four nephews, or such of them as should be living at the decease of his wife; but if the fund should not amount to 14,000*l.*, then all the legacies were to be reduced *pari passu*. The four nephews mortgaged their interest in the 8,000*l.*, with a power to the mortgagees to sell upon non-payment of the money, subject to such special conditions as they should think proper. The money not being paid, the mortgagees sold the property by auction, as a sum payable out of the residue, but without stating that it was liable to abatement, and one of the conditions of sale was that if the vendors should be unwilling or unable to satisfy any requisitions made by the purchaser, they should be at liberty to rescind the sale:—Held, that this condition was not depreciable; that the mortgagees were justified in selling under such a restriction; and that the omission to state in the particulars that the 8,000*l.* was subject to abatement was not a mis-statement calculated to mislead the purchaser. *Faulkner v. the Equitable Reversionary Interest Soc.*, 28 Law J. Rep. (N.S.) Chanc. 132; 4 Drew. 352.

Under a power of sale in a mortgage, whereby the purchaser was relieved from all obligation to inquire as to the propriety or regularity of the sale, and it was provided that, notwithstanding any impropriety or irregularity in such sale, the same should, as regarded the purchaser, be deemed valid, a sale was effected; but it was set aside, the mortgagee having exercised his power of sale oppressively, and the purchaser having, prior to the sale, been cognizant of such oppressive exercise of the power. *Jenkins v. Jones*, 29 Law J. Rep. (N.S.) Chanc. 498; 2 Giff. 99.

Where a mortgagee under an improper exercise of a power of sale contained in his deed, himself became the purchaser of the mortgaged property, on a bill filed fifteen years afterwards, the Court decreed redemption, and ordered the costs of the suit to the hearing to be paid by the mortgagee. *Robertson v. Norris*, 1 Giff. 421.

No lapse of time will bar the right to redeem, where relief is sought against the improper and oppressive exercise of a power of sale by the mortgagee, *emble*. *Ibid*.

Where a first mortgagee under his power of sale sold the mortgaged premises by private contract to second mortgagees, who were mortgagees in possession and also trustees for sale for the mortgagor, and

the mortgage deed required that before any sale should be made three months' notice should be given to the mortgagor, and contained a clause that a purchaser should not be required to ascertain that previous notice had been given, or to inquire into the necessity or expediency of the sale, and that the mortgagee's receipt should be a sufficient discharge. The second mortgagees at the time they purchased knew that the three months' notice had not been given to the mortgagor, he having died some time before, and no administration having then been taken out to his estate. Upon a suit for redemption by the mortgagor's administratrix,—Held, that she was entitled to redeem, and that the clause discharging a purchaser from ascertaining whether proper notice has been given, does not protect a purchaser who purchases with actual knowledge that such notice has not been given. *Parkinson v. Hanbury*, 1 Dr. & Sm. 143.

There is no rule in equity that a second mortgagee shall not purchase from a first mortgagee selling under his power of sale. *Ibid*.

Authority given to insert a power of sale in a mortgage of an infant's real estate to pay debts and costs. *Selby v. Cooling*, 28 Beav. 418.

(K) ASSIGNMENT.

A solicitor paid off with his own money a mortgage debt on a client's property, which was thereupon reconveyed to the client. The solicitor took the title-deeds by way of equitable mortgage with a written memorandum. Afterwards he induced another client to advance a smaller sum on a proposed mortgage of the property. The money was paid to the solicitor by the second client, and a mortgage was prepared for execution by the first client, who, however, never executed it, nor was aware of the intended security. The title-deeds were kept by the solicitor apart from other deeds of the mortgagor, but were not placed in any box of the proposed mortgagee. On the solicitor becoming bankrupt,—Held, that the second client had a valid security on the property as against the assignees, and the property having been sold by an agreement. Held, that he was entitled to be paid his principal and interest and costs in priority to any claim on the part of the assignees in respect of the residue of the sum secured. *Ex parte Hirtzel, in re Every*, 3 De Gex & J. 464.

A deed was executed by a legal mortgagee of leaseholds, the executor of the mortgagor, and a new mortgagee, whereby in consideration of the payment by the new mortgagee of the old mortgage debt, the discharge of which the old mortgagee thereby acknowledged, and in consideration of a further advance to the executor of the mortgagor by the new mortgagee, the old mortgagee and the executor assigned the mortgaged premises to the new mortgagee, with a new covenant by the executor of the mortgagor for payment of the aggregate sum and a new proviso for redemption. The deed contained no assignment of the old mortgage debt, but the operative words extended in the usual way to all the right and title of the old mortgagee in the premises:—Held, that the old mortgage was not extinguished as far as regarded priority over a subsequent incumbrancer. *Phillips v. Gutteridge*, 4 De Gex & J. 531.

Where the interest of a mortgage is regularly paid, and the mortgagor has never been called on to dis-

charge the principal, the costs of a transfer of the mortgage made by the mortgagees without any communication with the mortgagor are not properly chargeable against him. *In re Radcliffe*, 22 Beav. 201.

(L) RIGHT TO REDEM.

W R, in 1832, mortgaged an estate to three persons, trustees of an insurance company, as a security for 1,700*l.* and interest, and in April 1856 he joined as surety with W N, in a mortgage, by which he assigned a policy of assurance on his own life to trustees of the same office to secure 2,000*l.* and interest. W R knew that both advances were made by the insurance company, though it did not appear upon the deeds. In 1841 W R mortgaged the equity of redemption of the property in the deed of 1832, and in 1847 he further charged it in favour of S and E for securing in all 2,563*l.* and interest. No notice was given to the company. W R became bankrupt in July 1857, owing on the securities of 1841 and 1847 1,150*l.* The estates were sold, and the produce of that of 1832 was more than enough to pay the 1,700*l.* and interest, but that of 1856 was not enough to pay the 2,000*l.* and interest, or not sufficient to pay all the money lent:—Held, that, inasmuch as the mortgagees named in the deeds of 1832 and 1856 were, though different persons, trustees for the same company, that fact was immaterial, and that the company were entitled to be paid the deficiency on the 1856 mortgage out of the surplus arising from the 1832 mortgage, in preference to the mortgagees of 1841 and 1847, and to the assignees of W R. *Tassell v. Smith*, 27 Law J. Rep. (n.s.) Chanc. 694; 2 De Gex & J. 718.

A B mortgaged one estate to C D, and mortgaged another estate to E F. He then mortgaged his equity of redemption in both estates to G H, and notice of this was given to the two original mortgagees. The two original mortgages ultimately became vested in I K, who filed a bill to foreclose G H in default of payment of all that was due. G H insisted that he was entitled to redeem one estate without redeeming the other; but, held, affirming a decision of one of the Vice Chancellors, that he had no such right, and that the fact of C D and E F having had notice of the mortgage of the equity of redemption made no difference. *Vint v. Padgett*, 28 Law J. Rep. (n.s.) Chanc. 21; 2 De Gex & J. 611; 1 Giff. 446.

In 1776 J B, who was entitled to two third parts of an estate, mortgaged the same to S R, who was entitled to the other third part. In 1782 S R entered into possession, and continued in possession until his death in 1805. By his will, S R devised the property to his son S R in tail, with remainders over. In 1812 the persons entitled under J B's will commenced proceedings for the purpose of redeeming the two third parts, and in 1814 a compromise was made, and, by indentures of lease and release, the two thirds were conveyed to S R the younger, in fee. S R the younger died without issue; and it was held, affirming the decision of Stuart, V.C., that the right of the mortgagors to redeem was revived by the acknowledgment in 1814 of S R the younger, the tenant in tail; and that by the conveyance to him he had acquired the absolute interest in the two thirds, as against the remainder-

men under S R's will. *Pendleton v. Rooth*, 29 Law J. Rep. (n.s.) Chanc. 265; 1 De Gex, F. & J. 81; 1 Giff. 35.

Where property subject to a mortgage is settled, the tenant for life is entitled to redeem, and to have the legal estate conveyed to himself, but must hold the equity of redemption subject to the trusts of the settlement. *Wicks v. Scrivens*, 1 Jo. & H. 215.

The same principle applies where the security is in the form of a trust for sale. *Ibid.*

A mortgage was given for a judgment debt. There was a prior equitable charge, of which the mortgagees had no direct notice, but no investigation of title or production of deeds was had, besides which by arrangement the mortgagor's solicitor prepared the deed for the mortgagee's solicitor. The Court concluded that the arrangement was to give a mortgage subject to existing charges; and also that the mortgage was affected by the notice possessed by the mortgagor's solicitor of the prior equitable title. *Tweedale v. Tweedale*, 23 Beav. 341.

A made two equitable mortgages of two several estates, the one to A and the other to B. He then executed a legal mortgage of both to C, who had constructive notice of the prior equitable mortgages. B obtained a transfer of A's mortgage:—Held, that C could only redeem B on payment of both debts. *Ibid.*

(M) REDEMPTION AND RECONVEYANCE.

A mortgage was executed for 1,000*l.*, but 700*l.* only was advanced. The mortgagee alleged that, in consequence of the unsatisfactory nature of the security, he had agreed to advance only 700*l.*, the remaining 300*l.* being a bonus for the risk and hazard. The evidence supported this allegation. Upon a bill filed to redeem, upon payment of 700*l.*, it was held, that the plaintiff could only be entitled to a decree upon payment of the full sum of 1,000*l.* *Potter v. Edwards*, 26 Law J. Rep. (n.s.) Chanc. 468.

A father-in-law who paid a mortgage debt secured on his son-in-law's property, and took a receipt from the mortgagee, in which the mortgagee agreed to reconvey the property when required:—Held, not to have shewn an intention to exonerate the property. *Fennick v. Potts*, 8 De Gex, M. & G. 506.

(N) FORECLOSURE.

In a mortgage of leaseholds there was a proviso for redemption in case the principal should be paid at the expiration of five years, with interest half-yearly in the mean time at 5*l.* per cent. Default having been made in payment of the interest, a bill of foreclosure was filed, although the period for payment of the principal had not arrived:—Held, that the condition having been broken, the mortgagee was entitled to a decree of foreclosure, notwithstanding he had taken possession of the property, and had realized by sale of a portion of it more than enough to cover the interest due. *Edwards v. Martin*, 25 Law J. Rep. (n.s.) Chanc. 284.

Letters by a mortgagee to defendants beneficially interested in the equity of redemption, promising that her executors should cancel the mortgage, and containing words of gift:—Held, upon appeal, affirming the decision below, to be no defence to a suit of foreclosure by the executors of the mortgagee.

Scales v. Maude, 25 Law J. Rep. (n.s.) Chanc. 433; 6 De Gex, M. & G. 43.

The case of *Fletcher v. Fletcher*, 4 Hare, 67; s. c. 14 Law J. Rep. (n.s.) Chanc. 66, distinguished. *Ibid*.

Where, in a suit by a first mortgagee against the mortgagor and second mortgagee, the usual decree has been made for successive foreclosures, before the plaintiff can obtain an order for foreclosing the mortgagor, he must obtain an order for absolutely foreclosing the second mortgagee. *Whitbread v. Lyall*, 25 Law J. Rep. (n.s.) Chanc. 791; 8 De Gex, M. & G. 383; 3 Sm. & G. 314.

A suit having been instituted by a first mortgagee to redeem or foreclose several subsequent incumbrances, the Court made a special decree, fixing a day for any of the subsequent incumbrancers to redeem or be foreclosed. *Edwards v. Martin*, 28 Law J. Rep. (n.s.) Chanc. 49.

A second mortgagee is entitled under the 15 & 16 Vict. c. 86, to apply in a foreclosure suit for the conduct of the sale of the estate; but the Court will exercise a discretion, and will refuse such application, upon being satisfied that expense will be saved by giving the conduct of the sale to the first mortgagee. *Hewitt v. Nanson*, 28 Law J. Rep. (n.s.) Chanc. 49.

A first mortgagee filed a bill of foreclosure, and asked for a decree. Subsequent incumbrancers asked, under the 15 & 16 Vict. c. 86. s. 43, for a sale of the mortgaged estates. The plaintiff not consenting, the Court directed the subsequent incumbrancers to deposit a sum of 200*l*. to cover the expense of any ineffectual attempt to sell, and also directed a reserved bidding to be fixed sufficient to cover the amount due to the plaintiff, and made an order for sale of the estates within a given time, and foreclosure in default. *Whitbread v. Roberts*, 28 Law J. Rep. (n.s.) Chanc. 431.

A judgment creditor ranking after a first mortgagee, but prior in date to a further charge and to other judgments,—held entitled to a foreclosure, although all the other parties insisted on a sale. *Messer v. Boyle*, 21 Beav. 559.

A foreclosure was decreed in default of payment to three mortgagees who were entitled "on a joint account." Before the day appointed for payment arrived one of the mortgagees died:—Held, that the foreclosure could not be made absolute, but the Court appointed a new day for payment to the survivors. *Blackburn v. Caine*, 22 Beav. 614.

The mortgagor had executed a creditors' deed, but the judgment creditors had not acceded to it:—Held, that the trustees of the deed did not represent them under the 15 & 16 Vict. c. 86. s. 42, 29. *Knight v. Pocock*, 24 Beav. 436.

Effect of assigning a mortgage debt, reserving the securities. *Morley v. Morley*, 25 Beav. 253.

W M in 1846 mortgaged some property to the plaintiffs for securing a debt of 11,300*l*. In 1857 the plaintiffs assigned to trustees for their creditors this and another debt due from W M, and all securities for the same (except the mortgage of 1846 and the premises thereby assigned, and the benefit and advantage to arise thereupon). The surplus was to be paid to the plaintiffs, and there was a proviso that the plaintiffs were to have the property comprised in the mortgage for their own benefit:—Held, that, as against a subsequent judgment creditor of W M, the

plaintiffs could maintain a bill to foreclose the mortgage. *Ibid*.

Trustees of a creditors' deed held sufficiently to represent all the creditors in a suit to foreclose. *Ibid*.

(O) RECEIVER.

The mortgagee of a life estate, over which a receiver had been appointed, having taken no steps to recover his debt and interest during the lifetime of the tenant for life, was held not to be entitled after his decease to a fund in court, which had been paid in by the receiver from time to time, after keeping down the interest on a prior mortgage affecting the fee; but the same was held to form part of the personal estate of the tenant for life, the mortgagor. *Flight v. Camac*, 25 Law J. Rep. (n.s.) Chanc. 654.

A receiver of an estate was appointed by a mortgagor and mortgagee. They both joined in the appointment, and gave him power of distress and entry, and the mortgagor attorned as tenant to the receiver at a rent of 3,500*l*. The deed recited all the facts relating to the mortgage, and provided that nothing in the deed should abridge the rights of the mortgagee. The mortgagor afterwards became bankrupt, and the receiver distrained for 3,500*l*. Upon this being claimed by the mortgagee, by a party under a bill of sale and by the assignees of the mortgagor, it was held, (reversing the decision of the Court below,) that the validity of the distress depended upon the existence of a tenancy to the receiver; that such a tenancy was created, pursuant to the intention of all parties, by the attornment of the mortgagor to him, with the consent of the mortgagee, and that the express power of distress was not a power in gross, but annexed to the tenancy; and that the distress was valid, entitling the mortgagee to the produce of it. *Jolly v. Arbuthnot*, 28 Law J. Rep. (n.s.) Chanc. 547; 4 De Gex & J. 224.

(P) ACCOUNTS.

[*Lord Kensington v. Bouverie*, 7 Law J. Dig. 488; 7 De Gex, M. & G. 134.]

A mortgage-deed, creating an additional security for 10,000*l*, and intended also as a security for further advances to be made, contained a recital that the mortgagee was liable as surety for sums borrowed of third parties, which was not the fact. Though such sums had been borrowed through the instrumentality of the mortgagee, he was not allowed to extend the security to those sums against a party who had joined as surety for the 10,000*l*, and to assist in raising the further advances; and upon a bill filed for an account of what was due, and for redemption and delivering up of the securities, it was held (by the Master of the Rolls, and affirmed upon appeal) that an account must be taken on the footing of the deed; but no sums beyond the 10,000*l*. and interest were to be allowed to the mortgagee, except such as he had paid, or was then liable to pay, or had since become liable to pay, according to the provisions of the deed. *Lake v. Bruton*, 25 Law J. Rep. (n.s.) Chanc. 842; 8 De Gex, M. & G. 441; affirming 23 Law J. Rep. (n.s.) Chanc. 294; 18 Beav. 184.

Where a mortgagee of a newspaper, by an improper exercise of a power of sale, entered into possession as a purchaser and printed the paper,

receiving the profits and providing the necessary funds,—the Court, having set aside the purchase, refused to allow him to charge credit prices for printing, even though, on the mortgage account, a balance might be found due to him. *Robertson v. Norris*, 1 Giff. 428.

A motion to obtain the opinion of the Court as to the principle on which the account ought to be taken for the guidance of the chief clerk, is not irregular—*semble*. *Ibid*.

A, the first mortgagee of a ship, with the sanction and authority of B, the second mortgagee, sold it and received the proceeds, which exceeded the amount due to him:—Held, that A was accountable to B in the character of a trustee; and A having insisted that there was a deficiency, and having neglected to account, and a balance having been found against A in a suit by B,—Held, that A ought to pay the costs of the suit. B, however, had made charges in which he failed, and the Court, therefore, gave neither party costs. *Tanner v. Heard*, 23 Beav. 555.

Interest was paid on a mortgage of 360*l.* from 1829 to 1852; but the Court in 1857 decided that 110*l.* of the 360*l.* was not well charged on the property:—Held, in taking the accounts, that the interest thus paid for twenty-three years on the 110*l.* ought not to be treated as payments in discharge of the capital of the remaining 250*l.* *Blandy v. Kimber* (No. 2), 25 Beav. 537.

(Q) INTEREST.

In a mortgage to secure a debt, interest was reserved at the rate of 5*l.* per cent., with a proviso for reduction of the rate to 4*l.* per cent. on punctual payment. The mortgagee, who was a trustee, was held justified in accepting 4*l.* per cent. after default made in punctual payment. *Booth v. Alington*, 26 Law J. Rep. (N.S.) Chanc. 138; 6 De Gex, M. & G. 613.

Where a mortgage deed reserved 4½ per cent., but for a series of years, the deed being lost, all parties acted on the belief that only 4*l.* per cent. was reserved, the Court, overruling a decision of one of the Vice Chancellors, who had refused to order payment of the arrears of 10*s.* per cent., directed that the arrears should be paid. *Gregory v. Pilkington*, 26 Law J. Rep. (N.S.) Chanc. 177; 25 *Ibid*. 737.

On the death of a mortgagor in 1838, his widow (who was entitled to dower) took possession of the mortgaged estate, with the consent of the co-heirs, and she paid interest on the mortgage. In 1858 the mortgagee instituted a suit to realise his mortgage, in which it did not appear that any interest had been paid by one of the co-heirs during the interval:—Held, that the payment of the interest by the widow prevented the statute running; for either such co-heir was himself barred, or the payment of interest had been made on his behalf. *Ames v. Man-nering*, 26 Beav. 583.

(R) COSTS.

Where a negotiation for a mortgage goes off through the default of the mortgagor, the mortgagee's attorney cannot recover his costs from the mortgagor, in the absence of an express contract on the part of the latter to pay them. *Wilkinson v. Grant*, 25 Law J. Rep. (N.S.) C.P. 233; 18 Com. B. Rep. 319.

The costs of preparing a mortgage deed, &c. claimed by a firm of solicitors (one of whom was the mortgagee) are not mortgagee's costs; they are not covered by the security, and will not prevent the mortgagor from obtaining a reconveyance of the estate, or give the mortgagee any lien upon the title-deeds. *Gregg v. Slater*, 25 Law J. Rep. (N.S.) Chanc. 440; 22 Beav. 314.

A defendant to a creditors' suit, being made a party as mortgagee with power of sale, and also as claiming to be entitled to two other mortgages on the estate, which were set aside, sold under his power, and received the purchase-money. Stuart, V.C. then made an order in chambers, directing an account of the purchase-money, and of what was due to the defendant for principal, interest and costs, as mortgagee, other than the costs of the suit; and, after deducting such principal, interest and costs out of the monies in his hands, payment of the balance to the plaintiffs:—Held, that the order was right, and that the defendant had no right to retain generally his costs of suit. *Wickenden v. Rayson*, 25 Law J. Rep. (N.S.) Chanc. 641.

Where, through the unsoundness of mind of a mortgagee (not found lunatic by inquisition), proceedings under the 13 & 14 Vict. c. 60. (the Trustee Act, 1850,) are rendered necessary to obtain the reconveyance of the estate, the costs must be borne by the mortgagee. *Hawkins v. Perry*; *ex parte Sergeant in re Viall*, 25 Law J. Rep. (N.S.) Chanc. 656; 8 De Gex, M. & G. 439.

A mortgage to secure future advances will not operate as a security for costs subsequently incurred. *Shaw v. Neale*, 27 Law J. Rep. (N.S.) Chanc. 444; 6 H.L. Cas. 581; 24 Law J. Rep. (N.S.) Chanc. 563; 20 Beav. 157.

An equitable mortgagee filed his bill against the infant heir of the mortgagor (upon whom a vesting order had been made under the Trustee Act of 1850) for a sale of the property. The proceeds being insufficient to satisfy the mortgage-debt and costs, it was held, that the infant heir was not entitled to his costs of the suit, but he was allowed the costs of the vesting order. *Wade v. Ward*, 29 Law J. Rep. (N.S.) Chanc. 42; 4 Drew. 602.

Where lands subject to a mortgage had been sold under a decree in a creditors' suit, the mortgagee joining in a conveyance of the lands freed from his mortgage,—Held, that he was entitled to have the expenses of the actual sale, but no more, borne out of the proceeds of the sale, the other costs and expenses being left to be defrayed out of the general assets. *Berry v. Hebblethwaite*, 4 Kay & J. 80.

Where a mortgage in fee had been paid off to the mortgagee's executor, and a petition was presented under the Trustee Act, 1850, by the mortgagor for a reconveyance from the mortgagee's heir, who was a lunatic, or for a vesting order,—Held, that the mortgagor must pay the costs of the proceeding. *In re Stuart, ex parte Marshall*, 4 De Gex & J. 517.

Where a mortgagee has been put to expenses in defending the title to the estate, the defence being for the benefit of all persons interested, he is entitled to charge such expenses against the estate; but if his title to the mortgage only is disputed, the costs of his defence should not be borne by the estate as against parties interested in the equity of redemption, unless

they can be shewn to have concurred in or assisted the litigation. *Parker v. Watkins*, Johns. 133.

Generally the costs of a mortgagee are added to his security, and in whatever rank or order his security stands, his costs are united to it and form part of it; but if he institute a suit for the administration of the deceased mortgagor, his costs are those of a plaintiff in an ordinary administration suit. *Wright v. Kirby*, 23 Beav. 463.

Where a puisne incumbrancer sues for and recovers a fund for the benefit of all, his costs are paid in the first instance out of the fund recovered. *Ibid.*

An estate was greatly incumbered. The first charge was an annuity, and in default of payment the annuitant had a power to sell and invest the produce in the purchase of a similar annuity. The grantor reserved a power of repurchase. The annuitant having sold the estate, the fifth incumbrancer filed a bill to repurchase the annuity and distribute the produce:—Held, that the plaintiff's costs were the first charge on the fund, and that the costs of the other incumbrancer must be added to their securities. *Ibid.*

The plaintiff, a second mortgagee, obtained the costs of so much of a suit for redemption as had been incurred by the defendants, the first mortgagees unsuccessfully disputing his rights to redeem. But the Court, instead of ordering those costs to be paid to the plaintiff personally, directed them to be set off in case of the plaintiff's redeeming. *Wheaton v. Graham*, 24 Beav. 483.

A mortgagee of a 1,000 years' term filed a bill for foreclosure. At the hearing, by arrangement, a decree was made for the sale of the fee. It produced a little more than sufficient to pay the mortgage. The defendants declining an inquiry as to the value of the reversion in fee,—Held, that the plaintiff's costs had priority over those of the defendant. *Cutfield v. Richards*, 26 Beav. 241.

In a suit for foreclosure the assignees of a mortgagor disclaimed, and offered to be dismissed, without costs. The plaintiffs, having brought them to a hearing, were ordered to pay their costs subsequent to the disclaimer. *Davis v. Whitmore*, 28 Beav. 617.

(S) PRACTICE.

An enrolment of decree was vacated upon the ground of bad faith. *Wickenden v. Rayson*, 25 Law J. Rep. (N.S.) Chanc. 162; 6 De Gex, M. & G. 210.

The Court has no jurisdiction to order a sale of the mortgaged property freed from the mortgage, without the consent of the mortgagee. *Ibid.*

Where leaseholds were subject to a first mortgage, an annuity and subsequent incumbrances, and the rents were insufficient to keep down the interest on the first mortgage,—Held, that it was a proper case for an immediate sale at the first mortgagee's instance. *Phillips v. Gutteridge*, 4 De Gex & J. 531.

A mortgagee of a devisee filed a bill to enforce his security, and obtained a decree containing an inquiry as to the incumbrances on the estate. Immediately afterwards a legatee, whose legacy was charged on the estate and had priority over the mortgage, filed his bill to have the legacy raised:—Held, that the decree in the other suit was no bar to his proceeding with his suit; for that a prior in-

cumbrancer is not bound to go in under a decree obtained by a puisne incumbrancer, but is at liberty to institute a suit of his own. *Arnold v. Bainbridge*, 2 De Gex, F. & J. 92.

A mortgagee in fee of real estate having died intestate as to the mortgaged premises, which descended on his death to his infant heir, the Court, upon petition by his executors, one of whom was a married woman, made an order, under the Trustee Act, 1850, vesting the legal estate in the petitioners, to such uses as they should appoint; and, in default, to the use of petitioners in fee, subject to the equity of redemption, in order to enable them to reconvey to the mortgagor without the necessity of having the deed acknowledged by the married woman, under the act, 3 & 4 Will. 4. c. 74. *In re Powell*, 4 Kay & J. 338.

In a suit to foreclose, by a mortgagee (all parties consenting), the mortgaged premises were ordered to be sold and the proceeds paid into court. The purchase-money was invested, at the instance of the mortgagee, in consols, without objection on the part of the personal representative of the mortgagor; but when again converted into money (owing to a fall in the price of stock) was insufficient to satisfy the plaintiff's claim:—Held, the plaintiff was entitled to come in and prove for the deficiency in a suit to administer the mortgagor's estate. *Tompsett v. Wickens*, 3 Sm. & G. 171.

MORTMAIN.

The conveyance of land to trustees for the purpose of building a poor-house, held not within the Mortmain Act. *Barnaby v. Barnaby*, 28 Law J. Rep. (N.S.) Exch. 326: *nom. Barnaby v. Barnaby*, 4 Hurl. & N. 690.

A testatrix directed her executors, as opportunity might offer, to apply the residue of her personal estate, or such parts as by law might be legally applied to such purposes, in the "endowment" of district churches and chapels in populous places, so that the poor might have the gospel preached to them; and directed that a preference should be given to those parishes the churches of which were under the patronage of the trustees of the late Rev. Charles Simeon:—Held, upon appeal, affirming the decision below, that the gift was not within the Statute of Mortmain. *Edwards v. Hall*, 25 Law J. Rep. (N.S.) Chanc. 82; 6 De Gex, M. & G. 74: affirming 22 Law J. Rep. (N.S.) Chanc. 1078; 11 Hare, 1.

Held, also, that shares in canal companies, the Grand Junction Waterworks Company, and arrears of rent, were pure personality. *Ibid.*

A testator, by his will, gave real and personal property to T and M absolutely. After his death, an unsigned document was found among his papers, in which were the following passages—"I am confident, from the Christian characters of T and M, that if they are not able to do what I would have done, they will make use of what I have given them in such way as seems to them best to promote the glory of God and the welfare of our fellow sinners. I trust, however, that they will keep hundred pounds for themselves. It was my intention to have built a church or chapel, * * and to have

endowed it, * * and to have built ten or twelve almshouses," &c. Neither T nor M knew anything of the testator's intention during his life:—Held, that there was no secret trust for charitable purposes which could make the gift void under the 9 Geo. 2. c. 36. *Wallgrave v. Tebbs*, 25 Law J. Rep. (n.s.) Chanc. 241; 2 Kay & J. 313.

A testator gave and bequeathed to his executors 1,000*l.*, and directed them to lay out and expend the same, to erect a monument to the testator's memory in St. Paul's Cathedral:—Held, that this was a valid bequest. *Trimmer v. Danby*, 25 Law J. Rep. (n.s.) Chanc. 424.

A testator gave nine houses to his sister absolutely, suggesting at the same time that they would make eligible almshouses; he then bequeathed 4,000*l.* to trustees, and directed them, by deed, to settle the same, to provide annuities and stipends for nine elderly persons, and declare the rules of the institution, &c. By a codicil the testator confirmed his will, except such parts "as relate to the building almshouses, which I revoke, and desire that my executors may be released from carrying out the same, and the stipends and annuities connected therewith":—Held, that the legacy, though good by the will, was revoked by the codicil. *Baldwin v. Baldwin*, 26 Law J. Rep. (n.s.) Chanc. 121; 22 Beav. 413, 419.

A testator bequeathed 8,000*l.* to trustees for specific purposes, with a discretion that in case of his death, or within twenty-one years after, B, under the 6 & 7 Vict. c. 37, should be constituted a separate district for ecclesiastical purposes, to transfer the same to the Ecclesiastical Commissioners towards providing a church for such district, and the endowment or augmentation of the income of the minister thereof. B was not a separate district either at the death of the testator, or at the hearing of the cause:—Held, nevertheless, that the Ecclesiastical Commissioners were entitled to the benefit of the 8,000*l.* if B should be constituted a separate district within the twenty-one years from the death of the testator. *Ibid.*

A devised to B a piece of land in the hamlet of N. He then declared that he had long contemplated erecting and endowing almshouses on some part of his estate in the parish of N, and if within twelve months after his decease any person should give a piece of land as a site for such almshouses then as soon as the same had been legally dedicated to charitable uses he directed his trustees to pay to the trustees of the intended charity 60,000*l.*, to be devoted to the purposes of the said charity, but so that no part should be applied to the purchase of lands for the same. B within the twelve months duly dedicated to the purposes of the charity that land which had been devised to him. On a bill filed to have the 60,000*l.* applied for the benefit of the charity,—Held, that the gift in the will of that sum, as it expressly excluded the purchase of land, was a valid bequest, and was not affected by the 9 Geo. 2. c. 36. *Philpott v. the President and Governors of St. George's Hospital, the Attorney General v. Philpott*, 27 Law J. Rep. (n.s.) Chanc. 70; 6 H.L. Cas. 338; 25 Law J. Rep. (n.s.) Chanc. 33; 21 Beav. 134.

A bequest of pure personality to an association for buying inappropriate tithes and vesting them in the Church of England, is void under the Mortmain Act (9 Geo. 2. c. 36); notwithstanding the 25th section of the 6 & 7 Vict. c. 37, and the 23rd section of the

13 & 14 Vict. c. 94. *Denton v. Manners*, 27 Law J. Rep. (n.s.) Chanc. 623; 2 De Gex & J. 676; 27 Law J. Rep. (n.s.) Chanc. 199; 25 Beav. 38.

In 1851 L gave a piece of land to trustees upon trust to permit a church and schools to be built upon it. No funds were provided by the deed for that purpose, and no trust was declared of the rents until the erection of the buildings. L died in 1857. In a suit by the residuary devisees of L to impeach the deed, on the ground of there being a resulting trust for L,—Held, reversing a decision of the Master of the Rolls, that the deed, on the face of it, was valid. *Fisher v. Brierley*, 29 Law J. Rep. (n.s.) Chanc. 477; 1 De Gex, F. & J. 643.

In the above case, L, by her will, gave legacies to the amount of 12,000*l.* for the purpose of building and endowing a church and building schools on the land so given. In the same suit,—Held, also, on the same appeal, that this circumstance did not invalidate the deed or the legacies. *Ibid.*

In 1851 L, an elderly unmarried lady of large fortune, conveyed a piece of land containing two acres, and of the value of about 80*l.*, to trustees, upon trust to permit a church and schools to be built upon it. W was the confidential adviser and general manager of L. He was nominally bailiff of one of her farms and tenant of another, but, in fact, he did what he pleased with both farms, and paid sums on account to L. L died in 1857. It appeared in evidence that between 1851 and 1857 the piece of land was managed by W, and that the produce of it, or some part of such produce, was consumed at L's establishment. Nothing was done by the trustees with regard to the land before L's death. There was no direct evidence of any agreement between L and the trustees that L should have any benefit from the land, and there was some evidence to the contrary:—Held, on appeal, reversing a decision of the Master of the Rolls, that, under these circumstances, the deed was not void on the ground of a secret trust between L and the trustees that L was to have any benefit from the land. *Ibid.*

The 43 Geo. 3. c. 108. and the 4 & 5 Vict. c. 38. authorize a donor to give land to trustees for the purposes of building a church and schools, although a benefit may be reserved to him either by the deed of gift or by agreement with the trustees. *Ibid.*

A gift by a donor of a piece of land under these acts, for the purposes of a church and school, without distinguishing which part should be for a church and which for a school, is not void for uncertainty. *Ibid.*

The Penzance Public Library was established and kept on foot by the subscriptions of certain inhabitants of Penzance for the purpose of purchasing and preserving books for the use of such subscribers; and strangers were admitted to the benefits of the library on certain terms. The property of the library was vested in the officers for the time being, as trustees for the subscribers. One of the rules provided that the institution should not be broken up so long as ten members remained; but whenever the number was reduced below ten, all donations should be returned to the donors or their representatives, who might claim the same, and the remaining property be forthwith sold, and the proceeds appropriated to the foundation or support of some scientific institution in Penzance, to be determined by a majority of

the remaining members. A devise of freehold property to the trustees of the library, to hold to them and their successors for ever, for the use, benefit, maintenance and support of the said library, was held by Stuart, V.C. to be a valid devise, and not within the operation of the Mortmain Act; but, upon appeal, it was held that the devise was void on account of perpetuity, although the trust might not be charitable. *Carne v. Long*, 29 Law J. Rep. (N.S.) Chanc. 503; 2 De Gex, F. & J. 75; 27 Law J. Rep. (N.S.) Chanc. 589.

A bequest for charitable purposes of shares in a railway company, which, at the testator's death, had granted a lease of its railway property and undertaking for 999 years to another railway company at a fixed rent, and with an option of purchasing on notice,—Held (in affirmance of the decision of one of the Vice Chancellors), not to be void under the Statute of Mortmain. *Taylor v. Linley*, 29 Law J. Rep. (N.S.) Chanc. 534; 2 De Gex, F. & J.: affirming 28 Law J. Rep. (N.S.) Chanc. 686; 1 Giff. 67.

Growing crops are an interest in land within the Statute of Mortmain. *Symons v. the Marine Soc.*, 29 Law J. Rep. (N.S.) Chanc. 623; 2 Giff. 325.

Shares in mining companies conducted on the cost-book principle,—Held, not within the Statute of Mortmain, 9 Geo. 2. c. 36, the mines being vested in trustees for the purposes of the undertaking generally, and not in trust for the individual shareholders; and the interest of the shareholders being limited to the profits derived from working the mines. *Hayter v. Tucker*, 4 Kay & J. 243.

Devise of land for the erection of a schoolroom and offices, followed by a bequest of 400*l.* upon trust to expend the same, or such part thereof as might be necessary, in the erection of a schoolroom and requisite offices; and in case any part of the said 400*l.* should not be expended for that purpose, the same to be laid out in certain repairs:—Held, that the whole bequest was void under 9 Geo. 2. c. 36, the executors not having any alternative, the first trust being express, but to apply part at least of the 400*l.* in a manner forbidden by the statute; and inasmuch as the whole of so small a sum might well have been employed in building a school, an inquiry how much would have been sufficient for that purpose, as suggested in *Chapman v. Brown* (6 Ves. 404), would be useless. *Cramp v. Playfoot*, 4 Kay & J. 479.

Bequest to a charity of shares in the Rhymney Iron Company, which manufactured iron obtained from its own estates,—Held, void under the Statute of Mortmain. *Morris v. Glynn*, 27 Beav. 218.

The question whether shares in a company can be bequeathed to a charity depends on whether the substantial object of the company is or is not a dealing with land, and whether the land held by it is or is not merely auxiliary to a trading independent of land. *Ibid.*

A, in consideration of 800*l.* paid by B, granted a rentcharge to trustees in trust to pay it to the vicar of C in lieu of his small tithes; but if at any time the vicar should insist on taking the tithes, then in trust for the poor. The deed was duly enrolled. An objection that the deed was invalid as a purchase from the vicar, and void as not being made to take effect in possession, as regarded the charitable foundation in favour of the poor, was overruled. *Milbank v. Lambert*, 28 Beav. 206.

Bequest to a charity of a sum of money charged on the tolls of a harbour,—Held, void under the Statute of Mortmain. *Ion v. Ashton*, 28 Beav. 379.

Where lands are already in mortmain under a conveyance duly enrolled, no subsequent deed, conveying such lands to another charity requires enrolment under the 9 Geo. 2. c. 36. s. 2. *Ashton v. Jones*, 28 Beav. 460.

MUNICIPAL CORPORATION.

[See MANDAMUS.]

[The Acts concerning Municipal Corporations in England amended by 20 & 21 Vict. c. 50.—The Extension of the Boundaries of Burghs in Scotland provided for, and Doubts as to the Right of certain Persons holding Offices to be registered as Voters for Municipal Purposes, removed by 20 & 21 Vict. c. 70.—Municipal Franchise in certain Cases amended by 21 & 22 Vict. c. 43.—The Law relating to Municipal Elections amended by 22 Vict. c. 35.—Further Provision concerning Mortgages and other Dispositions of Property belonging to Municipal Corporations in England and Ireland, made by 23 Vict. c. 16.]

(A) ELECTION OF TOWN COUNCILLORS.

- (a) *Who may be Elected.*
- (b) *Voting Papers.*
- (B) *BURGESS ROLL AND LISTS.*
- (C) *CLERK OF THE PEACE.*
- (D) *NOTICE OF MEETINGS.*
- (E) *PROPERTY OF, AND CHARGES UPON.*
- (F) *CHARITIES.*

(A) ELECTION OF TOWN COUNCILLORS.

(a) *Who may be Elected.*

The mayor of a borough, who, by section 35. of stat. 5 & 6 Will. 4. c. 76, together with two assessors, declares the result of the election of town councillors, is disqualified from being elected a town councillor of the ward for which he is returning officer; and section 28, which disqualifies any person "during such time as he shall hold any office or place of profit, other than that of mayor, in the gift or disposal of the council," does not qualify the mayor as returning officer; and, therefore, if returned, the election is void. Where the mayor is one of the councillors who are in turn to go out of office on the 1st of November, a vacancy occurs by reason thereof, although as mayor he continues a member of the council until the 9th. *The Queen v. Owens*, 28 Law J. Rep. (N.S.) Q.B. 316.

Mandamus to the mayor, &c. of a municipal borough, reciting that on the 1st of November 1854 C and S, two councillors of a ward, being a third part of the number assigned for the ward, were in turn to go out of office, and an election ought to have been held for the election of two councillors for the ward under stat. 5 & 6 Will. 4. c. 76; but that an election was held on the 1st of November for one councillor only, whereby the office of one councillor was vacant; and the writ commanded the mayor, &c. to proceed to the election of a councillor. Return, that on the 9th of November 1853 S, being a councillor for the ward, was elected mayor for a

year and until his successor should have accepted the office; and S then accepted the office of mayor, &c., and held it till the 9th of November 1854, when his successor was elected mayor and accepted office, &c.; and S ceased to hold the office of mayor, and by reason thereof S was not, on the 1st of November 1854, in turn to go out of office as councillor; and the election ought not then to have been held for two councillors; and that, on the 30th of November 1854, S was duly elected councillor, and afterwards accepted that office, made and subscribed the declaration, and from thence continually held and continued to hold, and did still hold and continue in, the said office; and the same during all the time had been and still was full of S. On demurrer to the return,—Held, that the election of S as councillor on the 9th of November 1854 was at any rate not colourable, and there was therefore a plenary; and mandamus did not lie, the proper mode of questioning the election being by *quo warranto*. *Frost v. the Mayor, &c. of Chester*, 5 E. & B. 531.

(b) Voting Papers.

Where, at a municipal election, voting papers stated the property in respect of which the voter voted as "situate in the parish of C," and the borough contained divers streets, lanes, and other places named with different names, but the description in the voting papers was such as to be commonly understood,—Held, that this was an inaccurate description, which was cured by section 142. of the 5 & 6 Will. 4. c. 76. Per *Lord Campbell, C.J.* and *Crompton, J.*, this was also a sufficient description of the "street, lane or other place" where the qualifying property was situate, within section 32. *Regina v. Spratley*, 25 Law J. Rep. (N.S.) Q.B. 257; 6 E. & B. 563.

Voting papers used at an election of town councillors under the provisions of the 5 & 6 Will. 4. c. 76. s. 32. ought to be signed with the name of the voter, with the intention of the name signed being the signature of the voter; and such signature ought to be connected with the name of the street, lane or other place, in which the property for which the voter appears to be rated on the burgess-roll is situate. *The Queen v. Tart*, 28 Law J. Rep. (N.S.) Q.B. 178; 1 E. & E. 618.

(B) BURGESS ROLL AND LISTS.

On the revision of the burgess-lists for the borough of D. the Revision Court erroneously treated the burgess-list for the parish of T. as void (it being in fact good), and made out a new burgess-list for that parish of the claimants who proved their claims. The defendant was one of these claimants, and was fully qualified to be a burgess. The town clerk, adopting this new list as the burgess-list for the parish of T, inserted the defendant's name in the burgess-roll.—Held, that the defendant's name was improperly inserted in the burgess-roll, and that he might be removed by an information in the nature of a *quo warranto*, as the mayor and assessors had no power to make out such a list. *Seal v. the Queen* (Ex. Ch.), 27 Law J. Rep. (N.S.) Q.B. 139; 8 E. & B. 22.

A burgess who has property for which he is rated in two or more distinct wards is not entitled to be enrolled or to vote in more than one. And if, at the

time of revising the lists, he refuses to make his selection of the ward for which he wishes to vote, the mayor may strike out his name from all the lists except one. *The Queen v. the Mayor of Cambridge*, 28 Law J. Rep. (N.S.) Q.B. 10; 1 E. & E. 210.

Section 18. of the Municipal Corporation Act, 5 & 6 Will. 4. c. 76, does not prevent the granting of a mandamus to hold a court for the complete revision of the burgess lists of a borough at some other time than between the 1st and 15th of October, when there has been a wrongful omission to make the revision at the proper time, and serious inconvenience may arise to individuals and the public from such wrongful omission. Where, therefore, the mayor and assessors of the year had refused to revise the burgess-lists of particular parishes on frivolous grounds, a mandamus, tested in January of the next year, was granted to the succeeding mayor and the assessors, commanding them to hold a court and revise the said lists, and this for the purpose of deciding as to one of the lists upon the right of particular persons to have their names retained on the burgess-roll. *The Queen v. the Mayor and Assessors of Rochester (Parish of St. Margaret)*; *The Queen v. the Same (Parish of St. Nicholas)*, 27 Law J. Rep. (N.S.) Q.B. 45; 7 E. & B. 910.

The statute 5 & 6 Will. 4. c. 76. s. 15, as amended by the 20 & 21 Vict. c. 50. s. 7, requires overseers, on or before the 1st of September, to make out and deliver to the town clerk an alphabetical list of the burgesses. Section 48. of the first-mentioned act imposes a penalty of 50*l.* on every overseer who "shall neglect or refuse to make out, sign and deliver such list as aforesaid":—Held, that the penalty attaches to the not making out, &c. of the list on the 1st of September, and is not confined to the neglect or refusal to make out, &c. any list at all. *Hunt v. Hibbe*, 29 Law J. Rep. (N.S.) Exch. 222; 5 Hurl. & N. 123.

By stat. 5 & 6 Will. 4. c. 76. s. 48. an overseer neglecting to sign the burgess-list of a borough is liable to a penalty of 50*l.*, to be recovered by any person suing within three calendar months; and the money so recovered, after payment of the costs and expenses attending the recovery, is to be paid and appointed, one moiety to the person suing, the other moiety to the treasurer of the borough. Defendant recovered a penalty against an overseer, with taxed costs, as between party and party, and received the amount:—Held, that, in an action against defendant by the corporation for money had and received, it was sufficient *prima facie* for the corporation to prove the recovery and receipt of the penalty and the taxed costs; and that, in default of proof by the defendant of extra expenses, the plaintiffs were entitled to a verdict for half the penalty. *Mayor of Harwich v. Gant*, 5 E. & B. 182.

(C) CLERK OF THE PEACE.

By section 102. of 5 & 6 Will. 4. c. 76, it is provided that it shall not be lawful for the clerk to borough Justices, by himself or his partner, to be directly or indirectly interested or employed in the prosecution of any offender committed for trial by the Justices of whom he shall be such clerk as aforesaid, or any of them, at any court of gaol delivery or general or quarter sessions. F was appointed clerk to the Justices of the borough of N. He was

in partnership with P, who was clerk of the peace for the county in which N was situate, and who was entitled to receive certain fees upon the arraignment and trial of all prisoners at the Quarter Sessions. Certain offenders were committed by the Justices of N for trial at the General Quarter Sessions for the county, and upon their arraignment and trial P received fees. By arrangement between F and P, the former was entitled to receive, and did receive, one-half of the fees so taken by P:—Held by *Lord Campbell, C.J.* and *Erle, C.J.* (*Crompton, J. dissentiente*), that F was liable to be convicted upon an indictment preferred against him under the 102nd section above mentioned. *R. v. Fox*, 28 Law J. Rep. (n.s.) M.C. 157; 1 E. & E. 729; affirmed, on error, (*Fox v. Regina*), 29 Law J. Rep. (n.s.) M.C. 54; 1 E. & E. 746.

A clerk of the peace appointed by the corporation of a borough under the Municipal Corporation Act, holding office during good behaviour, and having fees attached to his office, cannot enter into an agreement with the corporation to receive a salary and account for the fees, such an agreement being void on two grounds of public policy: first, because a person accepting an office of trust can make no bargain in respect of that office; and, secondly, because the law presumes that all the fees are required for the purpose of enabling him to uphold the dignity and perform properly the duties of his office. *The Corporation of Liverpool v. Wright*, 28 Law J. Rep. (n.s.) Chanc. 868; Johns. 359.

(D) NOTICE OF MEETINGS.

By a local act, certain Commissioners were appointed for paving, &c. the town of K, and they were to carry on their proceedings at public meetings, of which notice in writing was to be fixed upon the door of the parish church. Under section 75. of 5 & 6 Vict. c. 76. the powers of the Commissioners were vested in the town council; by section 69. a notice of the time and place of the intended meetings of the town council was to be given by fixing the same on or near the door of the town-hall of the borough. In pursuance of the powers given by the local act, assessors were appointed at a meeting for the purpose of making a rate, and at another meeting a precept was issued to them to make the rate:—Held, that the notices of these meetings respectively were properly given by fixing them upon or near the door of the town-hall, as required by the Municipal Corporation Act. *The Town Council of Kidderminster v. Croft*, 28 Law J. Rep. (n.s.) M.C. 148.

(E) PROPERTY OF, AND CHARGES UPON.

The property of a corporation acquired subsequently to the passing of the Municipal Corporations Act, is liable to be taken in execution for debts contracted by the old corporation, prior to the passing of the act. *Arnold v. the Mayor and Corporation of Gravesend*, 25 Law J. Rep. (n.s.) Chanc. 530; 2 Kay & J. 574.

The consent of the Lords Commissioners of the Treasury to the alienation of the property of a corporation required by the 94th section of the Municipal Corporations Act is sufficiently signified by a letter signed by their secretary. Such consent can authorize no alienation or charge of the corporate pro-

perty further than is specified in the memorial on which it is founded. *Arnold v. the Mayor and Corporation of Gravesend*, *Pallister v. the Same*, 25 Law J. Rep. (n.s.) Chanc. 776.

A judgment entered up against a corporation for a debt contracted subsequently to the Municipal Corporations Act, is no charge upon any part of the corporate property not authorized to be charged therewith in the manner pointed out by the 94th section of the act. *Ibid.*

A corporation, by act of parliament, was authorized to raise money by debentures upon the tolls, rents and tolls of the borough markets. The interest upon these debentures was allowed to fall into arrear: Held, that the Court could grant a receiver of the tolls, but that it had no jurisdiction to interfere with the corporation in the letting or management of the stalls, &c. in the market-place. *De Winton v. the Mayor, &c. of Brecon*, 27 Law J. Rep. (n.s.) Chanc. 598; 23 Beav. 533.

The defendants were the holders of two mortgages, made by the corporation of Brecon, upon their land. One was made before the Municipal Corporation Act, and the other subsequently. This latter mortgage comprised in addition lands acquired under the Market House Act. The defendants brought an action to obtain payment of the money due on both mortgages. The corporation then brought into court the sum due on the mortgage made before the Municipal Corporation Act. The defendants, plaintiffs in the action, took this money out of court and proceeded with the action upon the second mortgage, and obtained a judgment. The defendants refused to reconvey the lands or deliver up the title-deeds in the first mortgage; and upon a bill by the corporation,—Held, that the first mortgage was satisfied before any judgment was obtained, and that no right to tack had arisen, and that the defendants must reconvey the lands and deliver up the title-deeds to the corporation. *The Mayor, &c. of Brecon v. Seymour*, 28 Law J. Rep. (n.s.) Chanc. 606; 26 Beav. 548.

The 96th section of the Municipal Corporation Act (5 & 6 Vict. c. 76), which enables municipal corporations to renew leases on a fine, in cases where sanctioned "by ancient usage, or by custom, or practice," at "a fine certain," or where they "have ordinarily made a renewal" upon "an arbitrary fine is to be construed liberally. *The Attorney General v. the Corporation of Great Yarmouth*, 21 Beav. 625.

The word "renewal" in the Municipal Corporation Act does not mean a mere custom to let on lease at different rents, and though the renewals need not be on precisely the same terms, there must be such a uniformity as to shew that the same lease has been renewed. *Ibid.*

Leases were granted by a municipal corporation of the same property in 1778, 1798 and 1824 to the same lessee and his assigns for twenty-one years, at a rent of 5s. In the two last instances alone a fine of 7s. 6d. had been taken. The covenants varied, and there was an interval of six years between the second and third, during which there was a yearly tenancy:—Held, that the case did not come within the 95th section of the Municipal Corporation Act, and that a renewal could not be granted at an under-value and on a fine. *Ibid.*

(F) CHARITIES.

The master of a charitable foundation was appointed by the presentation of a municipal corporation and institution by the bishop, who was the visitor. No part of the charity property was vested in the corporation:—Held, that the case was within the 71st section of the Municipal Corporation Act (5 & 6 Vict. 4. c. 76), and trustees of such right were appointed under it. *Re the Huntingdon Municipal Charities*, 27 Beav. 214.

MURDER.

The prisoner exposed her infant child in a field, on a cold, wet day, with intent that it should die. The exposure caused the child a congestion of the heart and lungs, which would have been shortly fatal had not relief been afforded it at the time. But the child having been restored by care, no bodily injury remained consequential on the exposure:—Held, that the prisoner could not be convicted, under the statute 7 Will. 4. & 1 Vict. c. 85. s. 2, of causing the child a bodily injury dangerous to life with intent to murder, as there was no lesion of any part of the organs of the child. *The Queen v. Gray*, 26 Law J. Rep. (N.S.) M.C. 203; Dears. & B. 803.

MUTINY ACT.

[See ARMY AND NAVY.]

NATIONAL GALLERY.

[Powers of Trustees and Director of the National Gallery extended, and the sale of works of art belonging to the public authorized, by 19 & 20 Vict. c. 29.]

NAVAL STORES.

The prisoner was convicted on an indictment, under 9 & 10 Will. 3. c. 41. s. 2, charging him with having illegally had in his custody, possession and keeping naval stores marked with the broad arrow. It appeared by the evidence that bags marked M, with their contents, addressed to G, an officer of the London and South-Western Railway Company at Nine Elms, were taken by two females to the Portsmouth station and duly forwarded to London by railway, and deposited in the goods department of the railway at Nine Elms, London, where G acted as officer. The prisoner, a marine store dealer at Portsmouth, wrote and telegraphed to an officer of the railway company to deliver the bags to Mr. Emmanuel. This was not done, but a letter written by G, stating "there are several bags lying at this station, consigned by you to me, marked M, to whom are they to be delivered?" was shewn to the prisoner by a clerk in the railway office, and the prisoner, in reply, directed the clerk to telegraph to "deliver to Emmanuel as before." The bags, in consequence of information, were opened at the goods department, and were found to contain naval stores marked with the broad arrow. Bags had been

previously forwarded in a similar manner by railway to the goods department of the company in London, marked E, which the prisoner had ordered to be delivered to Emmanuel:—Held, that there was evidence to support the conviction. *Regina v. Sunley*, Bell, C.C. 145.

NAVIGABLE RIVER.

The 53rd section of the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.) authorizes the conservators of the Thames to grant to the owner of any land fronting the river a licence to make any pier or other work immediately in front of his land, and into the body of the river, upon payment of such reasonable consideration as directed by the act, and subject to such other conditions as the conservators shall think fit to impose; and by a saving clause none of the powers of the act are to abridge any right, claim or privilege to which any owner of lands on the banks of the river is entitled:—Held, that the conservators have power, under this 53rd section, to license the erection of a platform interfering with the navigation of the river. *Kearns v. the Cordwainers Co.; The Cordwainers Co. v. Kearns*, 28 Law J. Rep. (N.S.) C.P. 285; 6 Com. B. Rep. N.S. 388.

Quære—whether such conservators have power to license such erection so as to interfere with the vested rights of individuals. *Ibid*.

The owners of adjoining land on the banks of the river have no right to complain if the erection so licensed does not deprive them of access to their land by the river side, but only interferes with the right which they have, in common with the rest of the public, to the unrestricted navigation of the river. *Ibid*.

The 11th section of the 54 Geo. 3. c. 159. operates by way of substitution for that part of the 19 Geo. 2. c. 22, which makes it an offence to throw out of any vessels, in a navigable river, ballast, rubbish, &c., so as to obstruct the channel or prejudice the navigation therein, and therefore a conviction under the earlier statute for such an offence is bad. *Mitchell v. Brown*, 28 Law J. Rep. (N.S.) M.C. 53; 1 E. & E. 267.

The owner of a vessel may be convicted of such an offence, though he be not on board at the time the act is done. *Ibid*.

NEGLIGENCE.

[See ACTION, *Walker v. Goe*, ante, page 6.]

- (A) WHAT AMOUNTS TO, IN GENERAL.
- (B) PRIMA FACIE EVIDENCE OF.
- (C) LENDER AND BORROWER.
- (D) LANDLORD AND TENANT.
- (E) MISTAKE BY TELEGRAPH COMPANY IN MESSAGE.
- (F) IMMUNITY FROM.
- (G) NEGLIGENCE OF PLAINTIFF CONTRIBUTING TO INJURY.
- (H) NEGLIGENCE OF RAILWAY AND OTHER PUBLIC BODIES IN THE CONSTRUCTION OR MANAGEMENT OF WORKS UNDER STATUTABLE POWERS.

- (I) LIABILITY OF MASTERS TO SERVANTS AND GUESTS.
 (K) LIABILITY OF OWNERS AND OCCUPIERS FOR STATE OF THEIR PREMISES.

(A) WHAT AMOUNTS TO, IN GENERAL.

In an action for an injury occasioned by a defendant's negligence,—e.g., negligent driving,—the plaintiff, to warrant the Judge in leaving the case to the jury, must give proof of well-defined negligence, and not merely some evidence of negligence, on the part of the defendant; and, where the evidence given is equally consistent with there having been no negligence on the part of the defendant as with there having been negligence, it is not competent for the Judge to leave it to the jury to find either alternative; such evidence must be taken as amounting to no proof of negligence. *Cotton v. Wood*, 29 Law J. Rep. (N.S.) C.P. 333; 8 Com. B. Rep. N.S. 568.

Foot-passengers, in crossing a highway, are bound to take due caution to avoid vehicles; and the drivers of vehicles are bound to take due caution to avoid foot-passengers. *Ibid*.

A was possessed of a wharf, and had a mast projecting therefrom over a river. B moored his vessel at the adjoining wharf, with her bowsprit overhanging the front of A's wharf, and, on the falling of the tide, the bowsprit of B's vessel, coming in contact with A's mast, broke it:—Held, that B was not responsible. *Dalton v. Denton*, 1 Com. B. Rep. N.S. 672.

(B) PRIMA FACIE EVIDENCE OF.

In an action against a railway company for negligence, the fact of the occurrence of an injury not necessarily importing negligence, even if it be *prima facie* proof, is not conclusive proof of negligence. *Bird v. the Great Northern Rail. Co.*, 28 Law J. Rep. (N.S.) Exch. 3.

An action cannot be maintained by the representative of a deceased person under the 9 & 10 Vict. c. 93, without proof of actual damage to the parties on whose behalf the action is brought. The mere proof, therefore, of the death by negligence does not entitle an executor or administrator to a verdict with nominal damages. The deceased, aged fourteen, the son of a mason, earned 4s. a week, which was applied by his father and mother to the general support of their family of which he was a member. No evidence was given as to whether the sum earned exceeded or was less than his actual cost of maintenance. The jury having found a verdict for the plaintiff, with 20*l.* damages (10*l.* of which they apportioned to the father and 10*l.* to the mother), the Court refused to disturb the verdict. *Duckworth v. Johnson*, 29 Law J. Rep. (N.S.) Exch. 25; 4 Hurl. & N. 653.

(C) LENDER AND BORROWER.

The duties of gratuitous lender and borrower of a chattel are, in some degree, correlative. The loan must be taken to be for the purpose of a beneficial use by the borrower; and the borrower is not responsible for reasonable wear and tear, but he is for negligence, for misuse, for gross want of skill in the use and for anything which may be defined as legal fraud. The lender is responsible

for defects in the chattel, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. By the necessarily implied purpose of the loan, a duty is contracted towards the borrower not to conceal from him those defects, known to the lender, which may make the loan perilous or unprofitable to him. *Blackmore v. the Bristol and Exeter Rail. Co.*, 27 Law J. Rep. (N.S.) Q.B. 167; 8 E. & B. 1035.

The defendants, being common carriers by railway, had two rates of carriage—tonnage and mileage; and they stipulated that goods carried at the latter rate should be loaded and unloaded by the owners. At a station on their railway the defendants had a crane, which they used to unload heavy goods when they undertook the unloading, and of which they allowed the gratuitous use to the owners of heavy goods carried at mileage rates. Some heavy pieces of stone were carried by the defendants to the station for H. at the mileage rates, and he received notice from the defendants to remove them. He requested the defendants' agent that the truck might be brought under the crane, and this was done by H and his two servants, assisted by servants of the defendants. Further assistance being necessary to raise a very large piece of stone, B, who was not in the employ of H or the defendants, was asked by H to assist: B did so; and the chain of the crane breaking, he was injured and died in consequence. The chain, at the time, was in an unsafe state, to the knowledge of the defendants:—Held, that there was no duty, with respect to the crane, imposed on the defendants by the contract between them, as carriers, and H as consignee. That the only duty was that arising from the contract of loan between H and the defendants, to which B was no way privy; and therefore that no action could be maintained by B's administratrix against the defendants. *Ibid*.

(D) LANDLORD AND TENANT.

The defendants, being the owners of a house and premises, demised the same on the 1st of April 1853 to M for thirty years, at a rent payable quarterly, with a right of re-entry if the rent should at any time be in arrear more than fifteen days. M occupied the first-floor himself for some time, and let out the rest of the house to separate weekly lodgers, each of whom had a right to draw water from a tank in the area, and to use the area for the purpose of doing so. In March M let the first floor to T, a weekly lodger, and then ceased to reside in the house, never paying the quarter's rent due at Lady-day 1858, or at the Midsummer following, and both were still in arrear at the time the action was brought. T had the same privilege of using the area and tank as the other lodgers. In July M became insolvent, and about the 25th of that month he gave up the lease to the official assignee, and was discharged upon the 30th. In the same month the defendants gave notice to the lodgers that the rent must be paid to them, and two of the lodgers did so pay the rent. On or about the 7th of August T, who was the tenant of the first floor, received a notice from the Inspector of Nuisances to repair a grating in front of the house; this notice was immediately handed by him to the defendants, and they repaired the grating. In November the defendants called upon the assignees to

elect whether they would take the lease or not; and upon their refusal to take it, the defendants took possession of it, and of the house and premises. Upon the 4th of August the plaintiff suffered an injury by falling through a grating in an area belonging to the house, and being part of the premises so let with the house. It was admitted that the injury was occasioned by the negligence of some person or persons in not keeping the grating in repair:—Held, by *Lord Campbell, C.J.* and *Hill, J.* that there was evidence to go to the jury to shew that the defendants were answerable for the negligence by which the plaintiff was injured:—Held, by *Wightman, J.* and *Erle, J.*, that there was no evidence to go to the jury. Held, by the Exchequer Chamber, that there was no evidence to go to the jury that the defendants before the time of the accident had avoided the lease and entered into possession of the premises, and had thus become answerable for the negligence by which the plaintiff was injured. *Bishop v. the Trustees of the Bedford Charity*, 28 Law J. Rep. (n.s.) Q.B. 216; 1 E. & E. 697. *Ibid.* 29 Law J. Rep. (n.s.) Q.B. 53; 1 E. & E. 697.

(E) MISTAKE BY TELEGRAPH COMPANY IN MESSAGE.

The Electric Telegraph Company's act (16 & 17 Vict. c. ciii.) provides (by section 66), that the public, without preference, shall have the use of the company's telegraph, subject to reasonable regulations to be made by the company. When a person wishes to transmit a message by the telegraph, a message paper is handed to him for his signature, on which is indorsed a notice that messages of consequence ought to be repeated from the station to which they are addressed, and that a higher rate is charged for repeated messages, and that the company will not be responsible for mistakes in the transmission of unrepeated messages:—Held, that the company is not liable for the consequences of such mistakes; that the condition introduced into the notice is reasonable; and if it be not a reasonable regulation under the act, it is such a limitation of liability as the defendants, in the character of common carriers, are entitled to create by notice to their customers. *M'Andrew v. the Electric Telegraph Co.*, 25 Law J. Rep. (n.s.) C.P. 26; 17 Com. B. Rep. 3.

Quære—whether the company would be liable for gross negligence in the transmission of an unrepeated message. *Ibid.*

(F) IMMUNITY FROM.

No action can be maintained against the owners of a transport vessel, employed by the Government, for damage done in the execution of positive orders of an officer of the Royal Navy, under whose command she was. *Hodgkinson v. Fernie*, 26 Law J. Rep. (n.s.) C.P. 217; 2 Com. B. Rep. N.S. 415.

Per Willes, J.—This immunity does not depend on martial law, but on the ground that persons acting under such orders cannot be said to be guilty of negligence. *Ibid.*

Where a vessel of the Royal Navy, towing two transports, anchored by order of the admiral, and the captain ordered the vessels in tow to hold on by their warps, and afterwards a breeze sprung up and one of the transports, swinging to it, came into collision with another transport in another column;

and the captain stated in evidence that after the order to hold on by the warps, it would have been proper for the master of the transport to let go his anchor if anything occurred which would have made it dangerous to his own or other ships if he did not do so,—Held, that, in an action against the owner of the transport for damage done by the collision, the Judge was right in leaving it to the jury to say whether the master was not guilty of negligent seamanship in not dropping his anchor on the wind changing. *Ibid.*

(G) NEGLIGENCE OF PLAINTIFF CONTRIBUTING TO INJURY.

Action by the owner of a collier brig for the loss of the brig occasioned by a collision at night with a steam-vessel of the defendants'. Plea, not guilty. The jury, on the trial, found, first, that there was fault on the part of the collier brig in not continuing the light required by the Admiralty Regulations made under 14 & 15 Vict. c. 79. s. 26. until the danger was passed; secondly, that the steam-vessel was going at too great a speed on so dark a night, in which respect there was want of caution, but that it was impossible to have avoided the accident when the steam-vessel came within two or three of the collier-brig's lengths; thirdly, that the preponderance of blame was with the steam-vessel:—Held, that the jury appeared by their finding to have come to the conclusion (as upon the evidence they were warranted), that the negligence of the master of the collier brig in not continuing to shew the light, directly contributed to the accident, and that at common law, therefore, the defendants were entitled to the verdict in the action. *Dowell v. the Steam Navigation Co.*, 26 Law J. Rep. (n.s.) Q.B. 59; 5 E. & B. 195.

Held, also, that there was a good defence to the action under section 28. of the 14 & 15 Vict. c. 79, which provides that where a collision is occasioned by the non-observance of the Admiralty rule with respect to the exhibition of lights, the owner of the vessel by which the rule has been infringed shall not be entitled to recover for any damage unless it appear that the circumstances were such as to justify a departure from the rule; and that this defence was open to the defendants under the plea of not guilty. *Ibid.*

Although there may be cases, even in actions for neglect of duty, in which the question, whether the plaintiff contributed to the loss or injury by his own negligence, may not properly arise on the general issue, yet it may arise even in actions for breach of a statutable regulation, where any duty has been cast upon the plaintiff, either by the statute, or through his own position or conduct, the neglect of which has so far contributed to the injury that it has not been caused entirely by the wrongful act or neglect of the defendants. *Ellis v. the London and South-Western Rail. Co.*, 26 Law J. Rep. (n.s.) Exch. 349; 2 Hurl. & N. 424.

Thus, in an action against a railway company, whose line intersected the plaintiff's land, for neglecting to provide proper gates and stiles for a public footway which ran across the railroad, according to section 61. of the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20), or for making their railroad so as not to carry it over or under a highway by means of a bridge, but across it on a level (according

to section 46); whereby the plaintiff's cattle strayed on the line and were killed by the engines, it appearing at the trial, on the general issue, and on proper traverses, that the way in question, whether a public footway or not, was also an occupation road, to which there would be properly such a gate as the company had erected, and which, under section 75, the plaintiff was bound to keep fastened, and that they had fixed a lock on and given him the key, which had been lost, and the gate left unfastened by his servants.—Held, that the Judge rightly directed the jury that the question as to the footway was immaterial; that even assuming that there was a footway, and that the defendants would have neglected their duty in not providing a stile for passengers, instead of a gate, had there not been an occupation road as well, the true question, under the circumstances, was, whether the accident had arisen through the substitution of the gate for the stile, or partly through the negligence of the plaintiff's servants. *Ibid.*

In actions for injuries by collision, though the damage is not occasioned entirely by the negligence or improper conduct of the defendant, the plaintiff is still entitled to recover, if he have not so far contributed to the misfortune by his own negligence or want of ordinary care, that but for such negligence the misfortune could not have happened, and if the defendant could, by the exercise of ordinary care and caution, have avoided the consequences of the neglect or carelessness of the plaintiff. *Tuff v. Warman* (Ex. Ch.), 27 Law J. Rep. (N.S.) C.P. 222; 5 Com. B. Rep. N.S. 573: affirming the judgment below, 26 Law J. Rep. (N.S.) C.P. 263; 2 Com. B. Rep. N.S. 740.

The plaintiff, a child of five years old, was under the care of his grandmother, who purchased a ticket for him, and another for herself, to go from A to B on the defendants' railway. While crossing the line at A to be ready for their train they were both knocked down and injured by another train. The accident was partly owing to the defendants' negligence, and partly to such negligence on the part of the grandmother as would disentitle her to recover damages from the defendants for the injury:—Held, that the plaintiff not being able to take care of himself, and being under his grandmother's care, there was such an identification between the grandmother and the plaintiff, that, by reason of her negligence, the plaintiff was unable to maintain an action for the injury to himself. *Waite v. the North-Eastern Rail. Co.* (Ex. Ch.), 28 Law J. Rep. (N.S.) Q.B. 258; E. B. & E. 719.

(H) NEGLIGENCE OF RAILWAY AND OTHER PUBLIC BODIES IN THE CONSTRUCTION OR MANAGEMENT OF WORKS UNDER STATUTABLE POWERS.

A waterworks company, pursuant to the statute incorporating them, laid down main pipes at the prescribed depth below the surface of the street and placed in them proper fire-plugs as required. By a frost of a severity rarely felt in England a fire-plug which had resisted the frost for twenty-five years was forced out and the water escaped from the main, but owing to the stopper above the plug being covered with ice and snow, the water could not rise to the surface, but was forced through the brickwork

round the neck of the main and made its way into the plaintiff's cellar, where it did damage:—Held, that the company were not liable, since the accident arose from a frost of extraordinary severity, the effects of which the company could not foresee or be expected to guard against, and, consequently, that there was no negligence on their part. *Blyth v. the Birmingham Waterworks Co.*, 25 Law J. Rep. (N.S.) Exch. 212; 11 Exch. Rep. 781.

Where an action cannot be maintained against a party unless there has been personal negligence on his part, it is not enough to shew that he has ordered work to be done, not necessarily amounting to any nuisance nor causing any injury, but in the course of which an injury is accidentally inflicted, although it appears that he did not give any special direction to adopt a particular precaution which might have prevented it; for it must be taken that he gave general directions to do the work in a proper manner, and to adopt all proper precautions; and the neglect of any such precaution, even assuming it to be negligence which might, under ordinary circumstances, render the employer legally liable, is not his personal negligence, so that he would not be liable in an action for an injury sustained in such a case by one of his own workmen, or in a case in which a statutable defence was raised on the ground that there was no negligence on the part of the defendant "otherwise than by his servants or workmen." *Scott v. the Mayor, &c. of Manchester*, 26 Law J. Rep. (N.S.) Exch. 132.

The corporation of a town were authorized by statute to carry on gas-works to light the town. The profits were to go, part in improving the town and part in reducing the water-rates:—Held, that the corporation were bound to make compensation for an injury arising from the negligence of their servants in laying down gas-pipes. *Scott v. the Mayor, &c. of Manchester* (Ex. Ch.), 26 Law J. Rep. (N.S.) Exch. 406; 2 Hurl. & N. 204: affirming the judgment below, 1 Hurl. & N. 59.

Where there were on the platform of a railway station two doors, one of which was marked "For gentlemen," and had a light over it, and led to an urinary, and the other was inscribed "Lamp-room," and was open, and had steps downwards inside, and no lamp over it; and the plaintiff, who could not read, after asking his way to the urinary, of a stranger, went in a hurry through the door of the lamp-room, and fell down the stairs and suffered injury thereby, —Held, in an action against the railway company for negligence, that the plaintiff was properly non-suited, there being no evidence to go to the jury to shew that the steps were more than ordinarily dangerous, or that the property of the defendants was so arranged as to be likely to produce danger. *Toomey v. the London, Brighton and South-Coast Rail. Co.*, 27 Law J. Rep. (N.S.) C.P. 39; nom. *Toomey v. the London, Brighton and South-Coast Rail. Co.*, 3 Com. B. Rep. N.S. 146.

A declaration stated, that the defendants were possessed of a railway and station and yard adjoining, through which cattle carried by the railway to the station were obliged to pass in going from the station to a highway, and that by reason of the premises the defendants were bound to maintain good and sufficient fences between the railway and the yard, so as to prevent cattle lawfully in

the yard from straying on the railway. Breach, that they did not maintain such fences, whereby the plaintiff's bull was killed:—Held, that there was no such liability to fence as alleged, and, therefore, that the declaration was bad. *Roberts v. the Great Western Rail. Co.*, 27 Law J. Rep. (N.S.) C.P. 266; 4 Com. B. Rep. N.S. 506.

The trustees of the Liverpool Docks, a corporate body, are, under certain acts of parliament, empowered to raise and were possessed of funds applicable to maintaining, cleansing, and preserving the docks; but the carrying into execution the powers and authorities given by the acts and the management and conduct of the estate and interest of the trustees are vested in a committee of persons called "The Committee for the Affairs of the Estates of the Trustees of the Liverpool Docks":—Held, that the trustees were not liable to an action to recover damages sustained by a vessel entering the dock, in consequence of its striking against and becoming imbedded in mud, alleged to be remaining there through the negligence of the trustees, and the docks being in an unfit state to be navigated and used by vessels in consequence of the want of necessary and reasonable cleansing; the case being governed by that of *Metcalfe v. Hetherington*. *Gibbs v. the Trustees of Liverpool Docks*, 26 Law J. Rep. (N.S.) Exch. 109; 1 Hurl. & N. 439.

Where a work of a public character (as a canal) has been constructed under the authority of an act of parliament, a right of action for an injury not occasioned wilfully, nor by an act necessarily causing it, but arising from the user of the work (as, for instance, through the overflow of the water in the canal), must be founded on negligence; and negligence is of the essence of the action; and although the jury have given a general verdict for the plaintiff, and it has been proved that the proximate cause of the injury was an act of the defendants' servants (as raising a flood-gate); yet, if it is doubtful whether that act necessarily must have caused the injury, and the jury also find that there was no negligence, the verdict will be entered for the defendants. *Whitehouse v. the Birmingham Canal Co.*, 27 Law J. Rep. (N.S.) Exch. 25.

Assuming it is *prima facie* evidence of negligence in a railway company that a train has got off the line, such evidence is entirely rebutted by proof that the accident arose from the wilful and wrongful act of a stranger. *Latch v. the Rimmer Rail. Co.*, 27 Law J. Rep. (N.S.) Exch. 165.

Although, where statutable powers are conferred, and exercised merely for the public benefit, and in the discharge of public duties, the persons so exercising them being in the position of trustees for the public interest, may not be liable for injuries thereby occasioned; yet where such powers are conferred on parties partly for their own benefit, and exercised for their own profit, such parties are answerable for injuries occasioned by their careless exercise of the powers so conferred. *Manley v. the St. Helen's Canal and Rail. Co.*, 27 Law J. Rep. (N.S.) Exch. 159; 2 Hurl. & N. 840.

Thus, where a canal company are empowered by private act of parliament to intersect highways, and to construct bridges to connect the intercepted portions, and the canal and bridges are vested in them as proprietors, and they are enabled to take tolls

from boats passing the bridges, and they erect swing-bridges, which the boatmen are entitled to open for the purpose of passing, and which, when opened, leave the edge of the canal unprotected, and there is not sufficient light or other means of preventing accidents, and the consequence is that, while the bridge is lawfully opened at night-time, a person falls into the canal without any fault on his part, the company will be liable to an action. *Ibid.*

Semble—it would be otherwise, if the boatmen, after having passed, had wrongfully left the bridge open at the time of the accident. *Ibid.*

Where a workman in the employ of one railway company was engaged in repairing their carriages upon a "siding" belonging to another company, but in the joint occupation of both companies, and he was placed between carriages, so that he could not see what might be coming, and was necessarily making a noise at his work, so that he could not hear, and an engine belonging to the other company came up into the siding and drove the carriages together, so that he was crushed between them and killed, and the jury found that the company to whom the engine belonged were guilty of negligence, by reason that their rails were defective, and that neither the deceased nor his fellow servants were so.—Held, that his representative could maintain an action against that company for compensation under Lord Campbell's Act. *Voss v. the Lancashire and Yorkshire Rail. Co.*, 27 Law J. Rep. (N.S.) Exch. 249; 2 Hurl. & N. 728.

A declaration alleged, in the first count, that the trustees, the proprietors of a certain dock, were entitled to receive tolls; that it was their duty to apply the tolls (among other purposes) in cleansing the dock, so that it should be in a fit state for vessels to enter; that the funds in the defendants' hands arising from the tolls were sufficient for the purpose of cleansing the dock, as well as of discharging all other liabilities and incumbrances on them; that the defendants did not take reasonable or any care about cleansing the dock, so that the plaintiff's vessel struck on the mud at the entrance of the dock and was injured. The second count charged that the defendants, knowing that the dock and the entrance to it were, by reason of the accumulated mud, in an unfit state to be used by vessels, did not take any care to put the same into a fit state, but negligently permitted the dock and the entrance to continue in such unfit state for want of reasonable cleansing, while they were, by the defendants' permission, used by vessels, and that the plaintiff's vessel, endeavouring to enter the dock, struck the mud and was damaged:—Held, as the defendants knew that the dock was in an unsafe state, and as they had sufficient funds to cleanse it, that probably it was their positive duty to cleanse it, and that they had no longer any discretion to allow it to remain as it was; but that, at all events, if they had a discretion to leave the dock in its dangerous condition, it was their bounden duty to have closed it to the public, and not to have invited the plaintiff's vessel to run into danger, by holding out that any vessel might enter the dock on payment of tolls; and that the defendants were liable for the injury, although they received the tolls only as trustees, without any beneficial interest in them. *Gibbs v. the Trustees of the Liverpool Dock* (Ex. Ch.), 27 Law J. Rep. (N.S.)

Exch. 321; 3 Hurl. & N. 164: reversing the judgment below, 26 Law J. Rep. (n.s.) Exch. 109; 1 Hurl. & N. 439.

The trustees of a dock were sued for injury to a vessel, on the ground that, knowing that the dock and the entrance thereto were, by reason of a bank or accumulations of mud, in an unfit state to be navigated and used, they suffered the same to continue in such state so that the vessel, in entering the dock, struck against and became imbedded in the mud. The defendants denied this, ascribing the injury to another cause, and the witnesses on both sides appeared to agree that if the mud bank had existed as alleged it must have been seen by the defendants' servants. The Judge was not asked by the defendants' counsel in his summing up to leave specifically to the jury the question of their knowledge of its existence, and he left to the jury in substance the question whether the bank had existed as alleged by the witnesses on one side, and denied on the other. The jury found for the plaintiff, adding that the injury had not arisen from the cause to which it was attributed by the defendants:—Held, that there had been no misdirection, and that the verdict was not bad. *Gibbs v. the Trustees of the Liverpool Dock*, 28 Law J. Rep. (n.s.) Exch. 57.

Commissioners acting under statutable powers are liable for injuries arising from the execution of works which they order, and which are defective in proper precautions against danger. Thus, where a local board of health had ordered new sewers to be constructed under a contract and plans which did not provide for a "penstock" or flap, necessary to prevent the plaintiff's premises from being flooded, and the consequence was that the premises were flooded with sewerage,—Held, that the Commissioners were liable to be sued for negligence, and that they were properly sued in the name of their clerk. *Ruck v. Williams*, 27 Law J. Rep. (n.s.) Exch. 357; 3 Hurl. & N. 308.

In an action by a passenger against a railway company, for an injury sustained while travelling on their line, the declaration complaining that they kept and maintained their line in an insecure state, the evidence being, that the embankment ran through a country subject to floods, and had five years ago been constructed of sandy soil, with insufficient culverts to carry off water; that an extraordinary fall of rain had caused a flood, which had washed away the soil, or part of the embankment, leaving the "sleepers" unsupported, so that the earth gave way, and the train, an express train, passing over it at night, at the ordinary express rate, went off the line; there being no evidence that the water was seen on the line, or that there had been anything to indicate danger, and no engineer or skilled witness having been called to prove that the nature of the soil of the embankment was such that water would wash it away in ordinary floods,—Held, that although the evidence as to the construction and condition of the line, at the time of the accident, and of the rate of speed at which the trains had been going had been properly admitted, as these were circumstances which might have shewn negligence, if it had been proved that the line was known or ought to have been known to be in an insecure state, yet that as there was nothing to shew that it was so known, there was no evidence of negligence, or so little that the verdict

was against the weight of evidence. *Withers v. the North Kent Rail. Co.*, 27 Law J. Rep. (n.s.) Exch. 417.

An action will lie against a local board of health of a corporate district, under the 11 & 12 Vict. c. 63, as a body, for negligently carrying out works within their powers so as to cause injury to any person, e.g. for so negligently and improperly constructing a sewer as to cause a nuisance by its discharge. *Semble*—that an injury so caused cannot be compensated under section 144, as "damage sustained by reason of the exercise of the powers of the act." *The Company of Proprietors of the Southampton and Itchen Floating Bridge and Roads v. the Local Board of Health of Southampton*, 28 Law J. Rep. (n.s.) Q.B. 41.

Where the defendants' line of railway passed on an embankment by the side of the plaintiff's wood, in which there was growing dry grass of a very combustible character; and sparks from the defendants' engine set fire to the wood, either by setting light to the grass on their own land, which was also dry and easily ignited, or by the sparks falling on the plaintiff's wood in the first instance, and the occurrence was not accidental, but in dry weather continual or occasional, and naturally arose from the use of the engine,—Held, that though the defendants had adopted every possible precaution to prevent the mischief, they were liable for it, the jury having found them guilty of negligence. *Vaughan v. the Taff Vale Rail. Co.*, 28 Law J. Rep. (n.s.) Exch. 41; 3 Hurl. & N. 743.

The defendants had undertaken to convey a passenger to Carlisle. Their line ended at Maryport, and their train, on arriving there, came into collision with some coal-waggons, owing to the careless management of a "switch." The station belonged to another company, and the defendants paid rent for the use of it with the "switch." The "siding" on which the waggons were, and which the "switch" worked, was for the traffic of the defendants. The "switch" was self-acting, and there was no one in charge of it; but the defendants had a servant of theirs close by, for the purpose of looking after some gates, and he could, and sometimes did, see if the "switch" was working rightly. The passenger being killed in consequence of the collision, and the jury having found the defendants guilty of negligence,—Held, that there was evidence to sustain that verdict; and *semble*, that even had the negligence been that of the other company, the defendants would have been liable. *Birkett v. the Whitehaven Junction Rail. Co.*, 28 Law J. Rep. (n.s.) Exch. 348; 4 Hurl. & N. 730.

The defendants, a railway company, were owners of a tramway, which ran for some distance parallel to their line, being separated from it by a fence, which was also their property, down to a point where the tramway crossed the railway; at this point the defendants had placed gates which could be shut, so as to separate the tramway from the railway, but which, according to the plaintiff's evidence, never were shut. The plaintiff was licensed by the defendants, on payment of toll, to use the tramway with trucks and horses, and, while so using it, one of his horses, alarmed at an approaching train, swerved from the tramway through one of the open gates on to the railway, and was killed by the engine. In an

action to recover for the loss of the horse, the jury found that there was no negligence on the part of the plaintiff, but that the defendants were negligent in leaving the gate open:—Held, per *Williams, J.* and *Byles, J.* (*dissentiente Erle, C.J.*) that the plaintiff, who used the tramroad on payment of toll, had a right to expect, and that a duty thereupon arose on the part of the defendants, as owners of the tramroad and recipients of the tolls, to employ ordinary care and diligence in the management of the gates, and that for the loss occasioned to the plaintiff by their neglect of that duty they were liable. Held, per *Erle, C.J., Williams, J.* and *Byles, J.*, that the statute 8 & 9 Vict. c. 20. s. 68, which imposes on railway companies the obligation to fence against adjoining owners, did not apply to a case like the present, where the adjoining land belonged to the company. *Marfell v. the South Wales Rail. Co.*, 29 Law J. Rep. (n.s.) C.P. 315; 8 Com. B. Rep. N.S. 525.

The plaintiff being at a railway station in the daylight, with a crowd of persons, awaiting the arrival of a train, caught his foot against the edge of a weighing-machine, the base of which was raised a few inches above the level of the platform, and, falling, broke his knee-cap. The machine was of a description in use at railway stations, and was in its usual place, adjoining the end of a counter on which passengers' luggage was placed on the arrival of trains, and was used for weighing luggage:—Held, that there was no evidence of negligence to go to the jury. *Cornman v. the Eastern Counties Rail. Co.*, 29 Law J. Rep. (n.s.) Exch. 94; 4 Hurl. & N. 781.

A railway company are not responsible for an accidental fire caused by a spark falling from one of their engines upon premises adjoining the railway, if they have taken every precaution that science can suggest to prevent injury. They are not liable unless they are guilty of some negligence in fact; and negligence cannot be implied from the mere employment of locomotive engines, as the use of them is expressly permitted by the legislature. *Vaughan v. the Taff Vale Rail. Co.* (Ex. Ch.), 29 Law J. Rep. (n.s.) Exch. 247; 5 Hurl. & N. 679.

(I) LIABILITY OF MASTERS TO SERVANTS AND GUESTS.

Where an injury happens to a servant while in the actual use of an instrument, engine or machine, in the course of his employment, of the nature of which he is as much aware as his master, and the use of which is, therefore, the proximate cause of the injury, he cannot, at all events if the evidence is consistent with his own negligence in the use of it being the real cause, nor in case of his dying from the injury can his representative, under Lord Campbell's Act (9 & 10 Vict. c. 93), recover against his master, there being no evidence that the injury arose through the personal negligence of the master. Nor is it any evidence of such personal negligence of the master that he has in use in his works an engine or machine less safe than some other which is in general use. *Dynen v. Leach*, 26 Law J. Rep. (n.s.) Exch. 221.

Therefore, where a labourer was killed through the fall of a weight which he was raising by means of an engine to which he attached it by fastening on to it a clip, and the clip had slipped off it, it was held that there was no case to go to the jury in an action by his representative against the master,

although it appeared that another and safer mode of raising the weights was usual, and had been discarded by the orders of the defendant. *Ibid.*

The declaration alleged that the plaintiff was lawfully in the defendant's house as a visitor, by his invitation, and that, for the purpose of leaving the house, the plaintiff, with the defendant's permission and knowledge, opened a glass door of the defendant's, which it was necessary to open, and that by the carelessness, negligence, and default of the defendant the door was in an insecure and dangerous condition, and unfit to be opened, by reason whereof and of the carelessness, negligence, default and improper conduct of the defendant a piece of glass fell from the door upon the plaintiff, and injured him:—Held, on demurrer, that the declaration disclosed no cause of action. *Southcote v. Stanley*, 25 Law J. Rep. (n.s.) Exch. 339; 1 Hurl. & N. 247.

(K) LIABILITY OF OWNERS AND OCCUPIERS FOR STATE OF THEIR PREMISES.

Declaration, by the plaintiff, as the administrator of his deceased wife, suing for his own benefit as husband, and claiming damages, that the defendant was in the occupation of an office and passage leading thereto from the street, used by him for the reception of customers and others on business; that the passage was the ordinary means of ingress and egress between the office and street; that the defendant negligently permitted a trap-door in the passage to remain open without being properly guarded and lighted, and that the deceased, having been to the office as a customer, was lawfully passing out by the passage, and, through the said negligence of the defendant, fell through the hole of the trap-door and was killed:—Held, first, that it was not necessary to disclose or allege any pecuniary damage suffered by the plaintiff, beyond the mere claim, in a declaration under the 9 & 10 Vict. c. 93. Secondly, that a good cause of action against the defendant was disclosed on the facts stated. *Chapman v. Rothwell*, 27 Law J. Rep. (n.s.) Q.B. 315; E. B. & E. 168.

On a private road leading to a county lunatic asylum, along which persons had been accustomed to pass by the leave of the owners, and were likely to continue to pass, the defendant, being about to build, received leave to place materials, and in pursuance thereof placed his materials in such a way as to obstruct the road and to make it dangerous to persons using it, and did not give notice to such persons by signal or otherwise. An injury having been caused thereby to the horse of the plaintiff while lawfully using the road,—Held, that the defendant was liable to an action by the plaintiff for the injury sustained. Held, also, that it was not necessary to aver in the declaration that the materials were so placed by the defendant without the permission of the owners and occupiers of the soil, as such allegation would raise an immaterial issue. *Corby v. Hill*, 27 Law J. Rep. (n.s.) C.P. 318; 4 Com. B. Rep. N.S. 556.

The owner or occupier of land, along which there is a right of way, leaving unprotected an excavation or reservoir of water, is not liable for the injury or death of a person falling into it in the dark, in consequence of his straying out of the way by mistake. *Hardcastle v. the South Yorkshire Rail. Co.*, 28 Law J. Rep. (n.s.) Exch. 139; 4 Hurl. & N. 67.

A declaration alleged that the defendants were seized in fee of waste land, and, before the grievance alleged, a quarry had been opened on the land, which was worked by leave of the defendants, who received a royalty; that the waste was open to the public, and all persons having occasion to cross it had been used to cross it with the licence of the owners; that the quarry was situate near to and between two public highways leading over the waste, and was dangerous to persons who might accidentally deviate, or have occasion to cross the waste, for the purpose of crossing from one road to the other; that the defendants, well knowing the premises, left the quarry unfenced, and the plaintiff, having occasion at night to cross the waste to get from one of the roads into the other, and not being aware of the existence of the quarry, fell into it and was injured:—Held, on demurrer, that the declaration disclosed no cause of action. *Hounsell v. Smyth*, 29 Law J. Rep. (n.s.) C.P. 203; 7 Com. B. Rep. N.S. 731.

NIGHT POACHING.

To support an indictment charging a man, with others to the number of three, with being unlawfully on land for the purpose of taking game armed by night, it is not necessary to give direct evidence that the men were on the land without the permission of the occupier or landlord; but the jury may infer that they were there unlawfully from their conduct and other circumstances. *The Queen v. Wood*, 25 Law J. Rep. (n.s.) M.C. 96; 1 Dears. & B. 1.

NUISANCE.

[The Smoke Nuisance Abatement (Metropolis) Act, 1853, amended by 19 & 20 Vict. c. 107.—Better Provision for the Removal of Nuisances, Regulation of Lodging Houses, and the Health of Towns in Scotland, made by 19 & 20 Vict. c. 103.—The Nuisance arising from the Smoke of Furnaces in Scotland abated by 20 & 21 Vict. c. 73.—The Acts for the Removal of Nuisances and the Prevention of Diseases, amended by 23 & 24 Vict. c. 77.]

(A) ACTION FOR.

- (a) *By Reversioner.*
- (b) *Obstruction to Right of Way.*
- (c) *Lawful Trade carried on in Proper Place.*
- (d) *Effect of Acquiescence.*

(B) REMOVAL OF.

- (a) *Powers and Jurisdiction of Local Authority.*
- (b) *Order to Abate: Enforcing.*
- (c) *Validity of By-law for.*
- (d) *Smoke Nuisance.*

(C) INDICTABLE AT COMMON LAW.

(A) ACTION FOR.

- (a) *By Reversioner.*

In an action by a reversioner for damage done to the reversion, by cutting off the eaves of a building belonging to him, and by erecting a wall with a drip over his premises,—Held, that as there might be re-

peated actions for continuing the nuisance, evidence tendered at the trial of the first action, for the purpose of shewing the diminution in the saleable value of the premises, was properly rejected. *Bathiskill v. Reed*, 25 Law J. Rep. (n.s.) C.P. 290; 18 Com. B. Rep. 696.

To entitle a reversioner to maintain an action for a nuisance whereby his reversion is injured, the injury must be shewn to be of such a permanent nature as to affect the reversionary interest; and, therefore, the landlord of a house cannot maintain such an action for alleged injury to his reversion by reason of the noise made by the defendants hammering in adjoining premises during the tenancy, although less rent was paid by the tenant in consequence of such noise. *Mumford v. the Oxford, Worcester and Wolverhampton Rail. Co.*, 25 Law J. Rep. (n.s.) Exch. 285; 1 Hurl. & N. 84.

To entitle a reversioner to maintain an action for an injury to his reversion, the injury must be of a permanent character. *Simpson v. Savage*, 26 Law J. Rep. (n.s.) C.P. 50; 1 Com. B. Rep. N.S. 347.

Making fires and causing smoke to issue from a chimney, the erection of the chimney itself not being a nuisance but only the use made of it, is not ground for an action by the reversioner of adjoining premises, although his tenants have given notice to quit in consequence, and the premises would sell for less if the nuisance were continued. *Ibid.*

(b) *Obstruction of Right of Way.*

To a declaration complaining of trespasses to the plaintiffs' landing-stage or dummy, the same being a barge moored to a wharf alongside a river, the defendant pleaded that the defendant had a right to land at a quay upon the banks of such river, which was a public navigable river, and that the plaintiffs permanently moored their dummy there so as to obstruct and prevent the defendant's approach to the quay, and so that it was impossible for him to land without passing over the dummy; and thus the plea justified passing over it and so committing the trespasses complained of, doing no unnecessary damage to the plaintiffs in that behalf:—Held, a good plea, as the defendant was, under the above circumstances, justified in exercising his right of landing by so passing over the dummy. *The Eastern Counties Rail. Co. v. Doring*, 28 Law J. Rep. (n.s.) C.P. 202; 5 Com. B. Rep. N.S. 821.

At the trial, it appeared, that the defendant committed the trespasses of landing upon the dummy both when the tide was so high that but for the dummy being there he could have landed at the quay, and also when the tide was so low that, if the dummy had not been there, he could not have landed:—Held, that the plea was a sufficient answer to the declaration, for if the plaintiffs complained of trespasses committed upon occasions of low tide, when the dummy did not interfere with the right to land, they ought to have new assigned in respect of such occasions. *Ibid.*

There was evidence at the trial of a custom to justify passing over a barge which, when alongside a wharf for the purpose of loading, interfered with another vessel having a right also to load or unload at such wharf. The plaintiffs' dummy was a covered barge permanently fixed to the wharf for the convenience of passing passengers to and from the plain-

tiffs' vessels at any state of the tide:—Held, that the custom did not apply to the case of such dummy, and that the evidence did not, therefore, support a plea justifying under such custom the passing over the dummy. *Ibid*.

The taking up the pavement and digging trenches in the roadway and footway of a public thoroughfare, in order to lay down service-pipes for the supply of gas from mains to private houses, are not acts that can be justified at common law, as done in the exercise of the right of every occupier of a house to make such a temporary obstruction of the highway as may be necessarily incidental to the enjoyment of his property; and a householder who authorizes such acts, and they who do them, having no parliamentary powers for the purpose, are liable to be indicted for a nuisance. *The Queen, on the prosecution of the Stoke Newington and Longton Gas Co. v. the Longton Gas Co. (Limited)*, 29 Law J. Rep. (N.S.) M.C. 118.

(c) *Lawful Trade carried on in Proper Place.*

In an action against the defendant for burning bricks on his own land for the purpose of building houses thereon, near to the plaintiff's house, and thereby causing noxious vapours, to the injury of the plaintiff's premises, the Judge told the jury that "although the carrying on of a lawful trade does annoy another, yet an action does not lie for the reasonable use of a lawful trade in a convenient place"; and he left it to them to say, first, whether the place in which the bricks were burnt was a proper place, and, secondly, if it was not a proper place, whether the plaintiff's enjoyment of life and property was thereby rendered uncomfortable:—Held, a right direction. *Hole v. Berlow*, 27 Law J. Rep. (N.S.) C.P. 207; 4 Com. B. Rep. N.S. 334; overruled by *Bamford v. Turnley*, 31 Law J. Rep. (N.S.) Q.B. 286.

(d) *Effect of Acquiescence in Nuisance.*

If works likely to become a nuisance are erected, and subsequently carried on without any objection, the owners of adjoining estates, who acquiesced so long as no perceptible injury was sustained, are not precluded, when injury arises, from objecting to an extension of the works, or from pursuing their legal remedy to recover damages for injury sustained by such works; and when an action has been brought, and damages recovered, the Court will not restrain the execution to obtain payment of the amount, or prevent the plaintiff in the action from taking other proceedings at law. *Bankart v. Houghton*, 28 Law J. Rep. (N.S.) Chanc. 473; 27 Beav. 425.

(B) REMOVAL OF.

(a) *Powers and Jurisdiction of Local Authority.*

An extra-parochial place having no inhabitants is within section 6. of 18 & 19 Vict. c. 121, which enacts that such places, having a population of less than 200 persons, shall, for the purpose of the act, be attached to and form part of the adjacent place having the largest common boundary with them. *The Queen v. Gee*, 28 Law J. Rep. (N.S.) Q.B. 298.

The proceeding before Justices given by the 18 & 19 Vict. c. 121. s. 12, for the removal and prevention of nuisances, is confined to cases where the

cause and effect of such nuisances exist within the area of the jurisdiction of the local authority. Therefore, where I, C & Co., brewers at R, poured their refuse into a river at that place, and the consequential result of that act was the pollution of the water of the river at D, and the local authority for D proceeded before the Justices for the abatement of the nuisance, it was held, that as the cause arose out of the jurisdiction of the local authority, the Justices had no power to hear and determine the question. *The Queen v. Cotton*, 28 Law J. Rep. (N.S.) M.C. 22; 1 E. & E. 203.

The drainage of two houses in parish P was carried by a covered drain into an open ditch in parish H; this ditch, being a nuisance, was made into a covered sewer by the "local authority" of H, under the Nuisances Removal Act, 1855; and they, under section 22, assessed, amongst others, the two houses in P, as using the said drain or structure so made:—Held, that the "local authority" has no power to assess property out of the limits of their local jurisdiction. *The Queen v. Warner*, 27 Law J. Rep. (N.S.) M.C. 144; *nom. R. v. Tatham*, 8 E. & B. 915.

Quare—whether the two houses used the structure within the meaning of the 22nd section, as they derived no benefit from the covering of the ditch, which was no nuisance to them when open. *Ibid*.

(b) *Order to abate: enforcing.*

The 18 & 19 Vict. c. 121. s. 14, which imposes a penalty on persons on whom an order of Justices has been made under that act, for disobedience of the order, and authorizes the local authority to enter on the premises to which the order relates and abate the nuisance, is merely permissive in the latter respect, and a mandamus will not be granted to compel the local authority to enforce the order on the default of the person upon whom it is made. *In re the Local Board of Health of the Parish of Ham*, 26 Law J. Rep. (N.S.) M.C. 64.

The 18th section of the 12 & 13 Vict. c. 45, by which any order of Quarter Sessions may be removed into the Court of Queen's Bench, and enforced as a rule of Court, does not apply to an order of Quarter Sessions to abate a nuisance, made after the trial of an indictment for the nuisance. *The Queen v. Bateman*, 27 Law J. Rep. (N.S.) M.C. 95; 8 E. & B. 584.

Under the Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121), the sanitary inspector for the local authority of a district obtained an order of Justices for the abatement of a nuisance. The local authority were requested by the party aggrieved by the nuisance to take steps for enforcing the order, but did not do so. The Court refused an application, by the party aggrieved, for a mandamus to compel the local authority to enforce the order. *Ex parte Bassett*, 7 E. & B. 280.

(c) *Validity of By-law for.*

Under the Public Health Act, 1848 (11 & 12 Vict. c. 63), local boards of health have no general power to make by-laws for carrying out the purposes of the act, but only such by-laws as authorized by section 55. A by-law that "all occupiers of any premises within the district shall properly clean and remove all snow, or other obstructions, from the foot-

path and channel opposite their respective premises, before nine of the clock in the forenoon of each day," is bad. An information having been laid against an occupier under this by-law, and it being proved that the occupier had neglected to remove snow, it was objected that the by-law was bad; but the Justice held that, inasmuch as it had been allowed by the Secretary of State, under section 115, he could not entertain the objection; and he convicted the occupier. The Court quashed the conviction on *certiorari*, though section 137 enacts that no proceeding touching the conviction of any offender against the act be removable by *certiorari*; holding that the Justice had acted without jurisdiction. *Quare*, by Lord Campbell, C.J., whether, if the Justice had heard the objection and decided against it, he would have acted without jurisdiction, so that the conviction might have been quashed. *Semble*, by Crompton, J., that he would. *Regina v. Wood*, 5 E. & B. 49.

(d) *Smoke Nuisance.*

A steam-tug, not carrying passengers, but employed exclusively in towing ships for hire to and from the various docks on the Thames, for the most part between London Bridge and the Nore Light, but sometimes going as far out to sea as the Downs, is within the 19 & 20 Vict. c. 107. s. 1, as "a vessel plying to and fro between London Bridge and any place to the westward of the Nore Light," and when employed within those limits is liable to penalties for not consuming her own smoke. *Walker v. Evans*, 29 Law J. Rep. (N.S.) M.C. 22.

By 8 Vict. c. 20. s. 114. every locomotive steam-engine to be used on a railway shall, if it use coal or other similar fuel emitting smoke, be constructed on the principle of consuming, and so as to consume its own smoke; and if any engine be not so constructed, the company or party using such engine shall forfeit 5*l.* for every day during which such engine shall be used on the railway:—Held, that the penalty only attaches where the engine using coal, &c. is so constructed as not to consume its own smoke when used with proper care, and under ordinary circumstances; and, therefore, that where an engine is properly constructed, but owing to the carelessness of the persons using it the smoke is emitted instead of being consumed, there is no liability to the penalty under the above section. *The Manchester, Sheffield and Lincolnshire Rail. Co. v. Wood*, 29 Law J. Rep. (N.S.) M.C. 29.

(C) INDICTABLE AT COMMON LAW.

Keeping wood naphtha in a warehouse near to streets, highways and dwelling-houses, in such large quantities as to endanger the lives and properties of the Queen's subjects therein, is indictable as a nuisance at common law. *The Queen v. Lister*, 26 Law J. Rep. (N.S.) M.C. 196; Dears. & B. 209.

OATH.

[The Unlawful Oaths Act (Ireland) continued by 19 & 20 Vict. c. 78.—Substitution of one Oath for the Oaths of Allegiance, Supremacy, and Abjuration; and Relief of Her Majesty's Subjects professing the Jewish Religion, 21 & 22 Vict. c. 48.—Committees of both Houses of Parliament enabled to administer

Oaths to Witnesses in certain Cases by 21 & 22 Vict. c. 78.]

By a local statute, a person appointed to act as tithe valuer was required, before acting, "To take and subscribe an oath in the words following":—"I, A. B., do swear faithfully to execute the powers, &c. So help me God":—Held, that a person who had subscribed an oath, in which the words "So help me God" were omitted, had substantially complied with the statute. *The Lancaster and Carlisle Rail. Co. v. Heaton*, 27 Law J. Rep. (N.S.) Q.B. 195; 8 E. & B. 952.

OBSCENITY.

[The Sale of Obscene Books, Pictures, Prints, and other Articles more effectually prevented by 20 & 21 Vict. c. 83.]

OUTLAWRY.

A defendant having been outlawed on final judgment in an action, petitioned the Insolvent Debtors Court and obtained an order for his discharge from custody, and afterwards appeared by attorney and obtained a rule nisi to reverse the outlawry:—Held, that the rule might be made absolute upon the defendant's making an assignment to the provisional assignee of his goods which were affected by the outlawry, and paying the costs of the outlawry and of the application for the rule. *Baskerville v. Sprye*, 25 Law J. Rep. (N.S.) Q.B. 334: s. c. *nom. Basterfield v. Sprye*, 6 E. & B. 376.

The mode of reversing a judgment of outlawry for error in fact, is still by writ of error, and not by proceedings under the Common Law Procedure Act, 1862. *Arding v. Holmer*, 25 Law J. Rep. (N.S.) Exch. 261; 1 Hurl. & N. 85.

A motion for judgment of reversal of outlawry for error on the default of a defendant to plead to the assignment of error, may be a rule absolute in the first instance. *Arding v. Holmer*, 26 Law J. Rep. (N.S.) Exch. 72; 1 Hurl. & N. 278.

A plaintiff, in a writ of error to reverse outlawry in final process, having appeared in person to assign error, need not appear in person at subsequent stages of the proceedings. *Smith v. Bromley*, *Bromley v. Smith (in error)*, 29 Law J. Rep. (N.S.) Q.B. 91.

The plaintiff in error *coram nobis*, having stated in his assignment of error that he appeared in person (the error being that he was beyond seas at the time of exigent awarded), and the defendant having pleaded *in nullo est erratum*, the Court refused, after joinder in error, to set aside the proceedings, on the ground that the plaintiff had not in fact assigned error in person; and they pronounced judgment, reversing the outlawry, on the prayer of counsel, and refused to postpone judgment until the debt on the original judgment was satisfied. *Ibid.*

PARENT AND CHILD.

[See DIVORCE and MATRIMONIAL CAUSES; Custody of Children—INDUSTRIAL and REFORMATORY SCHOOLS—INFANT.]

[Grants of Land to be made near populous Places for the Use of regulated Recreation of Adults, and as Playgrounds for Children, facilitated by 22 Vict. c. 27.]

- (A) GUARDIAN FOR NURTURE.
- (B) TRANSACTIONS AND FAMILY ARRANGEMENTS BETWEEN.
 - (a) General Points.
 - (b) Undue Influence.
- (C) CHILD'S PROPERTY.
- (D) GIFT BY CHILD TO PARENT.

(A) GUARDIAN FOR NURTURE.

Guardianship for nurture continues until a child has attained the age of fourteen, and the guardian for nurture, during that period, is entitled to the custody of the child; and a writ of *habeas corpus* is the proper proceeding, on the part of such guardian, to recover the custody of the child improperly detained from him. *In re Race*, 26 Law J. Rep. (N.S.) Q.B. 169; *nom. R. v. Clarke*, 7 E. & B. 186.

The law for this purpose recognizes no distinction as regards the discretion of the child between the ages of seven and fourteen. The Court, therefore, will not, where a child between those ages has been brought up under a writ of *habeas corpus*, obtained by the mother, a widow, who was the guardian for nurture, examine the child in order to ascertain whether there is mental capacity sufficient to exercise a choice, and, if so, the wishes of the child; but will at once restore the child to the custody of the guardian, unless it appears that the guardian, either by past immoral conduct or a want of *bona fides* in making the application, or by having some illegal intention or purpose in view, has forfeited her right to the custody of the child. *Ibid.*

The intention of the mother, herself a Roman Catholic, to remove the child from a Protestant establishment to a Roman Catholic seminary, is not enough to affect her right to the custody of the child as guardian for nurture, though the father of the child lived and died in the Protestant faith, and had brought up his children in the same faith; there being no directions of the father, by will, that his children should continue to be educated as Protestants. *Ibid.*

(B) TRANSACTIONS AND FAMILY ARRANGEMENTS BETWEEN.

(a) General Points.

Certain complicated family arrangements between a father, who afterwards became insolvent, and his son, were refused to be set aside in favour of the father's creditors, so far as they secured an annuity to the father's wife in case she survived him, it not being shewn that any available property of the father was thereby dedicated to the purchase of the annuity, and it appearing that by certain benefits which had accrued to the father at the expense of the son, the latter had acquired a right to stipulate as creditor for all the provisions of the deeds of arrangement. *Wakefield v. Gibbon*, 26 Law J. Rep. (N.S.) Chanc. 505; 1 Giff. 401.

Where there are transactions between father and child, commencing before the child attains twenty-

one, and continued soon after that time, regarding the property of the child, trustees of the fund, who act *bona fide*, and from no improper motive, are entitled to have evidence of their caution and vigilance preserved by suit before they make a transfer. *King v. King*, 27 Law J. Rep. (N.S.) Chanc. 29; 1 De Gex & J. 663.

(b) Undue Influence.

An estate was devised to a married woman for life to her separate use, remainder to her husband for life, remainder as she should appoint among her children and grandchildren, with remainder over among her children equally. The receipts of the married woman alone, or some person authorized by her to receive any payment of the rents after such payments should become due, were declared to be good discharges. The husband and wife mortgaged, by two deeds, their life interests. Their only son lived with them, and was maintained and educated by them, and the husband laid out money upon the permanent improvement of the estate. Five days after the son attained twenty-one he signed a memorandum, admitting that the larger part of the mortgage-money had been applied for his maintenance, education and advancement, and agreeing to execute such deeds as should be considered necessary for securing the mortgage-money upon his estate. A few months later the mother exercised her power by making a sweeping appointment in favour of her son; and the next day he conveyed the fee simple to a mortgagee, who paid off the first old mortgage and advanced further money, for securing the whole amount, the father and mother joining in the security; and at the same time the same parties in like manner acted with respect to the second old mortgage. After this it was ascertained that counsel were of opinion that the mother was restrained from anticipation, and subsequently the solicitor who had acted for the father and for the mortgagees, took a mortgage from the father, mother and son upon the estates for a further sum, part of which was paid to the son. No separate solicitor acted for the son in any of these transactions. The son filed a bill against the mortgagees, and the father and mother, to set aside the deeds, excepting so far as money had been actually paid to him upon the last occasion, and one of the Vice Chancellors, holding that the transaction was a family arrangement, dismissed the bill; but, upon appeal,—Held, that it was not a family arrangement, and could not be sustained; that the deeds must be set aside, excepting so far as any money could be proved to have been received by the plaintiff; that the words of the receipt clause created a restraint upon anticipation,—a fact of which the plaintiff was not aware when he executed the first two mortgages. Held, also, that in the third mortgage the mortgagee, acting as the solicitor of the plaintiff, did not sufficiently advise him as to the restraint; but treated the title as if there were no such restraint. Held, also, that although the bill contained strong charges of fraud against the first and second of the plaintiff's mortgagees, which were wholly unsustained, he was entitled to relief, there being other equities to support the bill; and, as against the solicitor and the father, to his costs to a limited amount. Held, also, that although the original agreement was not alleged in the bill, yet as it

was put in evidence, the Court would consider it as part of the materials upon which to found its judgment. The case of *Field v. Evans*, after an examination of the Registrar's book of the day, and a perusal of the petition, considered to be correctly reported. *Baker v. Bradley*, 25 Law J. Rep. (N.S.) Chanc. 7; 7 De Gex, M. & G. 597; 2 Sm. & G. 581.

The re-settlement of family estates between a father, tenant for life, and son, tenant in tail, will be supported where the son was aware of the new arrangements and approved the written proposals, though the son was without legal advice, was indebted, without income, and under the influence of his father, though the proposals for such re-settlement, signed by both father and son, were departed from in the preparation of the deeds, and though the father, without its being mentioned in the proposals, took a sum of 6,678*l.*, the purchase-money for parts of the settled lands taken by a railway company, and introduced into the settlement his own fee simple estates, valued at 100*l.* a year; the benefits which the son derived being, the payment of his debts, a defeasible income of 400*l.* a year during the life of his father, with a sum to be raised for his advancement in life, and a right to jointure any wife he might marry; while the father secured upon the estates a jointure for his wife, and limited the estates to the whole of his own male issue, in preference to the female issue of his son, and reserved to himself the ultimate reversion in fee. *Hartopp v. Hartopp*, 25 Law J. Rep. (N.S.) Chanc. 471; 21 Beav. 259.

A gift from a daughter to her father soon after she attains majority, and while parental influence is presumed to continue, will be set aside if the suit is instituted in due time; but if, after a course of dealing for more than ten years, shewing a deliberate intention on the part of the daughter not to disturb the transaction, which dealing is acquiesced in by the daughter's husband, (she having subsequently married and died,) the Court will not permit him to impeach the transaction. *Wright v. Vanderplank*, 25 Law J. Rep. (N.S.) Chanc. 753; 8 De Gex, M. & G. 133; 2 Kay & J. 1.

A father, who was a tenant farmer, with no independent income, received the rents of his daughter's land as guardian in socage, and out of them maintained and educated her. Ten years after the daughter had attained twenty-one, her husband (she being dead) filed a bill for an account of the rents and profits; but the Court refused to direct the account, affirming a decision of one of the Vice Chancellors. *Ibid.*

(C) CHILD'S PROPERTY.

A daughter was entitled to one-fifth of some property, and her father to the remainder. She resided with and was maintained by him, and he received the whole of the rents. After his death, she, for the first time, claimed against his estate an account of one-fifth of the rents for twenty years. The Court concluded that the common establishment had been maintained out of the mixed fund and rejected the claim. *Smith v. Smith*, 23 Beav. 554.

(D) GIFT BY CHILD TO PARENT.

A gift by a child to her parent immediately after attaining twenty-one cannot, under ordinary circum-

stances, be supported. *Bury v. Oppenheim*, 26 Beav. 594.

Soon after attaining twenty-one, a daughter sold her reversionary interest, and the amount was received by her father. He said she had determined that the most advantageous course for her to adopt would be to give the money to him to be applied by him in improving and extending his business, in order to increase his estate and to enable him better to provide for his family after his decease, and she accordingly gave him the money:—Held, that the father was a trustee of the money for the daughter, and bound to repay it. *Ibid.*

PARISH CONSTABLE.

Where, under the 5 & 6 Vict. c. 109, a precept had been issued by Justices ordering overseers to make out and return a list of men qualified and liable to serve as parish constables, and the overseers had duly called a meeting of the inhabitants for the purpose of making out such list, but the inhabitants assembled at the meeting declined to do so in consequence of thinking it unnecessary that any such constables should be appointed, a mandamus was granted ordering them to make out and return the list. *The Queen v. the Inhabitants of the Township of North Bierley*, 27 Law J. Rep. (N.S.) M.C. 275; E. B. & E. 519.

The Justices are the persons to determine whether parish constables shall still be appointed in places where the rural police system is established; and if in the exercise of their discretion they think fit to issue their precept the inhabitants must obey it. *Ibid.*

PARLIAMENT.

[Certain Offices of the House of Commons regulated by 19 & 20 Vict. c. 1.—The Law for the Registration of Persons entitled to vote in the Election of Members to serve in Parliament for Burghs in Scotland amended by 19 & 20 Vict. c. 58.—The Corrupt Practices Prevention Act, 1854, continued by 19 & 20 Vict. c. 84.—Proceedings in relation to the Election of Representative Peers for Ireland, regulated by 20 & 21 Vict. c. 83.—The Lord Lieutenant enabled to appoint Revising Barristers for the Revision of Lists and Registry of Voters for the City of Dublin by 20 & 21 Vict. c. 68.—Property Qualifications of Members of Parliament abolished by 21 & 22 Vict. c. 26.—Corrupt Practices Prevention Act, 1854, continued and amended by 21 & 22 Vict. c. 87.—The Act of the Twenty-fourth Year of King George the Third, Chapter Twenty-six, for issuing Writs during any Recess of the House of Commons, whether by Prorogation or Adjournment, extended by 21 & 22 Vict. c. 110.—Doubts as to the Qualification of Persons holding Diplomatic Pensions to sit in Parliament, removed by 22 & 23 Vict. c. 5.—An Act to continue the Corrupt Practices Prevention Act (1854), 23 & 24 Vict. c. 99.]

1.—ELECTION OF MEMBERS.

- (A) APPOINTMENT AND EXPENSES OF AUDITOR.
- (B) BRIBERY.

2.—REGISTRATION OF VOTERS.

(A) QUALIFICATION.

- (a) *For County Vote.*
- (b) *For Borough Vote.*
- (c) *Statement of.*

(B) NOTICE OF CLAIM.

(C) NOTICE OF OBJECTION.

(D) PRACTICE.

- (a) *Jurisdiction.*
- (b) *Consolidating Appeals.*
- (c) *Signing Lists.*
- (d) *Expenses of Preparing Lists.*

1.—ELECTION OF MEMBERS.

(A) APPOINTMENT AND EXPENSES OF AUDITOR.

The 17 & 18 Vict. c. 102, s. 15, enacts, that in every year, in the month of August, the returning officer of every county, &c. shall appoint an "election auditor" to act for and during the year then ensuing, and until another appointment be made. An auditor having been appointed in August 1854, no other appointment was made until March 1857:—Held, that the latter appointment was valid, and superseded the former. *The Queen v. Griffiths*, 26 Law J. Rep. (N.S.) Q.B. 331; 7 E. & B. 952.

A person who with his own consent is nominated as a candidate at an election of a member of parliament, but withdraws without going to the poll, is liable to the election auditor's fee of 10*l.*, under the statutes 17 & 18 Vict. c. 102, and 21 & 22 Vict. c. 87. *Edwards v. Whitehurst*, 29 Law J. Rep. (N.S.) Exch. 329; 5 Hurl. & N. 131.

(B) BRIBERY.

It is an offence against the first branch of the first clause of the 2nd section of the Corrupt Practices Prevention Act, 1854, to promise to pay a voter, at an election for a member of parliament, his travelling expenses, conditionally on his coming and voting for a particular candidate; but a promise to pay a voter his travelling expenses without such a condition is legal. Merely paying the voter his travelling expenses on account of his having voted is not prohibited by the second branch of the first clause of the 2nd section of the statute, as it is not necessarily a corrupt payment, but it would be illegal and corrupt if the payment were made in consequence of any previous unlawful promise to make it conditional on the voter's voting, or if it was connected with any corrupt bargain for the future. *Cooper v. Slade* (in error), 25 Law J. Rep. (N.S.) Q.B. 324; 6 E. & B. 447.

But by the House of Lords, where a letter desired an elector to come from H to C, to vote at the latter place for a particular candidate, a postscript to the letter said, "your travelling expenses will be paid":—Held, that this was evidence of bribery by the writer of the letter within the true intent and meaning of the 17 & 18 Vict. c. 102, s. 2. *Cooper v. Slade*, 27 Law J. Rep. (N.S.) Q.B. 449.

Evidence was given that in the defendant's committee-room there had been a discussion whether payment of an outvoter's travelling expenses was legal. The defendant declared his opinion that such payment was legal. The postscript was then (though not by the defendant's own act, nor by his direct

command) added to the letter:—Held, that this was evidence to shew that the letter was written by his direction and authority. *Ibid.*

Under the "Corrupt Practices Prevention Act, 1854" (17 & 18 Vict. c. 102), the appointment of a person as agent "for election expenses," pursuant to the 31st section, does not make him an agent to receive claims against the candidate under the 16th section. But, *scilicet*, the same person might act in both capacities if duly appointed for both purposes. *Grant v. Guinness*, 25 Law J. Rep. (N.S.) C.P. 66; 17 Com. B. Rep. 190.

The travelling and hotel bills of a candidate (being "personal expenses" by section 38), and the expenses of advertisements, are, by section 22, to be defrayed by himself or his agent; and it is not necessary that an account of these or of *bond fide* subscriptions for public or charitable purposes (excepted by section 24.) should be sent in to the agent appointed under the 16th section. *Ibid.*

The provisions of the Corrupt Practices Prevention Act, 1854, 17 & 18 Vict. c. 102, do not affect a creditor's right of action against a candidate in respect of work or goods connected with the election, done or supplied on the personal order of the candidate. *Norton v. Dickson*, 29 Law J. Rep. (N.S.) Exch. 337; 5 Hurl. & N. 637.

In an action for penalties, under the Corrupt Practices at Elections Act, 1854, for giving or offering bribes to electors, the declaration alleging that an election was "holden" for a member to serve in parliament; that a certain person was a candidate at the said election within the meaning of the act; and that the defendant was guilty of bribery within the meaning of the act, by giving (or offering) money to certain persons then being voters, &c. A copy of the writ and return from the office of the clerk of the Crown, bearing a memorandum by a clerk in the office that it was a true copy, was put in without objection, and a copy of the poll-book from the same office, made and stamped in the office, and a printed copy of the register, signed by the town clerk, were also put in, subject to objection. There was oral evidence of an election having been held in fact. At the close of the case for the plaintiff, it was objected that the copies of writ and return were not "certified," so as to be admissible under the 14 & 15 Vict. c. 99; that there was, therefore, no evidence that an election had been duly held; that the copies of the poll-book and register were not admissible; and that there was, therefore, no evidence that the persons bribed were voters:—Held, that the objection to the first document was too late; that all the documents were rightly received as evidence; and that there was sufficient evidence to sustain a verdict for the plaintiff. *Ross v. Lamb*, 29 Law J. Rep. (N.S.) Exch. 452.

Scilicet—that the copies of writ and return were "certified" copies within the statute. *Ibid.*

Quære—whether oral evidence of an election in fact would have been sufficient? *Ibid.*

2.—REGISTRATION OF VOTERS.

(A) QUALIFICATION.

(a) *For Borough Vote.*

Within the borough of B are certain charity trustees, including the Guildhall and a house (com-

municating with a yard at the back of the Guildhall) which was originally built as a residence for, and has always been occupied by, the hall-keeper for the time being, who is elected annually by the trustees. The claimant was first elected hall-keeper in January 1846, and was re-elected annually up to, and inclusive of, the present year; and in the minutes of the resolution of his appointment in two previous years, but not in that of the present year, were the words, "that he be continued as tenant of the house, &c." He had the exclusive control of the house, and paid all rates and taxes, but no rent, his occupation being considered as part payment for his services; and the barrister found that it was necessary for the due discharge of his duties as hall-keeper that he should reside there, and that he was required to do so:—Held, that the claimant did not occupy in the legal relation of tenant, but only as servant to the trustees, and was therefore not entitled to a vote. *Clarke v. the Overseers of the Parish of St. Mary, Bury St. Edmunds*, 26 Law J. Rep. (N.S.) C.P. 12; 1 Com. B. Rep. N.S. 23.

Under a charter, granted by William the Third, the mayor, aldermen and common council of a borough appointed annually four sergeants-at-mace, whose duties were to execute warrants, apprehend prisoners, assist in keeping the peace, attend the mayor's court (abolished by 9 & 10 Vict. c. 95.) and the mayor on state occasions. On the passing of the Municipal Reform Act (5 & 6 Will. 4. c. 76.) the corporation reduced the number of sergeants-at-mace to three, and continued to appoint them in the same manner as theretofore. They discharged the same duties as before, and were paid by the treasurer of the corporation appointed since the Municipal Reform Act. A police force was also appointed by the watch committee, pursuant to section 76. of that act:—Held, that the sergeants-at-mace were appointed by the corporation under the charter and not under the Municipal Reform Act; and were therefore not disqualified as "constables" from voting in the election of a borough member by the 9th section of the 19 & 20 Vict. c. 69. *De Boinville v. Arnold*, 26 Law J. Rep. (N.S.) C.P. 65; 1 Com. B. Rep. N.S. 3.

An hospital was incorporated by act of parliament, and was empowered to hold land, and consisted of a master and twelve brethren, and was governed by certain rules. The appointment of the brethren (by the heir of the founder) was for life, subject to removal for the causes specified in the rules. Each of the brethren, as such, occupied exclusively two rooms in the hospital (of which he kept the key), and a part of the garden, and was rated in respect of such occupation:—Held, that the brethren did not occupy as owners or tenants, and were therefore not entitled to a borough vote, under 2 Will. 4. c. 45. s. 27. *Heath v. Haynes*, 27 Law J. Rep. (N.S.) C.P. 50; 3 Com. B. Rep. N.S. 389.

Premises, of which A was the sole lessee, were occupied by him and his three partners for their joint business. The payment of the rent was carried to the account of the partnership expenses, and the profits were divided equally:—Held, that the three partners occupied as tenants within the 2 Will. 4. c. 45. s. 27. *Rogers v. Harvey*, 28 Law J. Rep. (N.S.) C.P. 17; 5 Com. B. Rep. N.S. 8.

The institution of Military Knights of Windsor is

a charity, and the religious observances and manifestations of respect required of them are not services which constitute an office. *Heartley v. Banks*, 28 Law J. Rep. (N.S.) C.P. 144; 5 Com. B. Rep. N.S. 40.

The occupation by the knights of their respective houses being subordinate to the purposes, and as part of the benefits, of the charity, and subject to the immediate control of the superiors of the institution, the dean and canons of Windsor, in whom, as trustees of the charity, is vested the legal estate in the houses, is not an occupation by them as owners, such as confers a vote for the borough, under 2 Will. 4. c. 45. s. 27. *Ibid.*

Each knight is appointed by the Crown, under the seal of the Garter, to the place vacated by his predecessor, with the same house, &c., together with all rights, &c., unto the said place of military knight belonging, to hold the same during the term of his good and statutable comportment therein. *Quære*—whether the interest of the knights in the benefits of the charity is a freehold interest. *Ibid.*

The name of a person claiming to be registered for a borough, under the 2 Will. 4. c. 45. s. 28, in respect of different premises occupied in immediate succession for twelve months, need not have been entered in the rate-book; provided he has paid the rates, he is entitled to be registered. *Rogers v. Lewis*, 29 Law J. Rep. (N.S.) C.P. 85; 7 Com. B. Rep. N.S. 29.

Scmble, per Erle, C.J., that even in the case of a person who has occupied the same premises for twelve months, payment of rates by him, provided he be the person intended to be rated, although his name does not appear in the rate-book, will satisfy the words of the 27th section, which requires that he shall have been rated, and shall have paid the rates. *Ibid.*

The omission of a person's name in a rate is not a "misnomer or inaccurate description," within the meaning of the 6 Vict. c. 18. s. 75. *Ibid.*

The assignment to a stranger of the reversion in a part of a house and land on a demise, under which the tenant took all the premises from one landlord, does not destroy such tenant's qualification under 2 Will. 4. c. 45. s. 27, as occupier of a house with land under the same landlord, so long as the tenant continues to hold under his original taking. *French v. Tucker*, *Smerdon v. the Same*, and *Bickley v. the Same*, 29 Law J. Rep. (N.S.) C.P. 93; 7 Com. B. Rep. N.S. 37.

(b) For County Vote.

Persons holding land within a manor in fee, conveyed by ordinary assurance, and acknowledging that they hold of the lord, and liable to customary service, but not holding by copy of court roll or at the will of the lord, are freeholders entitled to votes under the 8 Hen. 6. c. 7. *Passingham v. Pitty*, 25 Law J. Rep. (N.S.) C.P. 4; 17 Com. B. Rep. 299.

The vendee of freehold land capable of producing enough to give a vote for county members, who has not had the legal estate conveyed to him, and who is not in actual possession of the land nor in actual receipt of the rents and profits, is not entitled to a vote. *Anclay v. Lewis*, 25 Law J. Rep. (N.S.) C.P. 121; 17 Com. B. Rep. 316.

The word "beadman" does not necessarily imply an office which gives a vote for a county, under the 2 Will. 4. c. 45. s. 18. *Faulkner v. the Overseers of Boddington*, 27 Law J. Rep. (N.S.) C.P. 20; 3 Com. B. Rep. N.S. 412.

Certain lands were conveyed pursuant to the wills of S and W to trustees, in trust, among other things, to divide a certain portion of the rents among the beadmen of D. Six beadmen had been appointed from early times, for their lives; and for the last twenty years they had received 50s. a year from the trustees; but neither under the trusts, nor in the character of beadmen, were they liable to perform, nor did they perform, any duties:—Held, that they had not an equitable estate which "came to them by promotion to any office" under the 2 Will. 4. c. 45. s. 18, and that their names were, therefore, properly expunged from the list of voters. *Ibid*.

Lands in the counties of D and N were devised, by will, to trustees in fee, in trust to pay annually out of the rents and profits certain sums to certain persons, and 10l. to each of the fellows of a college, the surplus rents after such payments to be applied as directed by the will. The annual sums were received by the bursar of the college for the trustees, pursuant to directions in the will, and paid over by him. If all these annual payments were made out of the lands in county D as far as the net profits would go, the annual sums received by each fellow would be less than 10l., and more than 40s. If the payments were made rateably out of the land in each county, in proportion to the profits received from each, a less sum than 40s. would be received by each fellow out of the lands in D:—Held, first, that the fellows had not a rentcharge, there being no power of distress. Secondly, that they had not an estate by devise, or by promotion to an office within the 2 Will. 4. c. 45. s. 18. Thirdly, that the lands in the two counties must be taken as rateably apportioned for the payment of the annual sums, and that, consequently, the fellows had not freeholds of 40s. value in county D. *West v. Robson*, 27 Law J. Rep. (N.S.) C.P. 262; 3 Com. B. Rep. N.S. 422.

Quere—whether the fellows were *cestui que trust* in the actual receipt of the rents and profits of land within the 6 Vict. c. 18. s. 74, so as to be freeholders for life in the actual and *bond fide* occupation of the land within the 2 Will. 4. c. 45. s. 18. *Ibid*.

The appellant claimed to be registered as a county voter in respect of an undivided thirty-fifth share, of the annual value of 40s. in certain freehold property. The property was managed by one of the owners, who was allowed a commission of 5l. per annum for receiving the rents and transmitting to each owner his share, and this sum deducted from the gross rental reduced the yearly value of each below 40s. The revising barrister found that the allowance of this commission was, from the nature of the property, necessary for the collection of the rents:—Held, that, as the revising barrister had found that the allowance of the commission was necessary, the appellant was not entitled to vote. *Aliter*—if the revising barrister had found that the allowance was not necessary, but only optional. *Sherlock v. Steward*, 29 Law J. Rep. (N.S.) C.P. 87; 7 Com. B. Rep. N.S. 21.

The owner of a copyhold house, situate within a

borough, and let in different parts to separate tenants in such a manner as to constitute separate tenements within the meaning of 2 Will. 4. c. 45. s. 27, is disqualified by section 25. from voting for the county in respect of such house, if it be of sufficient value to confer on him the right of voting for the borough, although the separate value of each of such tenements is insufficient to give a borough qualification. *Proctor v. Annison*, 29 Law J. Rep. (N.S.) C.P. 90; 7 Com. B. Rep. N.S. 48.

(c) Statement of.

A was entitled to a fifty-oneth portion of a certain amount of land-tax as a fee-farm rent, sold by the Land-Tax Commissioners under 42 Geo. 3. c. 116, and which was charged upon land belonging to L, assessed at a certain sum, and also upon land belonging to R, assessed at another sum, the two assessments making together the amount of the tax so sold. A's portion of the sum assessed on L's land was alone enough to give the franchise:—Held, that it was sufficient to enter in the fourth column of the list of voters the name of L as the owner of the property out of which the fee-farm rent issued, without mentioning the name of R. Held, also, that the description of the qualification as a "fee-farm rent" instead of "a fifty-oneth part of a fee-farm rent," was, if erroneous, one which the barrister had power to amend, under 6 & 7 Vict. c. 18. s. 40. *Cooper v. Ashfield*, 28 Law J. Rep. (N.S.) C.P. 35; 5 Com. B. Rep. N.S. 16.

A person entitled to vote for a county, by virtue of 2 Will. 4. c. 45. s. 20. (Chandos clause), as occupier of a farm for which he was *bond fide* liable to a yearly rent of not less than 50l., stated in the list of claimants the nature of his qualification to be "50l. occupier," and the situation of the property to be "Cambridge Road":—Held, that the qualification so stated was sufficient in law, as pointing to a qualification under the Chandos clause; and that if the revising barrister was of opinion it was not sufficiently described for the purpose of being identified, he ought to have amended it under 6 & 7 Vict. c. 18. s. 40. *Howitt v. Stephens*, 28 Law J. Rep. (N.S.) C.P. 105; 5 Com. B. Rep. N.S. 30.

(B) NOTICE OF CLAIM.

Where the name of a person inserted in a list of claimants for a county is objected to, proof ought not to be required that the person objected to had given due notice of his claim to the overseers. *Davies v. Hopkins*, 27 Law J. Rep. (N.S.) C.P. 6; 3 Com. B. Rep. N.S. 376.

Quere—whether a notice of claim must be signed by the hand of the claimant. *Ibid*.

(C) NOTICE OF OBJECTION.

A list of voters under 6 Vict. c. 18. s. 4. purporting to be for the township of P, contained the name of a claimant who described his place of abode as "L. Hill." A voter sent an objection to him by post, under the 100th section of the act, addressed to him at "L. Hill":—Held, that it was sufficiently addressed, without adding the township of P, such description not being necessarily incorporated in the description of the place of abode by reference to the heading of the list. *Flint v. Sharp*, 25 Law J. Rep. (N.S.) C.P. 36; 17 Com. B. Rep. N.S. 281.

Where a notice of objection to a county voter, under the 7th section of the 6 Vict. c. 18, addressed to the overseers of a parish, but without naming the county, as directed by the 101st section of the act, was duly posted under that section, and was actually received by the overseers in time,—Held, that the service of the notice was sufficient. *Jones v. Innona*, 25 Law J. Rep. (N.S.) C.P. 78; s.c. *nom. Jones v. Innona*, 17 Com. B. Rep. 290.

Where a notice of objection to a county voter posted, under the 6 Vict. c. 18. s. 101, on the 24th of August, was addressed to the overseers of the parish, and it did not appear whether or not they had received it on the 25th, but the name of the voter objected to was included in the list of persons objected to, which the overseers sent to the clerk of the peace on the 29th of August (under section 9), and the list which they published on the 1st of September (under section 8).—Held, that there was sufficient proof of service, as it was to be assumed, in the absence of proof to the contrary, that the overseers having acted on the notice had received it in good time. *Godsell v. Innona*, 25 Law J. Rep. (N.S.) C.P. 79; s.c. *nom. Godsell v. Innona*, 17 Com. B. Rep. 295.

Quære—whether the overseers could waive the irregularity, if the notice had not been received in due time. *Ibid*.

Where a notice of objection has been duly posted, in accordance with the 6 Vict. c. 18. s. 100, the duplicate duly stamped is conclusive evidence of due service of the notice of objection, and it is immaterial that in consequence of delay in the post-office (however caused) it did not reach the person objected to until after the time prescribed by the statute. *Hornaby v. Robson*, 26 Law J. Rep. (N.S.) C.P. 55; 1 Com. B. Rep. N.S. 53.

The mere fact of a postmaster receiving a notice of objection delivered to him at an hour when he is not bound to receive it, does not invalidate the service of the notice, under the 6 Vict. c. 18. s. 100, provided that section has been in all other respects complied with. *Hannaford v. Whiteway, Paddon v. Whiteway*, 26 Law J. Rep. (N.S.) C.P. 75; 1 Com. B. Rep. N.S. 53 and 62.

It is not necessary that a notice of objection to a borough vote should, on the face of it, shew the voter's place of abode. *Barclay v. Parrott*, 26 Law J. Rep. (N.S.) C.P. 77; 1 Com. B. Rep. N.S. 49.

An objector must state his present place of abode in the notice of objection, signed by him pursuant to 6 & 7 Vict. c. 18. s. 7; and where he has changed his place of abode after the list of voters has been made out, it is not sufficient for him to state the place of abode inserted in such list. Such last-mentioned place of abode being intentionally stated in the notice instead of the present place of abode, is not an inaccurate description to which the 101st section of the act applies. *Melbourne v. Greenfield*, 29 Law J. Rep. (N.S.) C.P. 81; 7 Com. B. Rep. N.S. 1.

(D) PRACTICE.

(a) Jurisdiction.

A, whose name appeared on the list of voters for the county of B, and also on the list for the borough of B, was objected to for the county only. The objection being sustained, the revising barrister by

mistake erased his name from the borough-list, instead of from the county-list:—Held, that the 6 Vict. c. 18. s. 67. did not apply to such a case, there having been no appeal from the decision of the revising barrister; and that this Court had no general jurisdiction empowering them to correct the mistake. *Re Allen*, 28 Law J. Rep. (N.S.) C.P. 256; 6 Com. B. Rep. N.S. 334.

This Court has no general jurisdiction to interfere with the list of voters for members of parliament, in cases in which no appeal lies under the 6 & 7 Vict. c. 18. *In re Allen*, 6 Com. B. Rep. 534.

(b) Consolidating Appeals.

Appeals against the decision of a revising barrister cannot be consolidated under 6 Vict. c. 18. s. 44, unless they depend upon the same point of law. *Robson v. Brown*, 26 Law J. Rep. (N.S.) C.P. 81; 1 Com. B. Rep. N.S. 34.

(c) Signing Lists.

The 13th section of the 6 & 7 Vict. c. 18, which enacts that the overseers of parishes and townships shall make out lists of persons entitled to vote for the city or borough, and shall sign such lists, is directory only as to the signing of the lists; and a list not so signed is not therefore invalid. *Morgan v. Parry*, 26 Law J. Rep. (N.S.) C.P. 141; 17 Com. B. Rep. 334.

(d) Expenses of preparing Lists.

The town clerk of a borough is not entitled under the 6 Vict. c. 18. s. 55. to be paid out of the poor-rates for copying and arranging the lists of voters for the parishes in the borough, pursuant to section 48; and if he employs and pays another to do this when it might be done by himself and his usual staff of clerks, he is not entitled to be reimbursed; and the officers of any parish making such payment to the town clerk are liable to be surcharged the amount by the auditor. *The Queen v. Allday*, 26 Law J. Rep. (N.S.) Q.B. 292; 7 E. & B. 799.

PARTIES TO ACTIONS.

The members of a society registered under the Industrial and Provident Societies Act, 1852, are not liable to be sued individually for the debts of the society. The only persons liable to be sued are the officers of the society appointed under the 17 & 18 Vict. c. 25, or, if no such officer, the trustees. *Burton v. Tannahill*, 25 Law J. Rep. (N.S.) Q.B. 135; 5 E. & B. 797.

Although in an action on an agreement in writing, made by or with one or more members of a firm on behalf of the rest, all the members may be joined, it is otherwise when the agreement is *inter partes*, and there is no partnership between the person who is party to it on the one side or the other, and the third person whom it is sought to join; and it is questionable whether in the case of an agreement *inter partes* parol evidence is ever admissible for the purpose of shewing other persons to be parties to it. *Robinson v. Rudkins*, 26 Law J. Rep. (N.S.) Exch. 56.

PARTIES TO SUITS.

(A) NECESSARY OR PROPER PARTIES.

(a) *Generally.*(b) *Creditors' Suits.*

(B) JOINDER OF.

(A) NECESSARY OR PROPER PARTIES.

(a) *Generally.*

The bill stated that the plaintiffs contracted with the corporation of L to perform certain works, and the corporation agreed to pay for them in a certain specified manner, with a proviso that no sum of money should be considered to be due and owing, nor should the plaintiffs make any claim against or demand upon the said corporation for or on account of any work executed by them, unless the engineer of the corporation should certify the amount thereof, and that the plaintiffs were reasonably entitled thereto; and, further, that in case of disputes or differences arising touching the works, or the construction of the contract, or concerning any certificate, order or award which might have been made by the engineer, such disputes or differences should be referred to and decided by the engineer of the corporation; and that it should not be competent to the plaintiffs or the corporation to except, at law or in equity, to any hearing or determination before or of the said engineer, nor should the said engineer be made party to or be required to defend or answer any suit or proceeding at law or in equity, at the instance of the said corporation or of the plaintiffs, nor should he be required or be compellable by any proceeding whatsoever, either at law or in equity, or otherwise, to answer or explain any matter touching or relating to any certificate made by him. The bill also stated that a certain portion of the works had been completed by the plaintiffs, but the engineer, acting under the direction and in collusion with the corporation, withheld his certificate of such completion, and thereby prevented the plaintiffs from recovering payment therefor, and that he also, under the like direction, refused to act as arbitrator according to the terms of the contract. The bill was filed against the corporation and their engineer, praying that the withholding of the certificate by the engineer was a fraud upon the plaintiffs, and that the plaintiffs were entitled to receive such an amount of money as they would have been entitled to if such certificate had been granted. A demurrer to the bill filed by the defendant, the engineer, was overruled. *Scott v. the Corporation of Liverpool*, 25 Law J. Rep. (N.S.) Chanc. 227.

A suit was instituted by the trustee of a policy of assurance to obtain payment for the benefit of his *cestuis que trust*, who were not parties to the suit; their interests, however, were held to be sufficiently represented, and a decree was made, giving the money to the assignee of the original holder of the policy, who had become a bankrupt, on the ground that no sufficient notice of the assignment of the policy had been given to the assurance office when it was purchased by the settlor. Positive evidence was afterwards produced of such notice having been given, and the executors of the purchaser of the interests of some of the *cestuis que trust* filed another bill to

arrest the fund:—Held, that in point of form they were not compelled to get the plaintiff in the first suit to ask leave to file a bill of review; and that upon the merits they were entitled to arrest the fund, and have it transferred to the credit of the suit for the benefit of the *cestuis que trust*; but the costs of all parties were paid out of the fund. *Peirce v. Brady*, 26 Law J. Rep. (N.S.) Chanc. 257; 28 Beav. 64.

Liberty to sue on behalf of oneself and other persons who are too numerous to be brought upon the record, is dependent neither upon the discretion of the Court, nor upon the disposition of such other persons to concur in the suit. *Williams v. Salmon*, 2 Kay & J. 463.

But if such other persons have an interest which might be affected in case the suit were allowed to proceed as on their behalf at the instance of the plaintiff, or if full justice cannot be done to the defendants without having all such persons personally upon the record, the Court will not allow the suit to proceed. *Ibid.*

Bill by a single shareholder in an abortive company against the provisional directors, praying the common account; such directors, being entitled under the deed of settlement to full indemnity out of the deposits in respect of all costs, charges and expenses incident to the undertaking, had returned to all the shareholders, *pro rata*, a part of such deposits:—Held, that since the result of re-opening the whole of the accounts as prayed might be to shew that the persons on whose behalf the bill was filed had received more than the amount to which they were entitled, none of such persons could take the account without incurring the liability of refunding to recoup the defendants; for which purpose the defendants were entitled to insist on having all such persons substantially upon the record; and on this ground, as well as upon the merits, the bill was dismissed. *Ibid.*

New trustees had been appointed under a power in a settlement, but no assignment or transfer had been made to them of the trust fund, which consisted of monies paid into court in a suit:—Held, on a motion for decree in a suit for the execution of the trusts of the settlement, that the new trustees ought to have been made defendants: And an objection for want of parties having been taken by affidavit, no answer having been required to the bill:—Held, that the plaintiff had been properly ordered to pay the costs of the day. *Nelson v. Seaman*, 1 De Gex, F. & J. 368.

Administration *ad litem* held sufficient to represent the testator's estates in a suit seeking to establish a specific lien on his shares in a company which had been possessed by the defendants (his Scotch executors and residuary legatees), and who had received assets more than sufficient to answer all claims on the testator's estate. *Maclean v. Dawson* (No. 3), 27 Beav. 369.

At the hearing a cause was ordered to stand over for want of parties, and the plaintiff was to amend his bill by adding the names of such parties or their legal personal representatives. One of them was dead, and had no legal personal representative. A motion by the plaintiff for liberty to proceed in the absence of such representative, or for the appointment of a person to represent his estate, was refused,

with costs. *Williams v. Page* (No. 3), 27 Beav. 373.

(b) *Creditors' Suits.*

Bill filed by one of the creditors of an intestate against the son, who had alleged that he became entitled to all his father's property under a deed of gift, and praying that such deed might be declared void as against the plaintiff on the ground of fraud, or that, if necessary, the suit might be taken as on behalf of all the creditors of the intestate:—Held, upon demurrer, that the only relief the plaintiff could have would be as general creditor; that it was necessary to have a personal representative of the intestate before the Court; and that it was not sufficient in such a case to nominate a person under the recent act to represent the estate. *James v. Aston*, 25 Law J. Rep. (n.s.) Chanc. 343.

(B) *JOINDER OF.*

Bill dismissed for misjoinder, and because, though one plaintiff had an interest to maintain the suit, the other had not, and the interest of the former was not that claimed by the bill. *Barton v. Barton*, 3 Kay & J. 512.

PARTITION.

To a suit for partition of property, one undivided share of which was vested in a lunatic tenant in tail in possession, with remainder to an infant tenant in tail, with remainder to a married woman in tail, with remainders over, the persons interested in remainder after the lunatic and infant tenants in tail, were made defendants, and they, by their answers, claimed such interest in the undivided share of the property as they were alleged to have by the bill:—Held, that the persons so named as defendants were not unnecessary parties to the suits; and that, having regard to the remoteness and uncertainty of their interest in the property, their costs up to the decree on the hearing should be a charge on the property, which should be allotted in severalty in respect of the undivided share in which they were so interested. *Singleton v. Hopkins*, 25 Law J. Rep. (n.s.) Chanc. 50.

One of two tenants in common married, and the trustees of her marriage settlement, having a power of sale and exchange, effected a partition of the property under that power:—Held, that the question, whether the ordinary power of sale and exchange will authorize a partition, is so doubtful that a purchaser could not be compelled to take a title depending upon it; but that under the peculiar words of this power the partition was effectual. *Bradshaw v. Fane*, 25 Law J. Rep. (n.s.) Chanc. 413; 3 Drew. 534.

The plaintiff and defendant were tenants in common of a copyhold estate; the defendant was in possession when the plaintiff's title accrued, and continued to hold the estate during the infancy of the plaintiff:—Held, that the defendant must be considered as having entered upon the plaintiff's estate; that the defendant was entitled to an allowance for permanent improvements, but that he must be charged with an occupation rent proportionate to the improvements made. *Pascoe v.*

Swan, 29 Law J. Rep. (n.s.) Chanc. 159; 27 Beav. 508.

The Court will interfere and direct partition Commissioners, in the exercise of their discretion, in case of miscarriage by them; but an application to the Court to give such directions must be made by one of the tenants in common, and be founded on something the Commissioners have done, or on some dealing between the tenants in common. The Court has no jurisdiction to interfere upon the application of a stranger or of a tenant in common founded on dealings between one of the tenants in common and such stranger. *Wright v. Vernon*, 1 Dr. & Sm. 231.

In a suit for partition costs of infants, including as well the costs incurred before the issuing of the commission as those incurred subsequently thereto, charged upon and ordered to be raised out of the shares allotted to such infants respectively in severalty. *Cox v. Cox*, 3 Kay & J. 554.

The Court, in a suit for partition, will not in general direct a commission to issue; but will make a declaration that the estate ought to be divided, with liberty to the parties entitled to bring before the Judge at chambers proposals for a partition. *Clarke v. Clayton*, 2 Giff. 333.

In a suit for partition the plaintiff claimed as heir of a deceased tenant in common. The defendant ignored the plaintiff's title as heir, and at the original hearing an inquiry as to the fact was directed, which was found in favour of the plaintiff:—Held, that the defendant was not liable to pay the costs of the inquiry, except so far as they might have been increased by independent evidence adduced by the defendant in opposition to the plaintiff's title. *Lyne v. Lyne*, 21 Beav. 318.

On the cause coming on for further consideration, the defendant, who was entitled to a moiety, insisted that she was purchaser for valuable consideration of the other moiety:—Held, that although no such point had been raised by her answer, she was still entitled to make it available, and an inquiry was directed. *Ibid.*

A partition by parol and separate possession cannot be questioned after being acted on for more than twenty years. *Paine v. Ryder*, 24 Beav. 151.

Upon a partition the shares of the parties were very minute and complicated. The Court, to save expense, and instead of directing a conveyance of the several shares, declared each of the parties trustees, as to the shares allotted to the others of them, and then vested the whole trust estate in a single new trustee, under the Trustee Acts, with directions to convey to the several parties their allotted shares. *Shepherd v. Churchill*, 25 Beav. 21.

A partition decreed without a commission, in a case in which infants were interested, upon satisfactory evidence of the value. *Greenwood v. Percy*, 26 Beav. 572.

Many persons being interested in a partition deed, it was directed to be enrolled, with liberty to any party to have a duplicate at his expense. *Elton v. Elton* (No. 1), 27 Beav. 682.

Where the parties are equally interested, the practice is to give the custody of the deeds to the plaintiff; but where they are not, they are usually given to the person having the greatest interest. *Ibid.*

Subsequent costs in a partition suit ordered to be

borne by the parties according to the value of their respective shares. *Ibid.*

PARTNERS.

[See ARBITRATION (A) (a)—BILLS OF EXCHANGE AND PROMISSORY NOTES (A) (a).]

(A) PARTNERSHIP.

(a) *Constitution and Effect of.*

(b) *Dissolution of.*

(1) *Notice to Dissolve.*

(2) *Cause of Dissolution.*

(3) *Agreement to Dissolve.*

(4) *Effect of.*

(c) *Deed.*

(d) *Goodwill.*

(e) *Effect of Bankruptcy of Partner.*

(f) *Effect of Death of Partner.*

(B) RIGHTS AND LIABILITIES.

(C) POWERS AND DISABILITIES.

(D) SUITS.

(A) PARTNERSHIP.

(a) *Constitution and Effect of.*

Two brothers entered into a joint speculation to purchase land, with a view to re-selling it in small parcels at a profit. Two freehold estates were bought and conveyed to the brothers as tenants in common. A copyhold estate was surrendered to them as joint tenants, and two other estates remained still in contract when one brother died intestate. The purchase-money for these estates was paid by means of a joint credit with a banking company. Some of the land had been re-sold by the brothers:—Held, that the share of the deceased brother in these estates was, as between his real and personal representatives, to be regarded as personality. *Darby v. Darby*, 25 Law J. Rep. (N.S.) Chanc. 371; 3 Drew. 495.

The plaintiff and the defendant, being part-owners of a horse, agreed that the plaintiff should have the entire management of the horse, and that the expenses of keeping, training, and running him should be borne, and his winnings shared, by both equally. The horse won nothing, and the plaintiff having paid the whole of the expenses,—Held, that, even if a partnership existed between the plaintiff and the defendant in the management and running of the horse, half the sum expended by the plaintiff was in the nature of an advance by him of capital on behalf of the defendant, and which he was entitled to recover from the defendant. *French v. Styring*, 26 Law J. Rep. (N.S.) C.P. 181; 2 Com. B. Rep. N.S. 357.

Quære—whether the agreement constituted a partnership between the plaintiff and defendant. *Semble*, per *Cockburn, C.J.*, that it did. *Ibid.*

An agreement between underwriters to act in concert and share equally the profit and loss of all insurances, constitutes a partnership, though each underwrote policies in his own name for distinct sums. *Brett v. Beckwith*, 26 Law J. Rep. (N.S.) Chanc. 180.

The 35 Geo. 3. c. 63, requiring the names of insurers to be written upon policies, will not prevent

the insured from recovering from persons engaged as partners in underwriting, though each of the partners signed in his own name in distinct sums, and not on behalf of a firm. *Ibid.*

The decease of one partner will not leave the premiums due for insurances in the order and disposition of the survivor, so as to make them liable for his separate debts only. *Ibid.*

Any creditor of a deceased partner, whether joint or separate, may institute a suit to have the partnership as well as the separate estate administered in this Court, and the assignees of a surviving partner, who has become a bankrupt, are proper parties to the suit. *Ibid.*

Where land is purchased by partners out of the partnership assets, and used for the purposes of the business, it is to be considered as personality, both as between the parties themselves and as between the heir and personal representatives of a deceased partner. *Holroyd v. Holroyd*, 28 Law J. Rep. (N.S.) Chanc. 902.

Sir G L, when a retiring partner of the firm of B & Co., applied, on the 10th of July 1847, to G & Co., bankers, for a loan of 20,000*l.* on the security of his share of the partnership assets, and informed them, by letter of the 14th of the same month, that the amount of his share might be taken as about 25,000*l.*, and that he was informed by B, his partner, that part of the balance at credit with C, L & Co., of which firm he (Sir G L) was a member, on account of B & Co., would be appropriated towards payment of the amount, and that he would authorize B to pay the amount to G & Co., and he thereby bound himself to give to G & Co. a full and perfect lien thereon. Subsequently B wrote to G & Co., through Sir G L, stating that B & Co. had instructed C, L & Co. to transfer to them 5,000*l.* of the surplus partnership assets of B & Co. in their hands, and engaging to pay the remaining balance of Sir G L's capital. Sir G L sent to G & Co. a promissory note for 20,000*l.*, payable to the order of C, L & Co., with the letter of B, as a collateral security, and the 20,000*l.* was accordingly advanced. The firm of C, L & Co. became insolvent, and the promissory note, when presented, was dishonoured. G & Co., in 1855, after the death of B and of Sir G L, filed the bill against the surviving partners of the firm of B & Co., and against the representatives of the deceased partner, who claimed to be allowed to deduct the 5,000*l.* in the hands of C, L & Co., referred to in the letter of B. One of the Vice Chancellors decided that G & Co. were equitable assignees of Sir G L's share, and were entitled to recover the whole amount, without deducting the 5,000*l.*, alleged to be in the hands of C, L & Co.; and upon appeal by the defendants, the Lords Justices affirmed the decision, and considered, as there was no statutory bar, nor any presumption of injury to the defendants by lapse of time, that the lateness in filing the bill was no defence to the plaintiffs' claim. The order contained in the correspondence differed essentially from a cheque on a banker, a bill of exchange, or a promissory note. *Glyn v. Hood*, 29 Law J. Rep. (N.S.) Chanc. 204; 1 De Gex, F. & J. 334; 1 Giff. 328.

Where one of several partners agrees with a stranger for a sub-partnership, it is not to be implied, in the absence of any agreement, that the duration of

the sub-partnership is to be co-extensive with the original partnership. *Frost v. Moulton*, 21 Beav. 596.

A & B were partners for four years in the K mill, and A & C were sub-partners at will. A put an end to his sub-partnership with C. They afterwards met, and A drew up this document—"Mr. C to receive 3-16ths of the K mill during the present partnership of A & B; if Mr. C enters into any other business before, to renounce his interest above mentioned, and to receive 500*l.* as a quit-claim." It was taken to a solicitor to draw a formal agreement, who said it was too vague to act upon, and both parties differed as to its construction:—Held, that it was not a final concluded agreement, which could be enforced. *Ibid.*

(b) *Dissolution of.*

(1) *Notice to dissolve.*

If a partner has been guilty of embezzlement, or has committed a breach of trust, his co-partner may, by notice, dissolve the partnership from the date of the notice, notwithstanding the articles of partnership provided for its continuance for the joint lives of the partners. *Esell v. Hayward*, 29 Law J. Rep. (N.S.) Chanc. 806.

A notice of dissolution given to a lunatic partner is sufficient to put an end to the partnership. *Melless v. Keen*, 27 Beav. 236.

Notice by two partners to a third, that "we shall dissolve the partnership" on the 31st of December, operates as a dissolution on that day. *Ibid.*

(2) *Cause of Dissolution.*

The plaintiff and the defendant carried on the business of surgeons as partners under articles of partnership, which provided (*inter alia*) that "in case either of the partners should be desirous of retiring, and should give twelve calendar months' notice in writing of such his desire to the other partner, the continuing partner should have the option of becoming the purchaser of the share of the retiring partner, for a sum equal to two years' purchase of the share of the said retiring partner in the net annual profits of the business, provided such option were exercised within one calendar month from the receipt by him of such notice of retirement"; and they also stipulated that "each of the partners should employ himself assiduously in the business and concerns of the said partnership business, and use his utmost skill, care and diligence to promote and increase the same, and that if either of the partners should commit any breach of any of the covenants and agreements therein contained, and on his part to be respectively observed and performed, then and in any of such cases the other of the said partners, if he should think fit, should be at liberty to dissolve the said partnership by giving the party offending notice in writing, declaring the partnership to be dissolved and determined." On the 15th of August 1856 the defendant served upon the plaintiff the proper notice, under the articles, of his intention to retire from the business. Disputes having then arisen as to the conduct of certain portions of the business calculated greatly to reduce the value of the annual profits of the concern, the defendant, on the 18th of September 1856, having previously received notice, through his solicitor, that the plaintiff intended

to exercise the option given him to purchase the defendant's share of the business, under the articles, served upon the plaintiff notice of a dissolution of the partnership, on the ground of an alleged breach, by the plaintiff, of the stipulations of the articles. Later, on the same day, the plaintiff served notice, under the articles, of his intention to exercise his option of purchase, in accordance with the intimation he had previously given to the defendant's solicitor:—Held, the evidence failing to shew an actual violation of any stipulation of the partnership articles by the plaintiff, that the defendant was not entitled to a dissolution under the articles, and that the partnership business must be continued to be carried on, at whatever inconvenience, till the expiration of the twelve months after service of the plaintiff's notice of purchase. *Warder v. Stilwell*, 26 Law J. Rep. (N.S.) Chanc. 373.

A and B in 1856 entered into partnership as surgeons, B paying to A 750*l.* premium, upon the representation that A's profits were 700*l.* per annum. Disputes subsequently arose, and it was alleged by B that the profits of A were not half the amount represented, an allegation which was supported by A's income-tax return and other evidence. There was no evidence of the actual receipts of A. The Master of the Rolls decreed a dissolution of the partnership, and a return of one-half the premium; and this decision was affirmed, on appeal, on the ground of the misrepresentation as to the amount of A's profits previous to the partnership. *Jauancy v. Knowles*, 29 Law J. Rep. (N.S.) Chanc. 95.

Where partners who are so under contract for a fixed period, there being no specific power by the contract to dissolve, so conduct themselves that mutual confidence is impossible, the Court will of its own authority dissolve the partnership against the will of one of the partners. *Baxter v. West*, 1 Dr. & Sm. 173.

Motion for an interim injunction to restrain a partner who, six months previously, being temporarily of unsound mind, had attempted to commit suicide, from interfering in the partnership affairs, refused, the evidence not shewing that at the time of the motion he was incompetent to conduct the business of the partnership according to the partnership articles; and a motion in a cross-suit to restrain defendants in such cross-suit from preventing the partner who had been insane from transacting the business of the partnership as a partner thereof, granted. *Anonymous*, 2 Kay & J. 441.

The circumstances that the conduct and state of mind of the partner in question were such as at once to destroy the confidence of the other partners, and to induce customers to withdraw their custom from the firm, and that the malady under which he laboured might as easily have led him to attempt the life of one of his partners, were held not to furnish sufficient ground for granting the first motion. *Ibid.*

Examination of the authorities on this subject. They establish these propositions: 1st. Actual insanity of a partner is not in itself a dissolution of the partnership, but there must be a decree for dissolution. 2ndly. Such a decree, notwithstanding actual insanity proved to have existed before the filing of the bill, will not be made in a disputed case without a further inquiry whether, at the time when the

relief is sought, the party is in such a state of mind as to be able to conduct the business of the firm in partnership with the other members according to the articles of partnership. *Semble*—the affirmative of this issue would then lie with the party who had been of unsound mind. 3rdly. Insanity existing when the relief is sought is good ground for a dissolution. *Ibid*.

This Court has jurisdiction to dissolve a partnership of which the business cannot be carried on at a profit without further capital, each partner having contributed his share of capital; and it is not necessary to shew that the concern is embarrassed. *Jennings v. Baddeley*, 3 Kay & J. 78.

Dissolution of a partnership decreed on that ground in a case involving other and special circumstances, on which however the Court did not rely as essential to the decree. *Ibid*.

This Court will dissolve a partnership before the expiration of the term, where the circumstances have so changed, and the conduct of the parties is such as to render it impossible to carry it on without injury to all the partners. *Harrison v. Tennant*, 21 Beav. 482.

The Court dissolved a partnership entered into for a term of years when, without any breach of the partnership articles, circumstances had so altered that it could not be carried on upon the footing originally contemplated; and the confidence mutually reposed having ceased and given place to mistrust, so that it was apparent that the partnership could not go on without mutual injury. *Ibid*.

A & B, who had been partners for some time, entered into a new partnership with C. At the same time B took all the assets of the old firm, and covenanted to indemnify A from the liabilities. The Court held, that the partnership between the three might be determined by the Court for due cause, without setting aside the deed of indemnity, which might be the subject of another suit. *Ibid*.

This Court will not dissolve a partnership on the ground of a small infraction of the articles of co-partnership. *Anderson v. Anderson*, 25 Beav. 190.

Articles of partnership provided that if either of the partners should give guarantees without consent, the other might dissolve on giving notice. One of the partners in the course of eight years, gave a guarantee for 52*l*., and the other gave notice to dissolve:—Held, that this alone was not, in equity, a sufficient ground for a dissolution. *Ibid*.

(3) Agreement to dissolve.

In re Langmead's Trusts, 7 Law J. Dig. 513; 7 De Gex, M. & G. 353.

(4) Effect of.

If a premium is paid on the formation of a partnership for a term of years, and the partnership is dissolved before the expiration of the term from incompatibility of temper, &c., and there has been no fraud or misrepresentation by either party, the premium will be apportioned by the time fixed for the duration of the partnership, and the party receiving the premium must deduct so much as shall correspond with the time during which the partnership has continued, but he must return so much as shall correspond with the unexpired time of the

partnership. *Aste v. Wright*, 25 Law J. Rep. (N.S.) Chanc. 864; 23 Beav. 77.

If a partner in a periodical withdraws from the publication and determines the partnership, so that the right to use the name must be sold and the affairs wound up, he will not be restrained from advertising a work of a similar description under a new name, or the discontinuance of the former work, so far as his connexion with it was concerned. *Bradbury v. Dickens*, 28 Law J. Rep. (N.S.) Chanc. 667; 27 Beav. 53.

Several persons who were jointly entitled to several leases of a colliery, worked it in copartnership:—Held, on a dissolution, that one of the co-owners of the leases could not insist on a partition though there might be no debts, but that the whole must be sold. *Wild v. Milne*, 26 Beav. 504.

(c) Deed.

The first count stated, that the defendant and L, co-partners, by indenture did, and each of them did, grant, sell, assign and transfer to the plaintiffs all the co-partnership stock, debts, sums of money, and all other the personal estate and effects of the defendant and L as such co-partners. That at the time of making the indenture defendant was indebted to the co-partnership in 240*l*. Breach, non-payment to the plaintiffs of the 240*l*.:—Held, on demurrer, that there was no implied covenant on the part of the defendant or L to pay to the plaintiffs a debt due from either to the co-partnership, and the defendant was entitled to judgment. *Aulton v. Atkins*, 25 Law J. Rep. (N.S.) C.P. 229; 18 Com. B. Rep. 249.

The second count stated, that at the time of making the indenture, the defendant had in his possession a bill of exchange for 120*l*. payable to his order, the property of the defendant and L as such co-partners. Breach, that he made default in transferring the bill to the plaintiffs, and after the making of the indenture incapacitated himself from so doing:—Held, that there was an implied covenant on the part of the defendant not to do anything in derogation of his deed, and that he had acted in derogation of his deed by incapacitating himself from transferring the bill to the plaintiffs, and that they were entitled to judgment. *Ibid*.

(d) Goodwill.

F, H & B carried on the business of solicitors in partnership. A was afterwards admitted as a partner, and in 1838 F retired; he reserved to himself the right of introducing T as a partner in the firm. In 1846, H, B & A entered into new articles of partnership, the term of which was extended to 1853, and articles were inserted for the valuation and purchase of the share of any retiring or deceased partner during the term; these articles were made subject to the right reserved by F of introducing T. In 1848 H died, and his widow was paid the value of his share. In 1849 F introduced T as a partner. A memorandum was then drawn up, without reference to the articles of 1846, declaring that from September 1850 T should have one-fifth of the profits until September 1853, from which date he was to take an equal share in the partnership profits; the partnership to continue for ten years from the 1st of September 1850. A clause was afterwards added, that in the event of the death or retirement of either of the senior part-

ners before the 1st of September 1853, his two-fifths should be divided into thirds, two-thirds to be taken by the surviving senior partner, and one-third by T. A, in connexion with his signature to this memorandum, wrote that it was not to annul or prejudice the articles of 1846. In August 1853, A signified his intention of retiring from the business, and he claimed the value of his share of the partnership and of the goodwill. Upon a bill filed by A to have the value of his share in the business and the goodwill thereof ascertained,—Held (affirming the decision of the Master of the Rolls), that A, by his notice, had dissolved the partnership; that the two days intervening between the notice and the determination of the partnership under the articles of 1846, could give no marketable value to the goodwill in the business, and that A was only entitled to the profits during the continuance of the partnership. *Austen v. Boys*, 27 Law J. Rep. (n.s.) Chanc. 714; 2 De Gex & J. 626; 27 Law J. Rep. (n.s.) Chanc. 243; 24 Beav. 598.

Where a trade is established in a particular place, the goodwill of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. Goodwill is something distinct from the profits of a business, although in determining its value, the profits are necessarily taken into account, and it is usually estimated at so many years' purchase upon the amount of those profits. *Ibid.*

The term "goodwill" seems wholly inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs. *Ibid.*

If two or more partners carry on business, and one dies, his share of the goodwill is assets as part of his estate, but the value of his share will be computed with reference to his interest, limited however by any rights which may survive to his co-partners. *Smith v. Everett*, 29 Law J. Rep. (n.s.) Chanc. 236; 27 Beav. 446.

Where, therefore, after the death of a partner, his co-partner could carry on business alone, or by a slight alteration in the name of the firm, and upon the same premises, and a beneficial privilege vested solely in the surviving partner, who alone could confer that right on other persons,—Held, that the value of the share of the deceased partner must be a proportion of the net value, after deducting the amount at which the surviving rights were valued. *Ibid.*

The privilege conferred by the 7 & 8 Vict. c. 32. of issuing bank notes, continues to the surviving members of a banking firm. *Ibid.*

As to the principle on which the value of the goodwill of a business should be ascertained, as between the partners, on a dissolution. *Mellersh v. Keen* (No. 2), 28 Beav. 458.

Where on a dissolution, one partner obtains exclusively the benefit of the goodwill, and is made accountable for it, the Court, in ascertaining its value, considers what it would have produced, if sold in the most advantageous manner and at the proper period of time. *Ibid.*

The value of the goodwill of a banking business assessed at one year's average net profits. *Ibid.*

The legatees of the share of the mere goodwill of

a deceased partner cannot support a bill against the surviving partner to obtain the benefit of his legacy, even after assent by the executor. *Robertson v. Quiddington*, 28 Beav. 529.

A & B carried on business in partnership on premises belonging to the firm. A died, having bequeathed his goodwill (not including the book debts or stock in trade) to the plaintiff. The executors assented to the bequest, but had assigned the testator's interest in the trade premises to the surviving partners. To a bill by the plaintiff against the surviving partner to realize his share of the goodwill a general demurrer was allowed. *Ibid.*

(e) Effect of Bankruptcy of Partner.

The right of the solvent partner to sell the property of the partnership after the bankruptcy of his co-partner is personal to himself, and cannot be transferred; therefore he cannot, by suffering a writ of *f. fa.* to be executed against him, authorize the sheriff to dispose of the partnership property. *Fraser v. Kershaw*, 25 Law J. Rep. (n.s.) Chanc. 445; 2 Kay & J. 496.

A and B, who had been partners as solicitors, renewed the partnership for their joint lives, and in the agreement it was stipulated that upon the death of either, the survivor should during his life and the life of the widow of the deceased partner, pay to the appointee of the deceased partner either an annuity of 200*l.* or one-fourth of the profits of the business, at the election of the surviving partner. A, by settlement on his marriage, appointed in favour of his intended wife, who became his widow. The partnership continued till the death of A in 1851, and B carried on the business till his bankruptcy in 1856. At the death of A the firm was greatly in debt, and the debts B paid off, but he did not pay the widow either the annuity or any share of the profits, nor make any election. The widow claimed to prove under the bankruptcy, but her proof was rejected:—Held, on appeal, that the assignees had still the power of election, and they having elected to pay one-fourth of the profits, the debts of the old firm must be set off against the profits, and that for the purposes of the proof, the business must under the articles be considered, not a new, but a continuing business, and its debts be discharged before any profits could be divided. *Ex parte Harper, in re Parry Jones*, 26 Law J. Rep. (n.s.) Bankr. 74; 1 De Gex & J. 180.

(f) Effect of Death of Partner.

If the goodwill of a business belongs wholly to surviving partners, the representatives of a deceased partner are not entitled to participate in the profits made by the surviving partners, though as a new firm they debited themselves with the general assets of the old firm, including those of the deceased partner, and carried on the trade through a series of years, and through several changes in the firm, when from the nature of the trade, and the state of the accounts of the old firm, and its liabilities, it appeared that neither the assets of the deceased partner nor the assets of the old firm could have been realized, except by a continuance of the business. *Wedderburn v. Wedderburn*, 25 Law J. Rep. (n.s.) Chanc. 710; 22 Beav. 84.

A & B worked mines in partnership. The lease of the mines expired in 1845, and they continued to

work them as tenants from year to year. In November 1847 A died, and B continued to work the mines only sufficiently to keep them going. At Lady-day 1851, B obtained a new lease of the greater part of the mines, upon certain terms. On the 24th of November 1851, E, who claimed an interest under A's will, filed a bill against C (A's executrix) and B, for the administration of A's estate, and that the mine might be worked under the direction of the Court. Answers were put in, but nothing further was done in the suit. B continued to work the mine until December 1853, when he died intestate, and C took out letters of administration. On the 1st of June 1854 E sold his interest under A's will to X, who, on the 17th of the same month, instituted a suit to establish an interest on behalf of A's estate in the mine after A's death:—Held (reversing the decision of the Master of the Rolls, and Knight Bruce, L.J., doubting), that the interest of A in the mine did not cease on his death, but was still continuing. *Clements v. Hall*, 27 Law J. Rep. (N.S.) Chanc. 349; 2 De Gex & J. 173; 24 Beav. 333.

Upon the decease of a partner in trade, the firm was indebted to him for money advanced. The business was continued by the surviving partner, who, with the money of the firm, made additions to the stock in trade:—Held, as the executors of the deceased partner had permitted the continuance of the business, that they had no lien upon the subsequently acquired stock in trade for the money advanced to the firm by their testator. *Payn v. Hornby*, 27 Law J. Rep. (N.S.) Chanc. 689; 25 Beav. 280.

A surgeon sold a share of his business, and took the purchaser into partnership. The articles specified that the partnership was for such term as they should mutually agree, and that in case of death, absence or incapacity of either of the partners the survivor should have the right of purchasing his share at two years' value, or, in case of dispute, at a price to be named by valuers; but in case he should decline to purchase such share, then that it might be sold to any person willing to purchase. The purchaser died fifteen months after the date of the articles; and on his death the surviving partner refused either to purchase his deceased partner's share, or to admit any other person to be a partner with him:—Held, that the surviving partner could not repudiate the articles; and that his refusal to purchase the deceased partner's share, or to admit a new partner in his place, left the surviving partner liable to reimburse the value of the deceased partner's share, and also, in the mean time, to account for the accrued profits. *Featherstonhaugh v. Turner*, 28 Law J. Rep. (N.S.) Chanc. 812; 25 Beav. 382.

(B) RIGHTS AND LIABILITIES.

Several persons were engaged as partners in working coal-mines. The partnership was at will. The mines were worked by some of the partners, who, before the expiration of the last lease, agreed among themselves to conduct the whole for their own benefit. They thereupon gave notice to the other partners to dissolve the partnership, and entered into an agreement with the landlord for renewal to themselves only. They gave public notice of sale by auction of the plant and stock, and informed the other partners that they might bid, and that they themselves intended to do so, and told them that the

landlord had agreed to the renewal as before mentioned. Accounts were made up, and such of the excluded partners as assented and executed releases were paid their shares, but others re-used their assent, and claimed the benefit of the renewed lease, besides their share of the partnership assets. The new lease was granted in 1846, and in 1855 some of the excluded partners filed a bill to have the benefit of the renewed lease, and an account of the profits of the old and new partnership:—Held, that the renewal was a constructive trust for the benefit of all the partners, but that these excluded partners having taken no active steps for such a length of time to assert their rights, could not have relief in this court, for that mere words were not sufficient without active proceedings. *Clegg v. Edmondson*, 26 Law J. Rep. (N.S.) Chanc. 673; 22 Beav. 125.

A firm of stockbrokers purchasing, on behalf of a customer, foreign securities, passing by delivery, which, in their usual course of dealing, they retained in their own custody, are jointly and severally liable to make good the same if lost or misapplied. Where therefore, one of the partners, who was a trustee of a marriage settlement, under instructions to the firm, not only bought the foreign securities, but also individually transacted all the business of the customer with the firm, and finally applied them for his own purposes, not wholly unconnected with the firm,—Held, that the securities were in the custody of the firm and not of the trustee; that the firm was responsible for them whether lost or misapplied; and the trustee having absconded and become bankrupt, that the remaining partners must replace the securities. *The Marchioness de Ribeyre v. Barclay*, 26 Law J. Rep. (N.S.) Chanc. 747; 23 Beav. 107.

Giving a bill "for and on account of and in payment of" a debt operates as conditional payment only. Therefore, if, on the sale of goods to several partners, the vendor take the bill of one, payable at a future day, "for and on account of and in payment of" the price, under circumstances which do not shew that credit was exclusively given to that one, and the bill be not paid at maturity, the vendor may resort to the others for payment of the price. *Bottomley v. Nuttall*, 28 Law J. Rep. (N.S.) C.P. 110; 5 Com. B. Rep. N.S. 122.

So also, if the bill be only partially paid at maturity, the vendor may resort to the others for payment of the residue of the price. *Ibid.*

Circumstances under which the Court, as a jury, inferred that credit was not given exclusively to one of several partners. *Ibid.*

The purchase, by solvent partners, of the share of a partner, on an execution issued against him, in order to be valid must be made under circumstances beyond suspicion; therefore, where the solvent partners in a coal-mine, before the sale by the sheriff, removed the gear, and prevented access to the coal-mine through the shaft, and removed ironstone which had been newly raised, so as to prevent its being known that the seam of coal was almost reached, and then bid and became the purchasers, and a few days afterwards, and on one day's working, they discovered the seam of coal:—Held, that the purchase must be set aside, and on repayment of the purchase-money they were declared to be trustees of the share for the partner, although he had, without notice of the conduct of the purchasers,

received the balance of the purchase-money from the sheriff. *Perens v. Johnson*, 3 Sm. & G. 419.

(C) POWERS AND DISABILITIES.

The acting member of a firm has implied authority to assent to the transfer of their account from one banker to another, without the express assent of the others; though *quære*—whether the acting partner would have implied authority to borrow money from the party to whom he transferred the account, in order to pay off the original creditor. *Beal v. Caddick*, 26 Law J. Rep. (N.S.) Exch. 356; 2 Hurl. & N. 326.

Upon such a transfer, however, the actual amount due is alone transferred, and the banker to whom the account is transferred has no other rights than the party from whom it is transferred. And in an action by them against the partner, whose express assent to the transfer was not obtained, to recover the alleged balance of the account transferred, the question would be, what was the real and true balance of account as between the original parties, debtor and creditor? and the partner sued is entitled to raise any question as to the amount due from the firm which he might have raised in an action at the suit of the original creditor. *Ibid*.

But where the balance due from the firm at the time of the transfer of their account has been overtopped by subsequent payments to their credit, as to which there has been nothing to take the case out of the ordinary principle of appropriation of payments to the earlier items, the cause of action is not the balance of account existing at the time of transfer (which has thus been extinguished), but the balance subsequently becoming due. *Ibid*.

It is an incident of a common trading partnership that the managing partners have authority to borrow money for partnership purposes, which include the payment of partnership debts incurred in the ordinary course of business; and this authority is not excluded by special provisions in the partnership deed as to the raising of additional capital, or supplying deficiencies in the funds by contributions of the partners. Therefore, where in such a case the attorney of the managing partners paid partnership debts at their request, and on their promise to give a bill in the name of the firm, and the partnership deed contained a clause, "that if any of the partners should for any other purpose than the immediate use of the partnership draw or accept any bill of exchange in the name of the firm, the others might dissolve the partnership,"—Held, that the other partners were liable, either on the bill or for money paid to their use. *Brown v. Kidger*, 28 Law J. Rep. (N.S.) Exch. 66; 3 Hurl. & N. 853.

In a partnership, which is not for a fixed period, one partner has no implied authority to enter into a contract for a lease for twenty-one years of premises to be used for partnership purposes so as to bind the other partners. *Sharp v. Milligan*, 22 Beav. 606.

Semble—three partners agreed by parol for a lease of some premises; they entered and paid the rent. A B, one of the partners, two years afterwards, signed a contract for a lease on behalf of the firm. Possession was continued and rent paid until a dissolution. The Court, under the circumstances, inferred that A B had authority to sign the contract, though it was denied by the other partners, and

made a decree for specific performance against them. *Ibid*.

(D) SUITS.

The plaintiff filed a bill for dissolution of a partnership entered into with the defendant, and moved for a receiver. A question was raised upon the evidence as to the conduct of the parties, and as to whether there was any term fixed for the expiration of the partnership:—Held, that these questions must be decided at the hearing, and that the Court, not being able to say that a dissolution must be decreed at the hearing, would not appoint a receiver, which would operate as an injunction. *Baxter v. West*, 28 Law J. Rep. (N.S.) Chanc. 169.

Proprietors of a newspaper dissolved partnership, and one of them agreed to purchase the whole. Before the completion, and pending a suit for specific performance, the purchaser published statements as to the profits and loss of the paper, in order to establish a company to carry it on. A motion for an injunction to restrain him was refused. *Marshall v. Watson*, 25 Beav. 501.

The Court will restrain a purchaser from doing acts of waste and destruction, and will restrain a partner from doing an intentional serious injury to the partnership property. *Ibid*.

PATENT.

[See FRAUDS, STATUTE OF.]

[Law concerning Patents for Inventions with respect to Inventions for Improvements in Instruments and Munitions of War amended by 22 Vict. c. 13.]

- (A) WHAT INVENTIONS AND MANUFACTURES MAY BE PATENTED.
- (B) SPECIFICATION.
 - (a) Construction and Sufficiency.
 - (b) Comparison of Specifications.
 - (c) Provisional Specification.
- (C) GRANT OF, AND SEALING.
- (D) REGISTER OF PROPRIETORS.
- (E) RIGHT TO USE.
- (F) LICENCE TO USE.
- (G) ASSIGNMENT.
- (H) INFRINGEMENT.
 - (a) Action for.
 - (b) Injunction and Account.
 - (c) Particulars of Objections.
 - (d) Inspection.
 - (e) Costs.
- (I) PROLONGATION.
- (K) AVOIDANCE OF.
- (L) PENALTIES.

(A) WHAT INVENTIONS AND MANUFACTURES MAY BE PATENTED.

The discovery of a particular advantage to be obtained from a piece of mechanism previously known cannot be treated as a new invention, which will support a patent. Therefore, where the plaintiff took out a patent, respecting a centrifugal pump, described as being for "certain improvements in machinery for raising and impelling water and other

liquids, and in his specification described certain wheels, and claimed as his invention and application "the means of increasing the action of the machine by causing the liquid to enter the wheels at both sides;" and it appeared that the wheels were not new, and that the specification of a previous patent had shewn the plan of admitting water on both sides of a wheel for the purpose of being projected by centrifugal force, but that the previous patent had failed; the Court held, that the invention was not new, and the patent could not be sustained. *Tatley v. Easton*, 26 Law J. Rep. (N.S.) C.P. 269; 2 Com. B. Rep. N.S. 706.

Previously to the plaintiff's patent the process of manufacturing gas from vegetable matter containing oil was, first, to extract the oil from the seed or other substances, and then by dry distillation to procure gas from the oil. The plaintiff discovered that gas might be produced by dry distillation direct from the seed or other vegetable substance, thus getting rid of the intermediate process of extracting the oil from the material:—Held, that this invention was one for which a patent might be granted. *Booth v. Kennard* (Ex. Ch.), 26 Law J. Rep. (N.S.) Exch. 23; 1 Hurl. & N. 527.

A patent was obtained in 1856 for an improvement in finishing yarns of wool or hair. The specification stated the improvement to consist of causing the yarns, whilst distended and kept separate, to be subjected to the action of rotatory beaters or burnishers, by which the yarns would be burnished or polished on all sides. A patent had been obtained in 1853 for the same improvement in finishing cotton and linen yarns by a similar process similarly applied:—Held, that the patent of 1856, being merely for the application of a known process to a new article by known means could not be sustained. *Brook v. Aston*, 27 Law J. Rep. (N.S.) Q.B. 145; 8 E. & B. 478.

A patent is a patent for a combination, if a combination is expressly stated in the specification to be a part of the invention, although the combination is not expressly claimed: for a claim is not an essential part of the specification, or necessary for the protection of the invention. Nor is it necessary to disclaim those matters which manifestly form no part of the invention. *Lister v. Leather* (Ex. Ch.), 27 Law J. Rep. (N.S.) Q.B. 295; 8 E. & B. 1004.

A patentee, in his specification, claimed, as his invention, exhausting from millstone cases the dusty air blown through between the grinding surfaces, by a blast of air; being a combination of a blast and an exhaust applied to the working of a mill. The claim was not restricted to any particular mode of creating or applying the blast of air, nor to any particular mode of producing the exhaust; and both blast and exhaust had previously been used separately in working mills:—Held, that the invention of this combination and application of a blast and an exhaust might be made the subject of a patent. *Bovill v. Keyworth*, 7 E. & B. 725.

From the general description, it appeared that the upper stone was fixed and the lower stone was made to rotate; and some advantages were pointed out as resulting from this arrangement. *Quare*—whether, according to the true construction of the specification, the claim should be limited to the application of a combination of a blast and an exhaust with a

mill in which only the lower stone rotates? but, held, that, if the claim be so limited, the use of a new part of the combination, viz. a combination of blast and exhaust, though in connexion with a mill in which the upper stone does rotate, may be an infringement of the patent. *Ibid*.

The application of a well-known tool to work previously untried materials, or to produce new forms, is not the subject-matter of a patent. Where, therefore, the invention was for an apparatus for making an envelope of rushes to be put on bottles when required to protect them from injury, it was held, that there could be no patent for that part which consisted only in the application of the model of a bottle in order to make the envelope of the required form. *The Patent Bottle Envelope Co. v. Seymer*, 28 Law J. Rep. (N.S.) C.P. 22; 5 Com. B. Rep. N.S. 164.

Letters patent were granted to W, for an alleged invention of fishes and fish-joints for connecting the ends of rails used on railways. The fishes were made of iron, with a groove in the outer surface, for the purpose of preventing the square heads of the bolts passing through them and the rail, from turning round, and also for the purpose of procuring greater strength with an equal weight of metal than would have been obtained from a fish of the same thickness throughout:—Held, that this was a good subject-matter for a patent, although before the letters patent were granted grooved iron with bolts had been used for the purpose of fastening timbers placed vertically upon one another, or placed horizontally side by side. *Harwood v. the Great Northern Rail. Co.*, 29 Law J. Rep. (N.S.) Q.B. 198: overruled by the Exchequer Chamber, 31 Law J. Rep. (N.S.) Q.B. 198.

Previously to the date of the letters patent, a channelled plate which had been used for the purpose of supporting the flooring of a bridge, and which ran longitudinally the whole length of the bridge, was also used for the purpose of fishing a scarf-joint where the ends of two timbers met together, but it was not used with the view either of fixing the heads of the bolts, or with the view of obtaining greater strength with an equal weight of metal:—Held, that this was not a prior user which would invalidate the patent. *Ibid*.

(B) SPECIFICATION.

(a) Construction and Sufficiency.

At the trial of an action for the infringement of a patent for "a new manufacture of capsules, and of a material to be employed therein, and for other purposes," the defendant contended that the process which the plaintiff claimed as his invention was not new, as it had been discovered by one Dobbs, and by him disclosed to the world by two specifications, one of the date of 1804 and the other of the date of 1820. The Judge asked the jury whether they thought that a person of ordinary skill, reading Dobbs's specifications, and having no other information upon the subject, could at once proceed to make Betts's metal, not making experiments and "getting out bit by bit, but whether it was stated enough to enable him at once to set down and make Betts's metal:—Held, that this was not the proper question to be left to the jury, for though a workman might not in that way be able to make Betts's metal, still Dobbs's

specifications, or something done under them, might have disclosed some part of that which the plaintiff claimed. *Betts v. Menzies*, 27 Law J. Rep. (N.S.) Q.B. 154; 8 E. & B. 923.

The plaintiff took out a patent for improvements in the machinery for preparing cotton, and attached to his specification drawings shewing one mode of carrying out the invention into practice. In the specification he stated that he did not confine his claim to the particular mode shewn in the drawings, but claimed as his invention the application of the principle of centrifugal force to flyers under the machinery for roving cotton, &c., for the purpose of producing a hard and evenly-compressed bobbin. Subsequently the plaintiff entered a disclaimer, and by it disclaimed as part of his invention the application of the law of centrifugal force to such machinery, except the application of it by means of a weight acting on a presser, so as to cause it to press against the bobbin as described in the specification. The drawing shewed that the weight on which the centrifugal force was to act was a weight put at the top of the bobbin in connexion with a rod that went down by the side of the bobbin. The defendant's machine, alleged to be an infringement of the plaintiff's patent, produced the same effect on the bobbin through the action of centrifugal force on the rod, which went down by the side of the bobbin, and which was for that purpose made weighty, the weight being disturbed equally along its whole length:—Held, that, taking the specification and disclaimer together, the plaintiff's patent was a good patent for the particular invention described in the drawing attached to the specification. *Seed v. Higgins* (Ex. Ch.), 27 Law J. Rep. (N.S.) Q.B. 411; 8 E. & B. 755: affirming the judgment below, 27 Law J. Rep. (N.S.) Q.B. 143; 8 E. & B. 755.

Held, also, that the defendant's machine was not an infringement of the plaintiff's patent when so limited. *Ibid.*

Where the meaning of a document depends upon its terms and not on matters of fact *dehors* the document, the question will be for the Judge, even although the terms are technical or scientific. But where an ambiguity is raised by evidence *dehors* the document, which is plain upon the face of it, the ambiguity being as to a term which imports one thing in a scientific sense, and another in a commercial sense,—*quære*, whether it is for the Judge or the jury? *Hills v. the London Gaslight Co.*, 27 Law J. Rep. (N.S.) Exch. 60.

Thus, though the construction of a patent or specification is ordinarily for the Judge, yet where the plaintiff's specification mentioned the "precipitated or hydrated oxides of iron," and there was (on the issue of novelty) a prior patent proved, the specification of which mentioned "carbonate of iron," and the scientific evidence shewed that real carbonate of iron was so difficult to be preserved that it was not commonly sold in the shops (though it existed as a chemical substance), and what was sold for it would be in fact a hydrate, through absorption, but that carbonate would not be understood chemically as meaning "hydrate"; the Judge having ruled that the specification was to be construed commercially, not scientifically, that "carbonate" commercially meant the hydrate, and that on the issue of novelty the plaintiff must be nonsuited, the Court, after great

doubt, set aside the nonsuit, and granted a new trial. *Ibid.*

The plaintiff applied for a patent for improvements in making capsules. Some delay occurred in the office, and between the time of the application for and the issuing of the letters patent the plaintiff manufactured a quantity of the articles, in the making of which he had discovered improvements. They were made by his own workmen, and were not intended for sale before the patent was granted, nor were they sold:—Held, that this did not invalidate the patent. *Betts v. Menzies*, 28 Law J. Rep. (N.S.) Q.B. 361.

At the end of his specification the plaintiff stated as follows:—"I am aware that it has been proposed to cover lead with tin by applying the tin when in a state of fusion to the lead when adequately heated, so that the adhesion of the two metals would be produced by agency of heat with complete fusion of tin; but the adhesion of the two metals in my new material is produced by mechanical pressure, and I wish it to be understood that I do not claim the exclusive use of the several purposes hereinbefore described or referred to, of casting, cutting and rolling, except when the same are employed for the purposes of my said invention; and I hereby declare that I claim as the invention intended to be secured by the said letters patent, firstly, the manufacture of the new material, lead combined with tin, on one or both of its surfaces, by rolling or other mechanical pressure, as herein described; secondly, the manufacture of capsules of the new material of lead and tin combined by mechanical pressure, as herein described." In a former part of his specification he had explained the proportions which might be used for the manufacture of capsules, but he did not state that these proportions were essential, nor did he shew what the proportions were to be when the material was to be used for other purposes. He also explained the mode by which the two metals were to be combined, by rolling and re-rolling them together. Previously to the issuing of the letters patent to the plaintiff, D had taken out letters patent for an invention consisting in "plating, coating, or uniting lead with tin." In his specification he described his process of making the two metals cohere, by placing them together and passing them between the rolls of a flattening or rolling mill; and also another process, viz. that of fusion, by which he made his new metal:—Held, that the plaintiff's patent was invalid, as he really claimed that which had been already described by D. *Ibid.*

The plaintiff having obtained a verdict, a rule nisi was obtained to enter the verdict for the defendant on a point reserved, and for a new trial for misdirection, and because the verdict was against evidence; the Court made the rule absolute to enter the verdict for the defendant, without hearing any argument as to the new trial, and, notice of appeal having been given, enlarged the rest of the rule until the decision of the Court of Error. *Ibid.*

A patent was granted for "improvements in the manufacture of cases or envelopes for covering bottles." The specification, after describing the apparatus, in the arrangement of which the invention was stated to consist, claimed "the combination of mechanism and the making of envelopes for bottles as described":—Held, that the specification was for

the mode of making and not for the envelope, and that it was, therefore, not larger than the grant. *The Patent Bottle Envelope Co. v. Seymer*, 28 Law J. Rep. (N.S.) C.P. 22; 5 Com. B. Rep. N.S. 164.

In 1840 C took out a patent "for improvements in the manufacture of gas" &c., claiming the use of "certain salts, acids and oxides"; describing a process for the application of "an oxide"; and adding, "The same effect may be produced by the application of oxides of iron"; but not distinguishing between oxides "hydrous" and "anhydrous," nor, indeed, being aware of the distinction. He used his process for a few months openly, and at a large gas-works, where the gas purified thereby was consumed; and he then sold his invention to one L, who afterwards (in 1847) took out a patent "for improvements in manufacturing coal-gas," claiming a method of purifying by chloride of calcium, and claiming also the use of muriate and sulphate of iron; and adding, "The oxides or carbonates which result are useful for purification," but not expressly mentioning oxides of iron. He used his process for some time at certain gas-works; and, subsequently, in November 1849, the plaintiff applied for and obtained a patent, which the note he deposited described as being (*inter alia*) "for absorbing sulphuretted hydrogen and other gases into porous bodies, and removing them again, either by heat or taking off the atmospheric pressure"; and of which the original title was, "An improved Mode of manufacturing Gas and of obtaining certain substances applicable to purifying the same"; and he described a process of purification by means of the sulphates, "or the hydrated or precipitated oxides of iron," and also a process whereby the materials so used were to be re-oxidized, and thus renewed for use. In May 1853 the plaintiff disclaimed so much of his patent as related to the obtaining substances for purifying gas, and making its title simply "An improved Mode of manufacturing Gas," but retaining his claim to the processes for purifying by means of "hydrated or precipitated oxides of iron," and the renewal of the materials used. In an action against a gaslight company for a breach of this patent, by the use (as was alleged) of this process, the patents of C and L were put in, and they were called for the defendants, to shew that their processes virtually produced the same result as the plaintiff's, and as to the meaning of the terms employed; and there was a great body of testimony on both sides upon the question whether the former specifications indicated the use of hydrated oxides of iron:—Held, that the question not being as to the validity of the former patents, but of the plaintiff's, upon the issue of novelty, &c., it was not for the Judge merely to construe the specifications as matter of law with reference to that issue; but that the question was one of fact for the jury, to be determined upon the whole of the evidence, both as to the meaning of the specifications, and what was actually done under them. Held, also, that the patent was valid, and that no objection in law could be sustained against it, either with reference to the original description of it, the disclaimer, or the alteration of the title; and a verdict for the plaintiff was upheld. *Hills v. the London Gaslight Co.*, 29 Law J. Rep. (N.S.) Exch. 409; 5 Hurl. & N. 312.

The specification of an invention which consists

in the use of known materials in new proportions, is not necessarily bad for uncertainty, though the patentee does not limit himself to the precise proportions recommended. *The Patent Type Founding Co. v. Richard*, Johns. 381.

A specification stated in substance that the usual practice in the manufacture of type was to employ lead and antimony, and in some cases to add a small percentage of tin; that the object of the invention was to obtain tougher metal by employing tin in large proportions with antimony, greatly reducing or wholly omitting the use of lead; that the best proportions were twenty-five of tin and twenty-five of antimony, but that this might be to some extent varied, and that if lead were used, it must not exceed fifty per cent. of the whole—one part of antimony to three of tin or tin and lead being the best:—Held, on demurrer, that the specification was not bad on the face of it for uncertainty, and that the evidence of persons acquainted with the usual modes of manufacture was necessary to determine whether the invention was stated with sufficient precision. *Ibid.*

(b) Comparison of Specifications.

Where, to an action for infringement of a patent, the defendant pleads, denying that the plaintiff's invention is a new manufacture, the Judge is at liberty to compare the specification of the plaintiff's patent with that of another patent previously obtained, and on the comparison of them, and on the evidence before him, to direct the jury that the plaintiff's invention is not a "new manufacture." *Bush v. Fox* (House of Lords), 25 Law J. Rep. (N.S.) Exch. 251; 5 H.L. Cas. 707.

The specification of a patent for improvements in the manufacture of gas described the invention to consist in the direct use of seeds, leaves, flowers and beech-nuts, fruit, and other substances and matters containing oil, or oily and resinous matter, and stated that the mode of using the seed and constructing the apparatus might be the same as the apparatus used in the ordinary mode of making gas from coal; but that the inventor preferred placing the seed in a red-hot retort, of which a plan was given. The claim was "for making gas direct from seeds and matters therein named for practical illumination, or other useful purposes, instead of making it from the oils, resins, or gums previously extracted from such substances." On the trial of an action for the infringement of this patent, upon proof, on the part of the defendant, under a plea that the plaintiff was not the first inventor, that a patent had been previously granted to a third person for improvements in artificial light, the inventor proposing by his specification to use residuary matters obtained in the manufacture of fatty substances, and also the residuum after the oil had been pressed from the seeds, such as oil-cake, and also beech-nuts, or mast, cocoa-nuts, and all others abounding in oil, the learned Judge directed the jury to find a verdict for the defendant:—Held, that the direction was right, the two patents being substantially the same, and it being the province of the Court to take notice of the identity apparent upon the written document, and the consequent want of novelty; and that it was not necessary to submit the question of novelty to the jury. *Booth v. Kennard*, 26 Law J. Rep. (N.S.) Exch. 305; 2 Hurl. & N. 84.

Held, also, that the claim of the plaintiff was too large, being a claim to make gas direct from seeds generally, and by any mode, after a prior patent for making it by a particular method. *Ibid.*

Semble—that irrespective of the prior patent, the specification was bad. *Ibid.*

(c) Provisional Specification.

The nature of an invention need only be described generally in the provisional specification, which need not give all the details as to the manner in which the invention is to be carried out. *In re Newall v. Elliot*, 27 Law J. Rep. (N.S.) C.P. 337; 4 Com. B. Rep. N.S. 269.

An experiment performed in the presence of others, which not only turns out to be successful, but actually beneficial in the particular instance, is not necessarily a gift of the invention to the world; but if the inventor on other and subsequent occasions use his invention, and unnecessarily delays his application for a patent, he gives his invention to the world. *Ibid.*

An application under the 2nd section of the 16 & 17 Vict. c. 115, for the inspection of the provisional specification of certain letters patent, on the ground that the subject-matter was the same as that for which the applicant had obtained a patent, refused. *Tolson's Patent*, 6 De Gex, M. & G. 422.

Letters patent sealed in a case where the evidence shewed great similarity between the alleged invention and one for which a patent was already in force. *Ibid.*

(C) GRANT OF, AND SEALING.

L & W were joint patentees of an invention for propelling vessels, and whilst engaged in making experiments with regard to it an accident happened, which appeared to have suggested to each an improvement upon the method previously adopted. They communicated their ideas to each other, but neither took any steps to secure the benefit of the invention for two years, when L applied for a patent, against the sealing of which W entered a caveat, on the ground that he (W) was the first inventor. The evidence on this point being conflicting.—Held, that L, having first applied, was entitled to have his patent sealed, though possibly W might be able to get it repealed upon *scire facias*. *In re Lowe's Patent*, 25 Law J. Rep. (N.S.) Chanc. 454.

A, whilst engaged in carrying into effect a contract for the erection of a pier at H, invented certain machinery, which he used on the works for several months before applying for a patent, during which time it was open to the inspection of the public:—Held, that the invention had been dedicated to the public, and that he was not entitled to a patent. *In re Adamson's Patent*, 25 Law J. Rep. (N.S.) Chanc. 456; 6 De Gex, M. & G. 420.

Where the granting of a patent was opposed by the owner of a similar patent on the ground that the application was, under the circumstances, a breach of good faith on the part of the applicant, the Lord Chancellor directed the patent to issue upon certain terms. *In re Daines's Patent*, 26 Law J. Rep. (N.S.) Chanc. 298.

In computing time under the 16 Vict. c. 5, avoiding letters patent, on failure in payment of stamp duties, held, that the day of the date is excluded,

and that the three years do not expire until twelve o'clock at night of the anniversary of the day on which the letters patent were granted. *Williams v. Nash*, 28 Law J. Rep. (N.S.) Chanc. 886; 28 Beav. 93.

Where a petition to have the great seal affixed to a patent had been filed, and the respondents served with notice two months before the first day of Michaelmas Term, for which day the petition was answered, and the respondents only filed affidavits on the morning of that day:—Held, that they could not be read; and the patent was ordered to be sealed. *In re M'Kean's Patent*, 1 De Gex, F. & J. 2.

Unless a patent is clearly bad, the Lord Chancellor will not refuse to seal it, as the effect of such refusal, if erroneous, would be irremediable, whereas the sealing of a bad patent leaves every one at liberty to dispute it. *In re Spence's Patent*, 3 De Gex & J. 523.

Where it appeared that a master and his foreman had both invented certain improvements for which the master sought letters patent,—Held, that they ought only to be granted on the terms of their being vested in trustees for the master and the foreman. *Re Russell's Patent*, 2 De Gex & J. 130.

In general where there is a doubt as to the validity of the grounds of opposition to a patent, the proper course is to grant the letters patent, as an error in refusing them would be irremediable, while one in granting them would not. *Ibid.*

(D) REGISTER OF PROPRIETORS.

A patentee in 1853 assigned his patent, but the assignees omitted to register it under the 15 & 16 Vict. c. 83. s. 35. Afterwards, in August 1855, the patentee assigned the patent to another person, who registered it on the same day. The first assignees registered their assignment a week afterwards. The Court, in 1857, on the motion of the first assignees, ordered the register of the second assignment to be expunged and with costs, under the 38th section. *Re Green's Patent*, 24 Beav. 145.

As to the jurisdiction of the Court to "expunge, vacate and vary" entries on the "register of proprietors" of patents under the 15 & 16 Vict. c. 83. s. 38. *In re Morey's Patent*, 25 Beav. 581.

The Court can on motion expunge an entry fraudulently made, and can direct any facts relating to the proprietorship to be inserted on the register, but not the legal inferences to be drawn from them. *Ibid.*

A patentee assigned half the patent to A, and afterwards he assigned the whole to B, by a deed reciting that he had already granted a licence to work and use to A. B's assignment was first registered:—Held, that B had constructive notice of A's rights, and an entry was ordered, on motion, to be made in the register that the licence referred to in B's assignment was the deed of assignment to A subsequently entered. *Ibid.*

(E) RIGHT TO USE.

Where a patent is vested in trustees upon trust for several tenants in common or joint tenants. *Quare*—whether any one of them is at liberty to work the patent on his own account. *Hancock v. Bewley, Johns*, 601.

(F) LICENCE TO USE.

Declaration stated that by deed, reciting that the plaintiff had obtained a grant of letters patent for the inventing of certain improvements in manufacturing and getting up wire rope, it was witnessed that the plaintiff did thereby grant unto the defendant full and exclusive licence and authority to use, exercise and put in practice the said invention within certain limits, and for a certain term, and the defendant covenanted, amongst other things, that he "would well and truly pay to the plaintiff the sum of 12 sterling per ton for every ton weight of wire-rope manufactured and produced by the defendant by the aid of the said machinery under and by virtue of the said patent process, such payment to be made at the end of three calendar months, and the first payment thereof to be made at the expiration of the first three calendar months after the defendant should have commenced working the said machinery. And further, that he, the defendant, would make and deliver to the plaintiff at the expiration of every three calendar months as aforesaid a true statement in writing of the number of tons weight of rope so manufactured and produced by him," and also would permit the plaintiff at all reasonable times to examine the defendant's books and accounts for the purpose of ascertaining the accuracy of such statement. The breaches were, first, non-payment of the sum of 12 per ton on certain quantities of goods manufactured by the defendant; secondly, that the defendant did not deliver a true statement of the number of tons manufactured by him; and thirdly, that he would not permit the plaintiff to examine the books and accounts pursuant to his covenant. Pleas, first, that the plaintiff did not give, nor did the defendant take or have such exclusive licence within such district as by the said deed provided for; secondly, that the patent was worthless, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof, and that the defendant never took any advantage under the deed; that at the time of the making the said deed the plaintiff knew the matters aforesaid, and the defendant did not, and had no notice or knowledge thereof:—Held, on demurrer, that both pleas were bad. *Smith v. Scott*, 28 Law J. Rep. (N.S.) C.P. 325; 6 Com. B. Rep. N.S. 771.

(G) ASSIGNMENT.

The provisions contained in the 5 & 6 Will. 4. c. 83. and the 15 & 16 Vict. c. 83, as to notice of objections in actions for infringement of a patent, are confined to objections affecting the validity of the letters patent, and the defendant may object to the validity of an assignment of the patent though no notice of such objection has been given. *Chollet v. Hoffman*, 26 Law J. Rep. (N.S.) Q.B. 249; 7 E. & B. 686.

To a declaration for the infringement of a patent, which alleged that by indenture the letters patent "were duly assigned to the plaintiff," the defendant pleaded that the letters patent were not assigned as alleged:—Held, that the plaintiff's title under the assignment was put in issue, and, the assignment not being registered in pursuance of the 15 & 16 Vict. c. 83. s. 85, that the verdict

was properly entered for the defendant upon the plea. *Ibid*.

An agreement between the plaintiff and the defendants recited that the plaintiff had invented a method for the prevention of boiler explosions, and obtained a patent for it, and assigned away half of his interest in it, and the plaintiff was desirous of taking out patents for other countries; and it provided that the defendants should proceed to take out such patents, and should pay the sum of 2,500*l.* in such manner as should be mutually agreed upon;—in consideration whereof the plaintiff transferred to the defendants the half of those patents when they should be obtained, and the remaining half of the English patent. A declaration, founded on this agreement averred, for a first breach, that, though a reasonable time had elapsed, the defendants refused to pay the money on request; and, for a second breach, that though a reasonable time had elapsed, the defendants had refused to enter into any agreement as to the manner of payment. The defendants pleaded, first, as to the first breach, that when the action commenced no agreement had been made as to the manner in which the money was to be paid; secondly, to all the breaches, that the invention was not new in England and was worthless, and the plaintiff was not the first inventor; and, thirdly, to all the breaches, that, after agreement and before breach, the defendants under a new agreement, paid, and the plaintiff received 200*l.* as a balance in satisfaction:—Held, first, that there was in the agreement no warranty, express or implied, that the patent was indefeasible; and no fraud being alleged, and the defendants having the same means of knowledge as to the novelty and value of the patent as the plaintiff, that the second plea was bad; distinguishing the case from *Young v. Cole*, *Gomperts v. Bartlett*, and *Chanter v. Leese*. Secondly, that the second breach in the declaration was good, because, even if the entering into an agreement with respect to the manner of payment was a condition, the refusal by the defendants to enter into such an agreement rendered the performance impossible. Thirdly, that the third plea, to all the breaches, was bad; that it was not a traverse of the first breach, and was no answer, since that breach treated the money as payable immediately. *Hall v. Conder*, 26 Law J. Rep. (N.S.) C.P. 138; 2 Com. B. Rep. N.S. 22.

Semble—fourthly, that the first plea to the first breach was bad, because, if no mode of payment was agreed on, the money, being then due, was payable as the law directs where there is no stipulation as to mode of payment. *Ibid*.

Declaration, that on the 16th of March 1858, an agreement was made between H and the plaintiff, that a patent of the plaintiff's for an alloy should be assigned to H, H paying to the plaintiff by way of royalty 1*l.* per pound for each pound of alloy made or used by him under the letters patent during the existence of the letters patent, the royalty to be accounted for every six months after the date of the letters patent or from making any of the alloy, with a covenant for further assurance by the plaintiff; that on the 13th of November 1858, in pursuance of the agreement, and for the purpose of carrying out the terms thereof, by deed, made between the plaintiff and H, the letters patent were assigned to H, subject to the payment of the royalty upon every

pound of the alloy which should be manufactured by H to be ascertained in manner therein mentioned, and H covenanted to pay 1d. per pound for each pound of alloy which he should *make or sell*; that on the 17th of December 1858, by agreement between the plaintiff and the defendant, the defendant, in consideration of 250*l.* to be paid on the 23rd instant, &c., agreed to purchase the right of the plaintiff "in an agreement entered into with H, dated the 14th of March 1858 (meaning the agreement hereinbefore set forth), to receive a royalty of 1d. per pound on the metal sold under the patent specified therein; the second instalment to be paid conditionally, &c., otherwise the 250*l.* to be paid on the 23rd proximo to be considered as full purchase-money for the plaintiff's right in the aforesaid agreement." Breach, that the defendant had not paid the 250*l.* The plea set out the deed of the 13th of November, which, reciting that the plaintiff had agreed to assign the patent to H, H paying 1d. per pound on the alloy which he should *manufacture and vend*, it was witnessed that the plaintiff assigned to H, subject to the royalty of 1d. per pound on every pound of alloy *manufactured by him, to be ascertained in manner and at the times therein mentioned*; and H covenanted to pay a royalty of 1d. per pound on every pound of alloy which he should *make and sell*, to be paid *quarterly*, the first payment to be made on the quarterly day next after the vending of any of the alloy; and for the purpose of ascertaining the quantity sold, to *keep an account of the quantity made and vend*ed: provided that if H neglected to supply any persons desirous of purchasing alloy, &c., it should be lawful for the plaintiff to manufacture and vend the alloy, and use the invention for his own use; that the plaintiff accepted the deed and agreement therein in the place of the previous agreement, and exonerated H from any further performance of the agreement; that the defendant when he entered into the agreement had no knowledge of the deed or of the exoneration of H; that the defendant meant to buy the royalty under the agreement and not under the deed; and that the defendant had no knowledge of the provision in the deed that the plaintiff was to be at liberty to make the alloy for his own use. Replication, that before suit the defendant had notice of the deed, and did not within a reasonable time repudiate or give any notice to the plaintiff of his intention to repudiate his agreement:—Held, first, that the plea was a good answer to the action, inasmuch as it shewed that the plaintiff had by the deed incapacitated himself from giving to the defendant that which he had bought; secondly, that the replication was bad. *Webster v. Newsome*, 5 Hurl. & N. 42.

(H) INFRINGEMENT.

(a) Action for.

A obtained a patent for the manufacture of cast steel by the use of "carburet of manganese," which was thrown into the crucible when the iron was in a state of fusion. B afterwards employed oxide of manganese and coal tar (a carbonaceous matter), which when put into the crucible with the iron produced on it precisely the same effect as did the carburet. This combination was not known when the patent was taken out; the two things were cheaper

than the carburet:—Held, that, in substance, this was a new invention, and was not an infringement of the patent. *Unwin v. Heath* (House of Lords), 25 Law J. Rep. (N.S.) C.P. 8.

If a patent be taken out for an invention, by means of a combination, the use of a subordinate part of the combination, if such part be new and material, may be an infringement of the patent. Whether it be so may be more a question of fact for the jury than of law for the Court. *Lister v. Leather* (Ex. Ch.), 27 Law J. Rep. (N.S.) Q.B. 295; 8 E. & B. 1004.

The precipitation of animal and vegetable matter from sewage water, by means of hydrate of lime, for agricultural purposes, is a good subject-matter for a patent. *Higgs v. Godwin*, 27 Law J. Rep. (N.S.) Q.B. 421; E. B. & E. 529.

If another person uses the same process, and obtains a product, not for the purposes of commercial profit, but for the purpose solely of deodorizing and purifying the sewage water, he is not guilty of an infringement of the patent. *Ibid.*

An assignee of a separate and distinct part of a patent is entitled to sue for an infringement of such part, without joining in such action persons who are interested only in the other part of the patent. *Dunnicliff v. Mallett*, and *The Same v. Birkin*, 29 Law J. Rep. (N.S.) C.P. 70; 7 Com. B. Rep. N.S. 209.

The assignee of two several moieties of a patent has a sufficient legal interest in the patent to sue for its infringement. *Walton v. Lavater*, 29 Law J. Rep. (N.S.) C.P. 275; 8 Com. B. Rep. N.S. 162.

The defendant, a patentee, assigned a moiety of the patent to the plaintiff at one time, and the remaining moiety to a third person at another time; the plaintiff, having afterwards acquired, by assignment, such remaining moiety, was held entitled to sue the defendant for a subsequent infringement without giving him previous notice of such last assignment. *Ibid.*

Evidence of importation and sale of articles in imitation of the patented articles, known to the importer to have been made from the patent, is evidence against him of an infringement. *Ibid.*

Held, also, per *Erle, C.J.*, that it would equally be evidence of an infringement, although the importer had not had such knowledge. *Ibid.*

The assignor of a patent who has sold it as valid, cannot, as between himself and the assignee to whom he sold it, raise any question as to the patent being void for want of novelty. *Ibid.*

(b) Injunction and Account.

In the case of an infringement of a recent patent, it is not a matter of course to require the plaintiff to establish his right at law, but the Court will have regard to the whole case made on the pleadings and by the evidence. *Clark v. Ferguson*, 1 Giff. 184.

In a suit for the infringement of a patent, where the Court considers the plaintiff entitled to full costs as between solicitor and client, the decree or order should contain an express direction that the costs be so taxed notwithstanding the 43rd section of the Patent Law Amendment Act, 1852, provides that he shall have such full costs, unless the Judge shall certify that he ought not to have them. *Lister v. Leather*, 4 Kay & J. 425.

The rule in patent cases that this Court cannot decree an account unless it can grant an injunction, applies, notwithstanding it may appear at the hearing that since an interim injunction was moved for, the defendants have sold articles which, had the facts and law been then sufficiently ascertained, the Court would have restrained them from selling. *Price's Patent Candle Company (Limited) v. Bauwen's Patent Candle Company (Limited)*, 4 Kay & J. 727.

The plaintiffs were owners of a type-founding patent, the defendant was a printer who used types alleged to be colourable imitations of the type patented by the plaintiffs. On a bill for injunction,—Held, that the Court had jurisdiction on motion to order the defendant to deliver a sample of type to the plaintiffs for analysis, and order accordingly. *Patent Type Founding Company v. Walter*, Johns. 727.

Held, also, that laches sufficient to defeat the plaintiffs' right to an interlocutory injunction was no bar to an order on the same motion for inspection and samples. *Ibid*.

(c) Particulars of Objections.

In an action by a patentee against his licensee on a covenant to pay for roving machines made with the plaintiff's invention, and to make none without,—breach, first, in not paying for roving machines made with the invention; and, secondly, in making machines without it; the defendant, having in answer to the interrogatories, admitted the making of many hundreds of roving machines, but not with the plaintiff's invention, and declared that he could not state to whom they were sold, nor give any further information about them, without disclosing his own evidence; and the plaintiff claiming in respect of all the machines the defendant had made, under one or other of the covenants, and asserting that he had seen some of them, which had his invention applied,—Held, that the defendant was entitled to such particulars as should describe those portions of the machines to which the plaintiff contended that his invention had been applied, so as to enable the defendant to understand, as far as possible, the nature of the machines as to which he was to be charged under either of the covenants, and that it was no answer to the application for such particulars that the defendant's answer to the interrogatories was insufficient to enable the plaintiff to furnish the particulars, for if the answers were insufficient, they should have been objected to. *Jones v. Lee*, 25 Law J. Rep. (N.S.) Exch. 241.

But the plaintiff was allowed to inspect the machines on the premises of the defendant, and also to examine him *visd voce*. *Ibid*.

The 15 & 16 Vict. c. 83. s. 41. requires the defendant in an action for the infringement of a patent to deliver particulars of any objections on which he means to rely at the trial, and where he intends to rely upon a prior user or publication the particulars must state the place or places at which, and in what manner the invention has been used or published prior to the date of the patent; and in the absence of such statement the defendant will be precluded from giving evidence of such prior user or publication. *Hull v. Ballard*, 25 Law J. Rep. (N.S.) Exch. 304; 1 Hurl. & N. 134.

In an action for the infringement of a patent for machinery for grinding corn, the defendant delivered

the following particulars of objection: that the improvement was not new, and "that the same had been generally known and publicly used in corn-mills for many years previously":—Held, that evidence, on the part of the defendant, was admissible of an user by two millers at Chester of the invention in question prior to the granting of the patent, such evidence being within the literal meaning of the words in the particulars; and that the plaintiff was too late in his objection to the admissibility of it, it being his duty if he objected to the generality of the particulars to apply to a Judge at chambers to have them amended. *Ibid*.

(d) Inspection.

In an action against printers for the infringement of a patent for the making of type by a certain combination of metals, an application, on the part of the plaintiff, not merely for inspection of the type used by the defendants' type-founders, but also to be permitted to take specimens thereof for the purpose of analysis, was refused, it appearing that the defendants had purchased their type, and the only ground laid for the application being, that by analysis it would appear that the composition was similar to that of the plaintiffs' type, and amounted to an infringement of the patent. *The Patent Type Foundry Co. v. Lloyd; The Same v. Harrison*, 29 Law J. Rep. (N.S.) Exch. 207; 5 Hurl. & N. 192.

But *semble*, that there may be power to make such an order in some cases. *Ibid*.

In an action for the infringement of a patent for a mode of making veneers or mouldings, the Court refused to order an inspection by the plaintiff of the defendant's manufactory and machinery; it being doubtful on the plaintiff's affidavit whether his patent was for the kind of veneering, or for the process by which it was done; and the defendant positively swearing that he used no machinery in the process. *Meadows v. Kirkman*, 29 Law J. Rep. (N.S.) Exch. 205.

And, *quære*, whether the Court had power to make such an order. *Ibid*.

(e) Costs.

Where the plaintiff, in an action for the infringement of a patent, after having given notice of trial, abandoned the action, the defendant having delivered with the pleas particulars of objections pursuant to the requirements of section 41. of 15 & 16 Vict. c. 83,—Held, that the defendant was entitled on taxation to his costs for preparing the particulars and the evidence in support of them. Section 43. applies only to cases where there has been a trial.—Held, also, that the defendant, having obtained a rule for a special jury, was not entitled to his costs thereby incurred. *Greaves v. the Eastern Counties Rail. Co.*, 28 Law J. Rep. (N.S.) Q. B. 290.

(I) PROLONGATION OF.

Letters Patent comprised three separate subjects. Upon an application for an extension of the term of the patent, one only of the three subjects (that relating to railway breaks) appeared to the judicial committee to be deserving of a renewed grant. Prolongation granted under statute 15 & 16 Vict. c. 83. s. 40, for such part only of the letters patent as related to railway breaks, and not to the other subject.

matter of the patent. *In re Lee's Patent*, 10 Moore's P.C. 226.

A patentee, agreed, by deed, with a public company to grant them exclusive licence to use his patented machine, and also covenanted with them to obtain, at the expiration of the term, a renewal of the patent for the same purpose. Under this deed the company alone used the patent. An application by the patentee for a prolongation was refused, on the ground that the agreement was contrary to public policy, and repugnant to the provisions of the statute 5 & 6 Will. 4. c. 83, relating to prolongation of letters patent. *In re Cardwell's Patent*, 10 Moore's P.C. 488.

To entitle a patentee, or his assignee, to an extension of the term of letters patent, the petitioner must establish three things: first, the merit of the invention; secondly, that the parties interested had done all in their power to bring the invention into public use and to turn it to advantage; and, thirdly, that from circumstances beyond their control, they have been unable to obtain adequate remuneration. *In re Markwick's Patent*, 13 Moore's P.C. 310.

An extension granted to the assignee, upon condition of the annuity being secured to the patentee. *Ibid.*

The accounts produced at the hearing were unsatisfactory, owing to the non-production of the books. The Judicial Committee, in recommending a prolongation of the term of the letters patent, directed a proper account of the profits and losses of the patent, to be verified by affidavit, with an explanation accounting for the non-production of the books, to be laid before the Attorney General, subject to which they extended the term. *Ibid.*

The Judicial Committee have power, under statute 7 & 8 Vict. c. 69. s. 4, to grant an extension of the term of letters patent to the assignee of the patentee. Prolongation of the term of letters patent granted to a public company who were the assignees of the patentee. The patentee had ceased to have any connexion with the working of the patent, and the assignees were prevented from working it at a profit by reason of the discovery of the gold-fields in Southern Australia, which caused a derangement and scarcity in the labour market. *In re Napier's Patent*, 13 Moore's P.C. 543.

(K) AVOIDANCE OF.

The 16 & 17 Vict. c. 5, which substitutes stamp duties on patents for fees, by the 2nd section makes patents granted under the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), subject to avoidance on the non-payment of certain stamp duties within certain periods; and its effect is to give the patents by instalments, first, for three years, on the payment of 25*l.* stamp duty, then for four years more on payment of 50*l.* within the three years, and then for the full period, on payment of 100*l.* within seven years from the date of the grant. By deed, the plaintiff, an inventor, agreed with the defendant that the plaintiff should do all acts necessary, except the payment of money, for procuring and perfecting letters patent, and should, immediately after the same were procured, execute an assignment to the defendant of one-third share in the patent, and the defendant agreed to pay all fees and disbursements which might be necessary for procuring the letters patent, enrol-

ling the specification, and otherwise perfecting the same:—Held, that the assignment by the plaintiff was the entire consideration for the defendant's undertaking to pay the fees and disbursements, and a condition precedent; and that, without having executed such an assignment, he could not sue the defendant for not paying the 50*l.* necessary to be paid within three years, under the 16 & 17 Vict. c. 5. s. 2. *Hill v. Mount*, 25 Law J. Rep. (N.S.) C.P. 190; 18 Com. B. Rep. 72.

(L) PENALTIES.

In an action for penalties, under the 5 & 6 Will. 4. c. 87. s. 7, for using unauthorized the word "patent," &c. it is necessary to prove that the word was used with a view of imitating or counterfeiting the stamp of a patentee; but it is no defence that the patented article imitated was not a new manufacture, the grant of the patent being conclusive on the defendant. *Myers v. Baker*, 28 Law J. Rep. (N.S.) Exch. 90; 3 Hurl. & N. 802.

PASSPORTS.

[The Stamp Duty on Passports reduced by 21 Vict. c. 24.]

PAWNBROKER.

[The Acts relating to Pawnbrokers amended, persons who are to be deemed pawnbrokers described, penalty on persons deemed to be pawnbrokers not taking out proper licences, imposed by 19 & 20 Vict. c. 27.—The 39 & 40 Geo. 3. c. 99, for better regulating the Business of Pawnbrokers, amended by 22 & 23 Vict. c. 14.—The Act for better regulating the business of Pawnbrokers amended by 23 Vict. c. 21.]

A pawnbroker is not liable, under section 24. of 39 & 40 Geo. 3. c. 99, for damage to pledges occasioned by an accidental fire, without proof of its having been caused by any default or neglect. *Syred v. Carruthers*, 27 Law J. Rep. (N.S.) M.C. 273; E. B. & E. 469.

A common informer, who lays an information against a pawnbroker for an offence under the 39 & 40 Geo. 3. c. 99, is entitled to a moiety of the penalties imposed by section 27. on the party so offending. *Canwell v. Morgan*, 28 Law J. Rep. (N.S.) M.C. 208.

On the hearing of a complaint against a pawnbroker, under the 14th section of the 39 & 40 Geo. 3. c. 99, for refusing to deliver up a pledge to the owner on payment of the loan, it appeared that the pledge had been stolen in a burglary in the pawnbroker's house, he having left it for twenty-four hours without any one on the premises; the Justices were of opinion that the robbery occurred through the negligence of the pawnbroker, and adjudged that he, not having shewn reasonable cause for non-delivery, should deliver up the pledge or pay the value. On appeal, under 20 & 21 Vict. c. 43,—Held, that the case was not within the 14th section of the 39 & 40 Geo. 3. c. 99; for that that section applied only to a refusal to deliver back a pledge when it remained in the pawnee's possession; but that the Justices were right

in holding that the pledge was lost by the pawnbroker's neglect, and that they ought, therefore, to have made an order under the 24th section of the same Act. *Shackell v. West*, 29 Law J. Rep. (n.s.) M.C. 45.

Semble—that the Court had power, under the 6th section of the 20 & 21 Vict. c. 43, to draw up an order under the 24th section. *Ibid*.

But the Court declined to do so, and remitted the case to the Justices for re-hearing, with a view to the 24th section, in order not to deprive the appellant of his appeal to the Quarter Sessions, under the 35th section of the same act. *Ibid*.

PAYMENT.

[In *Goods*, see *Truck Act*—Into Court, see *Debt* (B).—After Action, see *Pleading*.—And see *Principal and Agent*.]

PEACE PRESERVATION ACT.

[The better Preservation of the Peace in Ireland provided for by 19 & 20 Vict. c. 36.]

PENALTY.

[The Law concerning the Remission of Penalties amended by 22 Vict. c. 32.]

[See *DAMAGES* (E).]

In a *qui tam* action, upon a local act, (incorporating the Health of Towns Act, 11 & 12 Vict. c. 63,) by an unsuccessful candidate against a party elected Commissioner, for acting as such Commissioner, the declaration alleging that the defendant had so acted, and alleging that "thereby and by reason of the premises" the plaintiff had been and was a party grieved under the statute, the only evidence that the defendant had so acted being, that after his election he had voted for a chairman, and there being no evidence of any particular grievance to the plaintiff arising therefrom, nor of any grievance but that of his having lost his election, and the local act providing that no one except a party grieved should sue for penalties without the consent of the Attorney General, which had not been obtained,—Held, that the plaintiff was not a party grieved; that it was not alleged in the declaration that he was so, as a matter of fact, but merely as an inference of law from facts stated, which did not shew that he was so; that, therefore the consent of the Attorney General was necessary, and ought to have been alleged in the declaration as a condition precedent to the right of action; that the declaration was therefore bad; and that, although there was not any ground of nonsuit, there was ground for a rule to stay proceedings; and a rule to arrest the judgment, and also to stay proceedings, was accordingly made absolute. *Hollis v. Marshall*, 27 Law J. Rep. (n.s.) Exch. 255; 2 Hurl. & N. 755.

A booth used as a theatre by strolling players, is not "a house or other place of public resort for the public performance of stage plays," within the meaning of the statute 6 & 7 Vict. c. 68. s. 2, and, therefore, the manager and proprietor of such a booth

is not liable to the penalty imposed by that section for keeping a house or other place of public resort open for stage plays. *Darys v. Douglas*, 28 Law J. Rep. (n.s.) M.C. 193.

PENAL SERVITUDE.

[The 16 & 17 Vict. c. 99. amended by 20 & 21 Vict. c. 3.]

PENSION AND PENSIONERS.

[The Payment of the Out-Pensioners of Greenwich and Chelsea Hospitals further regulated by 19 & 20 Vict. c. 15.—Laws concerning Superannuations and other Allowances to Persons having held Civil Offices in the Public Service amended by 22 Vict. c. 26, extended by Provisions of the Superannuation Act, 1859, 23 & 24 Vict. c. 89.]

PERJURY.

W was convicted of perjury upon an indictment which alleged that "a petition for process was, under and in pursuance of the statutes made and passed, &c. (the titles of the several statutes relating to insolvents were given), filed and prosecuted in the county court of Staffordshire, at Wolverhampton," by W; that the said W duly received an order for protection from process to the day of his first examination; that afterwards, and whilst the proceedings were still pending, to wit, at the time of filing the said petition, the said W came before R, at the county court aforesaid, and within the jurisdiction aforesaid, for the purpose of making an affidavit and verifying on oath his petition and schedule, he, the said R, then being a Commissioner, &c., and the said W was duly sworn before the said R, he, the said R, then having competent authority to administer the said oath. The indictment then contained in the usual manner allegations of materiality and assignments of perjury upon the affidavit verifying the petition and schedule:—Held, on a writ of error, that the indictment sufficiently shewed jurisdiction in the county court, and that it was not necessary to allege expressly that W had resided within the district of the county court for six months next immediately preceding the time of filing his petition. *Walker v. the Queen* (in error), 27 Law J. Rep. (n.s.) M.C. 43; 8 E. & B. 439.

On hearing an information against a publican for keeping his house open after eleven at night, a policeman swore that he did not see four men leave the public-house after eleven on a particular night. Perjury was assigned on this allegation; and it was proved on the trial of the policeman for the perjury, by three witnesses, that he had said to them on separate occasions that he had seen the four men leave the public-house after eleven. It was further proved, by three other witnesses, that the policeman had offered to smash the information for a sum of money; and that he had said he had received some money, and was to have more to settle it. It was also shewn that four men did leave the public-house on the night in question after eleven:—Held, that there was sufficient

evidence of perjury to justify a conviction. *The Queen v. Hook*, 27 Law J. Rep. (N.S.) M.C. 222; *Deara & B.* 606.

An indictment for perjury for forging a receipt alleged that, on the hearing of a cause in a county court, it became a material question whether B had, in the presence of the prisoner, signed at the foot of a certain bill of account, purporting to be a bill of account between a certain firm called "B & Co." and "J W," a receipt for payment of the amount of the said bill:—Held, that the bill of account was sufficiently specified. *The Queen v. Webster*, 28 Law J. Rep. (N.S.) M.C. 200; *Bell's C.C.* 154.

On an indictment for perjury committed by an insolvent, on his examination before the Insolvent Debtors Court, where proof is given of the filing of the petition, it will be presumed that the sittings of the Court are lawfully holden, it being a court of record, and having jurisdiction by the filing of the petition to institute an examination of the insolvent. Therefore no evidence need be given that due notice of the filing of the petition had been inserted in the *Gazette*, or that a day had been appointed for the examination of the insolvent and had been duly adjourned, though those facts are alleged in the indictment. *The Queen v. Westley*, 29 Law J. Rep. (N.S.) M.C. 35; *Bell's C.C.* 193.

To prove that the prisoner was a trader owing less than 500*l.*, his petition alleging those circumstances is ample evidence. *Ibid.*

An averment in the indictment that the insolvent filed his petition, "to wit, on the 20th day of May 1859," is sufficient to shew that he filed it after the passing of the statute 10 & 11 Vict. c. 102, for the Court will take judicial notice of the time at which a statute is passed. *Ibid.*

A Judge, on the trial of an indictment for perjury, has power to amend the description of an act of parliament in the indictment. *Ibid.*

Semble—where the title of an act is not correctly set out in an indictment, but the variation from the true title is so small that the Court can have no doubt what statute is referred to by the title indicated, no objection can now be sustained to the sufficiency of the indictment on account of the variance. *Ibid.*

PETITION OF RIGHT.

[The law relating to petitions of right amended and the proceedings simplified and provisions for the costs thereof made by 23 & 24 Vict. c. 34.]

PHYSIC.

[The qualifications of practitioners in medicine and surgery, regulated by 21 & 22 Vict. c. 90; the Medical Act, 1858, amended by 22 Vict. c. 21; by 23 Vict. c. 7; and by 23 & 24 Vict. c. 66.]

To an action for work and labour and operations performed as a surgeon, the defendant pleaded that the plaintiff had not been examined, or approved, or admitted to exercise or occupy himself as a physician or surgeon as required by the statute:—Held, that the plea was bad for not shewing that the work, &c. was done in a place within the operation of the statute 3 Hen. 8. c. 11, which imposes a penalty on

persons practising as physicians or surgeons in London, or within seven miles thereof, or in any diocese within the realm, without being examined as required by the act. *D'Allez v. Jones*, 26 Law J. Rep. (N.S.) Exch. 78.

By the 21 & 22 Vict. c. 90. s. 4, the General Council of Medical Education and Registration is to consist of one person chosen from time to time by each of the several bodies therein named, and, amongst them, by the University of London:—Held, that the authority to choose such member is vested in the Senate, consisting of the Chancellor, Vice Chancellor and Fellows for the time being, and not in the whole body of graduates of the University. *The Queen v. Storrar*, 28 Law J. Rep. (N.S.) Q.B. 526.

The Medical Act, 1858, section 40, enacts, that any person who shall wilfully and falsely pretend to be, or take or use the name or title of surgeon, &c., or any name, title, addition, or description implying that he is registered under this act, or that he is recognized by law as a surgeon, &c., shall upon a summary conviction for any such offence pay a sum not exceeding 20*l.* And section 27. enacts, that the absence of the name of any person from "the Medical Register" shall be evidence, until the contrary be made to appear, that such person is not registered according to the provisions of this act:—Held, that the mere fact that a person, whose name did not appear in the medical register, represented himself to be a surgeon, was not sufficient to warrant a conviction under the 40th section. *Pedgrift v. Chevalier*, 29 Law J. Rep. (N.S.) M.C. 225.

PLEADING, AT LAW.

[See PRACTICE, AT LAW—SET-OFF.]

- (A) PLEAS.
 - (a) *Not Guilty.*
 - (b) *Distributive.*
 - (c) *Of Justification.*
 - (d) *Construction of.*
- (B) REPLICATION.
- (C) NEW ASSIGNMENT.
- (D) EQUITABLE PLEADINGS.
 - (a) *Plea.*
 - (b) *Replication.*
 - (c) *Rejoinder.*
- (E) COURTS OF APPEAL.
- (F) GENERAL RULES.
- (G) IN CRIMINAL CASES.

(A) PLEAS.

(a) *Not Guilty.*

The plea of not guilty to a declaration for debauching and carnally knowing the wife of the plaintiff, does not put in issue the marriage of the parties. *Kenrick v. Horner or Horder*, 26 Law J. Rep. (N.S.) Q.B. 214; 7 E. & B. 628.

(b) *Distributive.*

In an action for money paid, &c., the defendant pleaded that the money was paid, &c. for and in respect of certain differences which the plaintiffs, as the defendant's brokers, contracted to pay for them

on account of certain unlawful contracts, by way of gaming and wagering, relating to the public funds, and to railways and shares in railways, and to the then present and future prices thereof respectively; and in lieu of, and instead of making, accepting, and paying for transfer thereof, partly contrary to the 7 Geo. 2. c. 8, and partly contrary to the 8 & 9 Vict. c. 109:—Held, that the plea being no answer as to the money paid in respect of losses on the sale of shares was bad altogether, and was not made good as to the money paid in respect of losses on sales of consols, by the 75th section of the Common Law Procedure Act, 1852. *Lyns v. Sleafield*, 1 Hurl. & N. 278.

(c) *Of Justification.*

Declaration, that the plaintiff was possessed of certain land forming part of the bed of a canal, and that the defendants erected a bridge across the canal, and caused it and the walls adjoining to be so constructed that the parts of the same extended and projected over parts of the canal. Plea, that the several acts, matters and things complained of were lawfully done by the defendants under and by virtue of powers given to them by an act, made, &c.:—Held, that the plea in these general terms was good. *Beaver v. the Mayor, Aldermen and Citizens of Manchester*, 26 Law J. Rep. (N.S.) Q.B. 811; 8 E. & B. 44.

A bridge may be so situate as to be a "street" within the meaning of a statute. *Ibid.*

In trespass for breaking and entering the plaintiff's premises, the defendant pleaded a justification under a search warrant granted by a Justice of the county of Stafford. At the trial, the defendant gave in evidence a search warrant granted by a Justice of the borough of Wolverhampton, acting as such, but who was also a Justice of the county of Stafford:—Held, that the evidence did not support the plea. *Webb v. Ross*, 4 Hurl. & N. 111.

(d) *Construction of.*

To an action for goods sold, the defendant pleaded first, except as to 22l. 8s. 3d., never indebted; secondly, as to the 22l. 8s. 3d., payment after action brought of 22l. 8s. 3d. to the plaintiff, who accepted it in satisfaction of the said claim of 22l. 8s. 3d., and of all damages accrued in respect thereof. Issue thereon. The first issue having been abandoned, the defendant, in support of the second, proved that he paid 22l. 8s. 3d. to the plaintiff, who accepted it without any mention of costs:—Held, that as the word "damages" included "costs," and there was no evidence of the plaintiff having received the amount in satisfaction of his costs, that he was entitled to enter a verdict for nominal damages. *Cooke v. Hopewell*, 25 Law J. Rep. (N.S.) Exch. 71; 11 Exch. Rep. 555.

In an action by an incoming against an outgoing incumbent for dilapidations, the defendant pleaded an exchange of benefices between the plaintiff and himself "in their then state and condition," with an agreement on the plaintiff's part not to call upon the defendant to pay for the repairs in the declaration mentioned. The plaintiff joined issue on this plea, and also demurred, and a verdict having been found for him at the trial, the Court upon a motion for judgment *non obstante veredicto*, held that the plea was

good, inasmuch as it did not necessarily shew a simoniacal contract:—Held, that they were bound to put the same construction upon the plea when brought before them on the demurrer. *Goldham v. Edwards*, 17 Com. B. Rep. 141.

(B) REPLICATION.

To a plea of the Statute of Limitations in an action on a promissory note, the plaintiff replied that the note was made by the defendant jointly with one T P, and that within six years before suit T P paid the plaintiff interest on the note:—Held, that, assuming the payment to have been made before the passing of the 19 & 20 Vict. c. 97, the replication was bad on general demurrer. *Ridd v. Moggridge*, 2 Hurl. & N. 567.

(C) NEW ASSIGNMENT.

To an action for polluting a stream, and impregnating it with noxious substances, whereby the plaintiff's cattle were unable to drink the water, the defendant pleaded an immemorial right to use the water of the stream for the purposes of his trade of a tanner and fell-monger, and returning it polluted to the stream when so used, and also a prescriptive right for twenty and forty years respectively. The plaintiff new assigned "that he sued not only for the grievances in the pleas admitted, and attempted to be justified, but for that the defendant committed the grievances over and above what the defences justified." At the trial, it appeared that the defendant and his father and grandfather had for a long series of years carried on the business of tanners at the place in question, using the water of the stream as they wanted it; but that, within the last twelve years, the tannery premises had been considerably enlarged and the business (and consequently the pollution of the stream) increased fourfold. Without leaving anything to the jury, the Judge ruled that the defendant was entitled to a verdict on all the issues, except the first and second:—Held, that, whether the pleas were to be understood as claiming an immemorial or a prescriptive right, not limited to the purposes of the tannery, or the more limited right to use the water for the purposes of the business as carried on more than twenty years ago, the verdict was not warranted by the evidence. *Moore v. Webb*, 1 Com. B. Rep. N.S. 673.

(D) EQUITABLE PLEADINGS.

(a) *Plea.*

Section 83. of the Common Law Procedure Act, 1854, enables a defendant to plead by way of defence facts entitling him to relief on equitable grounds, only where the facts would entitle him to an absolute and perpetual injunction in equity against the judgment in the action, and not merely to a temporary or conditional injunction. The act gives no power to Courts of common law to pronounce a conditional judgment; and a plea, therefore, on equitable grounds, which does not satisfactorily shew that judgment upon it in favour of the defendant will be a complete bar to the action, cannot be supported. *Wodehouse v. Farebrother*, 25 Law J. Rep. (N.S.) Q.B. 18; 5 E. & B. 277.

A Court of common law will not allow an equitable defence, which will carry the effect of the judgment further than a Court of equity would have done,

if the proceedings had been in equity. *Wood v. the Copper Miners Co.*, 25 Law J. Rep. (N.S.) C.P. 166; 17 Com. B. Rep. 561.

A plea in bar to an action, upon equitable grounds, will not be allowed, unless the circumstances stated in it would justify a Court of equity in granting not only an unconditional, but a perpetual injunction. *Ibid.*

A plea, on equitable grounds, which amounts to a statement of the pendency of an arbitration in which the arbitrator has power to decide on what terms the contract declared on is to be put an end to, and that by the agreement of reference no action is to be brought between the parties, is not good. *Ibid.*

A declaration stated that the defendants agreed to load for certain commission a ship of the plaintiffs for a certain voyage, with a guarantee of 5,500*l.*, and to procure cargo for the voyage, rendering not less freight than that amount, which was to serve as the basis to cover, as far as that amount, the deficit which might result in the entire amount of all the freights of the ship, and that in case the freight of the cargo did not amount to that sum, they would pay the owners the difference between it and the freight procured, and that whatever amount might exist in excess of the guarantee should be for the exclusive benefit of the owners of the ship, and that the express guarantee being constituted in reference to freight, should remain subject to the rate of commission; that the ship sailed, and that the amount of the freight of the cargo shipped and of the freights procured for her did not amount to 5,500*l.*, but to a lesser sum. Breach, non-payment by the defendants of the smaller sum. Pleas—first, non assumpsit. The defendants further proposed to plead an equitable plea, under the 17 & 18 Vict. c. 125. s. 83, that the agreement was made between themselves and the plaintiffs' agent, and that the defendants' guarantee was that the ship should earn freight at a certain rate per ton, so that, if filled, she should attain a freight of 5,500*l.* per ton, and that they did not give an absolute guarantee of 5,500*l.*, nor that they would procure cargo rendering not less freight than that sum; that the contract was then put into writing and signed by both parties; that it was drawn up in a foreign language of which the defendants were ignorant, and was so expressed as to render the guarantee absolute and not in the conditional form agreed on; and that the defendants at the time of signing it understood the guarantee to be in that limited form, and that the plaintiffs were seeking to avail themselves of the mistake:—Held, that the plea ought to be disallowed, being equivalent to a bill in equity for reforming the contract. *Perez v. Oleaga*, 25 Law J. Rep. (N.S.) Exch. 65; 11 Exch. Rep. 506.

Quære—whether the subject-matter of the proposed plea was not a good defence under the plea denying the contract. *Ibid.*

In an action on a dissolution of partnership deed, in which one of the parties covenanted with the other not to practise in a certain district, the action being for the penalty incurred by practising in a certain part of that district, a plea was allowed to be pleaded, by way of equitable defence, to the effect that the part in question had been treated between the parties in their partnership arrangements as not part of that district, that it was not intended to include it in the prohibition to practise, and that the deed in that

respect was executed under a mistake in fact, the ground of the defence being, not that a Court of equity would reform the deed (for, *semble*, it could not be reformed), but would decree a perpetual and absolute injunction against suing upon the covenant for practising in the place in question. *Luce v. Irod*, 25 Law J. Rep. (N.S.) Exch. 307; 1 Hurl. & N. 245.

Semble—that such issues should be determined by the Judge without a jury. *Ibid.*

Although the Court will not allow a defence to be pleaded on equitable grounds where it appears not to disclose a right to an absolute and unconditional relief in equity, yet it will not be disallowed where the question whether it does disclose such a right is reasonably arguable; and where it has already been allowed by a Judge, it will not be struck out merely because the question is doubtful. If the question is doubtful, it will be left to be determined on demurrer; and if it is suggested that the form of the plea is artful and equivocal, although that may be a reason for not originally allowing it in that form, yet, when it has been allowed, it will rather be a ground for an application to amend the plea as likely to embarrass the plaintiff, than to strike it out. *Elliot v. Mason*, 26 Law J. Rep. (N.S.) Exch. 175.

Thus, where in an action on a guarantee a Judge had allowed the defendant to plead as a defence on equitable grounds an agreement between the principal debtor and the creditor that the debtor should do certain things, and that in consideration thereof the debt (on a bond) should be relinquished, with a general averment that all things had happened, &c., the Court, although deeming the plea somewhat intricate, yet, having directed a verbal amendment to remove an ambiguity, declined to strike it out; because it appeared a doubtful question whether the agreement discharged the surety in equity before it was entirely performed. *Ibid.*

Although, where a defendant pleads an equitable plea alone, he may possibly have a right to plead it without the leave of the Court, yet, where he applies for leave to plead it with other and legal pleas to the same matter, this is an application to the discretion of the Court or Judge, and that discretion will be exercised with regard not only to the matter of the equitable plea itself, but to all the circumstances under which the application is made. And although the plea itself is one which the Court might be disposed to allow to be pleaded, yet (especially where the application is by way of appeal from the decision of a Judge at chambers), if there are circumstances shewing that it is pleaded for delay, (as if there is an absence of any affidavit as to its truth, and of any authority to shew that it discloses grounds for an unconditional injunction in equity, and the defendant is under terms to try at the next Sittings or Assizes,) and a Court of equity would probably only grant an interim injunction on the condition of the money being brought into court, and the defendant declines this condition, the Court will refuse leave to plead the alleged equitable defence. Under such circumstances, leave was refused, on an action for money lent, to plead, by way of equitable defence, that the money was advanced on the security of consignments of goods to be sold by the plaintiffs, and out of which they might have reimbursed themselves, had they not wrongfully and improperly sold the same for less than the best market price. *Atterbury v.*

Jarvis, 26 Law J. Rep. (n.s.) Exch. 178; 2 Hurl. & N. 114.

The relief spoken of in section 83. of the Common Law Procedure Act, 1854, means absolute, unconditional relief. *Flight v. Gray*, 27 Law J. Rep. (n.s.) C.P. 13; 3 Com. B. Rep. N.S. 320.

The declaration alleged that the plaintiff and B were possessed of stock upon trust, and that the plaintiff had incurred expense in the execution of the trust without recompense; that one M caused to be represented to the plaintiff by the defendants that the trust had been executed, and that M was entitled to the stock, and the defendants assured the plaintiff that such representation was correct, and requested the plaintiff to execute a power of attorney to enable M to have the stock transferred to him; that the plaintiff was and is ignorant whether M was entitled or not; that in consideration of the premises, and that the plaintiff would execute the power of attorney without requiring further proof of the right of M to the stock, the defendants promised the plaintiff to pay him 32*l.* within fourteen days. Averment of performance of conditions precedent. Breach, non-payment of the money. Plea, on equitable grounds, that before making the promise the plaintiff represented to the defendants that certain dividends on the stock had not been received by the plaintiff, any such unreceived dividends being intended and authorized by the power of attorney to be received for the use of M, whereof the plaintiff had notice; that the defendants, in reliance upon such representation, and believing the same to be true, made the said promise; but that the same was not true, inasmuch as the plaintiff had then received one of the dividends, amounting to 30*l.*, and that the defendants would not have made the promise if they had known that the plaintiff had received the dividend, as the plaintiff had notice, and ought to have remembered he had so received the same:—Held, on demurrer, that the declaration was good, and the plea no answer. *Gorouck v. Cree*, 29 Law J. Rep. (n.s.) C.P. 308; 3 Com. B. Rep. N.S. 574.

The defendant became surety for the performance by H of a contract with the plaintiff W for the fittings of warehouses at a fixed price. The contract between W and H contained a stipulation that W should and might insure the fittings from fire at such time and to such amount as the architect might consider necessary, and deduct the insurance from the amount of the contract; and also that H should and would provide to the satisfaction of the architects a dry and sufficient store for the reception of the fittings from time to time as such of them were completed, and until they could be received at the warehouse. H had completed two-thirds of the fittings, and they remained in his workshops to the knowledge and without the objection of the plaintiff or his architect. The workshops were accidentally burnt, and H was unable to complete his contract:—Held, that there was a contract by the plaintiff to insure, and that by reason of his not insuring, the defendant was released in equity from the guarantee. *Watts v. Shuttleworth*, 29 Law J. Rep. (n.s.) Exch. 229; 5 Hurl. & N. 235.

Quere—whether a plea to an action brought against a defendant in this country upon a contract made and executed in France, that the debt had been attached (*saisir arrêté*), pursuant to the Code de

Drang, 1855—60.

Procédure Civile, by creditors of the plaintiff in that country, is any answer, either legal or equitable? *Simian v. Miller*, 1 Com. B. Rep. N.S. 686.

In an action upon a contract for the supply of a certain quantity of coals during a period of six months, two breaches were assigned: first, that the defendants refused to take the stipulated quantity of coals; secondly, that they omitted to pay for those which they had received in the manner provided for by the agreement, viz., by bills at three months from the 1st and 14th of each month. The defendants having obtained a Judge's order allowing them to add two pleas to the following effect: "1. On equitable grounds, that, during the said six months, a dispute arose between the plaintiff and the defendants, and, after the lapse of the said six months, it was agreed that such dispute should be settled, and that the defendants should take as many cargoes as remained untaken, and that the plaintiff should allow the defendants for any quantity of small coals in such cargoes exceeding 6*l.* per cent., and that the agreement in this plea mentioned should be accepted in satisfaction of the said breach of contract, and that the defendants were always ready and willing to perform the said agreement. 2. On equitable grounds, that, after the said cargoes in the second breach mentioned were supplied, and after the breaches, accounts were had and stated, and in such accounting a sum was agreed upon as the sum to be paid to the plaintiff after deducting the sum due from the plaintiff to the defendants, and that the plaintiff should take bills of exchange for the amount so agreed upon, and that the defendants delivered bills of exchange, and paid the bills so given." The Court, on motion, varied the order, by allowing the defendants to plead the first of the two pleas, striking out "on equitable grounds," and to plead another plea in the same form on equitable grounds, omitting the allegation as to the acceptance in satisfaction, and directing that the second plea on equitable grounds should remain, the plaintiff to be at liberty to reply or demur. *Jonassohn v. Ransome*, 3 Com. B. Rep. N.S. 779.

(b) *Replication.*

To a plea of the Statute of Limitations to a declaration against the defendants, as executors of G, for goods sold and money lent to the testator, the plaintiff replied, on equitable grounds, that the causes of action accrued within six years before the death of G, who, by his will, devised certain lands to the defendants, and also bequeathed to them the residue of his personal estate, upon trust to sell and convert the same into money, and thereout to pay his debts and legacies, and to hold the residue in trust for the plaintiff and his other children equally, and averring that the monies realized were sufficient to pay all debts and legacies. To a plea of set-off, to the same action, for use and occupation of the testator's house and for money lent, &c. by the testator, the plaintiff replied, on equitable grounds, that G, by his said will, devised to the plaintiff the testator's house at C, and also bequeathed certain monies to him, and also devised and bequeathed various lands, monies, and shares to his other children, including one of the defendants, and by his will declared that the monies and other effects then already advanced and delivered

by him to his said several children should be deemed to be advancements, and that they respectively should not be required to account for the same, and that the matters of set-off were monies and effects so advanced and delivered by the testator to the plaintiff:—Held, that on both these equitable replications the defendants were entitled to judgment. *Gulliver v. Gulliver*, 25 Law J. Rep. (n.s.) Exch. 341; 1 Hurl. & N. 174.

The Court will not allow any plea or replication on equitable grounds where it does not appear to them that there is any ground for equitable relief. *Hunter v. Gibbons* and *Dudley v. Gibbons*, 26 Law J. Rep. (n.s.) Exch. 1; 1 Hurl. & N. 459.

It is doubtful whether, under the Common Law Procedure Act, it is allowable, in an action for a mere pecuniary claim, in answer to a plea raising a legal bar, to reply matter merely shewing a claim maintainable, if at all, in equity and for a different amount; and on this point *Wood v. Dwarries* distinguished, not only on that ground, but also on the ground that there the decision was on demurrer. *Ibid.*

In an action, in substance for the value of coal wrongfully taken out of the plaintiff's mine, a replication to a plea of the Statute of Limitations that the wrongful taking was fraudulently concealed from the plaintiff until within six years before suit, was disallowed, on the ground that a Court of equity would not restrain the defendant from setting up the defence, and that if there was any right to equitable relief it could only be by a bill for an account, in which the amount allowed would be different from the amount recoverable at law. *Ibid.*

Where, to a declaration on a policy of assurance on the life of H, setting out the conditions of the policy, *inter alia*, that it was to be void if H departed beyond Europe, the defendant pleaded that H departed beyond Europe, the Court refused to allow the plaintiffs to reply on equitable grounds that at the time of making the policy it was stipulated between the plaintiffs and defendants that the policy should not be vitiated by reason of H visiting places out of Europe, and that the plaintiffs entered into such policy on the terms of such stipulation. But the Court allowed a replication of leave and licence. *Reis v. the Scottish Equitable Life Assur. Soc.*, 26 Law J. Rep. (n.s.) Exch. 279; 2 Hurl. & N. 19.

Declaration on the statute, 4 Ann. c. 16. s. 27, by one tenant in common against another for not accounting for rent received by him. Plea.—That before the receipt of the rents, the plaintiff and defendant, by indenture, demised the premises to W for a term of 500 years, which by divers mesne assignments vested in the defendant. Equitable replication, that the indenture was a mortgage to secure a sum of money and interest; that the defendant received more than sufficient to pay the mortgage debt, interest and costs, and he accordingly paid the same:—Held, that the Court could not deal with the replication, since they had no power to compel a reconveyance; therefore they ordered it to be struck out. *Gorley v. Gorley*, 1 Hurl. & N. 144.

(c) Rejoinder.

In an action in a court of common law a party will not be allowed to plead upon equitable grounds

matter which he has raised in a suit in equity instituted with reference to the matters in the action. *Schlumberger v. Lister*, 29 Law J. Rep. (n.s.) Q.B. 157.

(E) COURTS OF APPEAL.

A special libel of appeal and an allegation by the appellants and responsive allegation by the Crown pleading new matters, admitted by the Court of appeal, and fresh evidence taken thereon. *Hocquard v. the Queen*, 11 Moore's P.C. 155.

An objection for want of parties to a bill ought to be made in the Court below. A Court of appeal will not treat the suit as defective when no such objection was taken in the Colonial Court. *Bowes v. the City of Toronto*, 11 Moore's P.C. 463.

(F) GENERAL RULES.

An allegation averred that by the act of the Legislative Council of India, No. 22, of 1855, and the rules and regulations passed pursuant to such act, the defendants were exempted from responsibility for the damages sued for by reason of the ship being in charge of a pilot, whom the defendants were obliged by the provisions of that act to take on board. The responsive allegation did not traverse such averment as to the fact of the act, and the rules and regulations, and the requirement to take a pilot on board, but simply alleged that the defendants were not exempted by the act, and the rules and regulations:—Held, that the act, and the rules and regulations, being pleaded, and not denied, there was no necessity to prove them, the responsive allegation admitting, as far as was necessary between the parties to the cause, the act, rules and regulations as a fact, though not the effect of their operation in law. *Prosser v. the European and American Steam Shipping Co.*, 13 Moore's P.C. 484.

It is a rule to be observed in all courts, that a party complaining of an injury and suing for redress, can recover only *secundum allegata et probata*. *Malcomson v. Clayton*, 13 Moore's P.C. 198.

The reason for strictly adhering to this rule in pleading explained and illustrated. *Ibid.*

(G) IN CRIMINAL CASES.

[Misjoinder of Counts, see CONVICTION.]

The prisoner stole the goods of J B from his stall, which at the time was in charge of R B his son, a child of fourteen, who lived with his father and worked for him. The first indictment against the prisoner for stealing the goods described them as the property of R B. The Sessions thinking this a wrong description directed an acquittal, and caused a new bill to be sent up laying the property in J B. To this the prisoner pleaded *autrefois acquit*:—Held, that the plea could not be sustained, for the prisoner could not on the evidence have been convicted on the first indictment, charging the property as that of R B, and that the Court could only look at the first indictment as it stood, without considering whether the allegation as to the ownership of the goods might not have been amended, under the statute 14 & 15 Vict. c. 100, so as to have warranted a conviction. *The Queen v. Green*, 26 Law J. Rep. (n.s.) M.C. 17; Dears. & B. 113.

PLEADING, IN EQUITY.

(A) BILL.

- (a) *Statements and Charges in.*
- (b) *Multifariousness.*
- (c) *Of Revivor.*
- (d) *Of Review.*

(B) DEMURRER.

(C) ANSWER.

(D) PLEA.

(A) BILL.

(a) *Statements and Charges in.*

In January 1854 G grants a lease to F, with covenants. In March, F mortgages by underlease, reserving ten days, to N, and declares himself trustee of the ten days for N, covenanting to perform the covenants. F does not perform the covenants, and in July N takes possession and takes on himself the performance of the covenants. In April G married and settled his interest in the land subject to the lease. In March 1854 F. had, at the instigation of G, assigned all his interest to a trustee for G, and in the same month G. informed N, that he, G, had got all F's interest. In February 1855 G sent notice to F and N to perform the covenants. In October 1855 G brought ejectment in the names of his trustees against F, but notice of the ejectment was served on N, and N let judgment go by default. The bill was now filed by N against F for foreclosure of the mortgage and for assignment of the residue of ten days; and at the bar the plaintiff asked for payment of the mortgage debt by way of equitable damages. The bill was assumed by arrangement to allege the assignment by F, in trust for G, but it did not allege the ejectment nor the judgment in ejectment, though that fact appeared in evidence:—Held, first, that if the bill had alleged the ejectment and judgment, the plaintiff could have no relief in equity against F (the case distinguished from *Close v. Wilberforce*, 1 Beav. 112, and *Wilson v. Leonard*, 8 Beav. 373); secondly, the bill not alleging the damage, the relief prayed in respect of that damage could not on that ground be given, although the damage appeared by the evidence. *Nokes v. Fish*, 8 Drew. 735.

A bill must allege the substance of the ground of relief. *Ibid.*

Where an heir-at-law filed a bill to set aside as unduly obtained a will, purporting to dispose of real estate, alleging the existence of an outstanding legal estate, or in the alternative to have the benefit of legacies on the ground of their being void under the Mortmain Act, but failed to prove the existence of any outstanding legal estate, the bill was dismissed (without prejudice to the right to file another) as to the former alternative for want of equity, and as to the latter alternative as being premature; *Lord Justice Knight Bruce*, who thought that the bill might have been retained, to afford an opportunity of trying the question of the validity of the will, not agreeing in the dismissal. *Wright v. Wilkin*, 4 De Gex & J. 141.

(b) *Multifariousness.*

A testatrix, being domiciled in Scotland, left large real estates in Scotland, and personal estate in Eng-

land, to trustees, upon trust for her nearest heirs and executors. In January 1840 the defendant A M was, upon the application of the defendant W M I, his tutor-in-law, and according to the Scotch form, served nearest and lawful heir-of-line to the testatrix, and afterwards entered into possession of the real estate. The defendant W M I claimed to be sole next-of-kin of the testatrix, and was let into possession of the personal estate. The bill alleged a number of fraudulent acts against the two defendants, whereby they had wrongfully obtained possession of the estates; and the plaintiffs claimed to be entitled to the property, and sought relief in respect of the real and personal property, and payment of costs, from both defendants. A M demurred for want of equity, on the ground that this Court could not deal with the rights of parties to real estate in Scotland, and that this defendant was not alleged to have claimed or obtained any part of the personal estate:—Held, that even if there could be no relief against the defendant in respect of the real estate, yet that he might be liable for costs, if the charges of fraud which were made against him could be maintained. The demurrer was therefore overruled. A demurrer for multifariousness was also overruled, on the ground that the bill might pray relief against two persons respectively as to real and personal estate vested in the same trustees by one instrument. *Innes v. Mitchell*, 26 Law J. Rep. (n.s.) Chanc. 625; 4 Drew. 57.

(c) *Of Revivor.*

A bill of revivor against A B alleged that a defendant to the original bill had died, having by his will appointed A B executrix, and that she had taken on herself the execution of the will, and had possessed the assets and taken on herself the administration thereof. It prayed revivor against her as such executrix. A B pleaded simply that she was not executrix. The plea was allowed. *Cooke v. Gittings*, 21 Beav. 497.

An estate on which there were two equitable mortgages was ordered to be sold and the produce divided according to their priorities, which, however, were not declared by the decree. Afterwards the second mortgagee instituted a second suit, claiming priority over the first, upon a title paramount to that of the mortgagor, which was discovered in the first suit:—Held, that a bill of revivor was unnecessary, and relief was given in the second suit. *Langstaff v. Nicholson*, 25 Beav. 160.

(d) *Of Review.*

To sustain a bill of review, the alleged error must be apparent on the face of the decree, and must be specifically assigned by the bill; and such error must not be a mere error of judgment. *Green v. Jenkins*, 29 Law J. Rep. (n.s.) Chanc. 505; 1 De Gex, F. & J. 454.

To maintain a bill of review, the decree sought to be reversed must be contrary to some statutory enactment, or some principle or rule of law or equity recognized and acknowledged or settled by decision, or be at variance with the forms and practice of the court. *Ibid.*

A bill of review must state on the face of it that it is filed with the leave of the Court; if it does not it is demurrable. A general demurrer does not in-

clude as a demurrer on the record the ground of the bill (being a bill of review) not stating on the face of it that it is by leave of the Court, but that ground may be taken *ore tenus*. *Henderson v. Cook*, 4 Drew. 306.

A bill purporting to be an original bill sought to review a prior decree in a suit between the same parties, on the ground of the decree having been obtained by fraud; the fraud alleged was that the defendants had in their answer concealed certain facts from the plaintiffs and the Court, but it appeared that those facts might have been elicited by exceptions:—Held, that was not such fraud as to justify an original bill without leave of the Court to review a decree. *Ibid*.

(B) DEMURRER.

A defendant obtained the common order to plead, answer or demur, not demurring alone. He then filed a demurrer and answer, entitling them "The demurrer and answer of the above-named defendant to the bill of complaint of the above-named plaintiff." The body of the demurrer contained a statement, that "as to the said bill" the defendant demurred to it. On a motion to take the demurrer and answer off the file for irregularity, as being wrongly entitled, and in fact only a demurrer to the bill.—Held, that the title was correct; but the words "as to the said bill," in the body of the demurrer, ought to have been omitted. The demurrer to be amended; but no order made on the motion, and no costs. *Osborne v. Jullion*, 26 Law J. Rep. (N.S.) Chanc. 5; 3 Drew. 552.

To a bill stating that by a private act of parliament certain real estates were settled inalienably upon the Earl of S, and that proceedings were pending in the House of Lords to establish the plaintiff's claim to the earldom, and that the defendants were in possession under an alleged title derived from a former earl, and praying that pending those proceedings before the House of Lords a receiver might be appointed, and the defendants restrained from committing waste, the defendants demurred. Demurrer allowed, there being no allegation that any proceedings were pending for the recovery of the estates. *Earl Talbot v. Hope Scott*, 27 Law J. Rep. (N.S.) Chanc. 273; 4 Kay & J. 96, 189.

The bill charged that many of the tenants of divers parts of the settled estates had, by reason of the conflicting claims, refused to pay their rents to either the plaintiff or the defendant, and by reason thereof such rents were in danger of being lost:—Held, that this was not sufficient to support a prayer for a receiver, there being no allegation that proceedings had been taken against the tenants. *Ibid*.

The bill also stated that the defendants were trustees of other parts of the estates for the benefit of such person as should be Earl of S, and that the claim to the earldom was in litigation, and prayed for a receiver. Plea, that the plaintiff was not Earl of S:—Held, good. *Ibid*.

Plea not overruled by a voluntary answer in support. *Ibid*.

After a decree in an administration suit some of the plaintiffs filed a supplemental bill against their co-plaintiffs and the defendants, alleging generally that it was inconvenient that they and their co-plaintiffs should continue to be represented by the

same solicitor, and praying that the suit might be carried on between the parties to the supplemental bill in the same manner as it was carried on between the parties to the original suit. On demurrer for want of equity.—Held, that the bill could not be sustained. *Peareth v. Peareth*, 28 Law J. Rep. (N.S.) Chanc. 118; Johns. 58.

A bill prayed the rectification of a settlement made in the Scotch form between parties resident in Scotland, and it prayed the appointment of new trustees in the room of a deceased trustee. A general demurrer for want of equity was put in in the usual form, except that it alleged that the plaintiff was not entitled to relief "in this court," instead of "in a court of equity"; these words being intended to embrace a demurrer for want of jurisdiction:—Held, that want of jurisdiction should be the subject of a separate demurrer, distinct from a demurrer for want of equity; but a defendant demurring generally for want of equity might nevertheless demur *ore tenus* for want of jurisdiction. *Barber v. Barber*, 29 Law J. Rep. (N.S.) Chanc. 49; 4 Drew. 666.

A defendant objecting to a bill for want of a sufficient statement of facts, should raise that objection by plea, and not by demurrer; and although the Court might not be able, upon the merits, to grant the relief prayed as to the rectification of a settlement, it could not refuse to entertain the relief prayed as to the appointment of new trustees; and, therefore, as some relief could be granted, the demurrer must be overruled, but without costs. *Ibid*.

In a bill against B and C, the plaintiff stated a circumstance which was material in order to charge C, not positively as a fact, but as an allegation made by B; a demurrer by C was allowed. *White v. Smale*, 22 Beav. 72.

A bill for production of title-deeds and an alleged will, and for the establishment and carrying into effect of the trusts of the will, alleged that the testator had devised his estate to A *B and his children, or some of them*, upon trust for A *B and his children, or some of them*. The plaintiffs claimed under the intestacy of A B, as his children, but not alleging that he had never had any other children:—Held, that there was no sufficient allegation of title, and a general demurrer for want of equity allowed. *Bothomley v. Squire*, 3 Drew. 517.

A bill setting up a case that an absolute conveyance of an equity of redemption was made to the defendants on the faith of a verbal promise to reconvey on being paid the price, alleged that the effect of the agreement was so; but did not set out the terms of the agreement *totidem verbis* as a fact. Held, that there was a sufficient allegation of a promise, and that the Court could not say on demurrer that there could be no relief. *Morison v. Morison*, 4 Drew. 315.

(C) ANSWER.

A feme covert executrix answering separately from her husband is not exempted by her coverture from rendering an account of the assets come to her hands. *Pemberton v. McGill*, 26 Law J. Rep. (N.S.) Chanc. 49.

The incumbent of the rectory of B W, of which the defendants were patrons, filed his bill against them, alleging that, in ignorance of his title, he had accepted and executed a lease from them to him of a

moiety of the tithes of the parish of B W at a rent of 70*l.* per annum, and that the tithes so demised belonged to the rector; and alleging that the defendants were in possession of other lands in the parish of B W, part of the rectory, and belonging to the plaintiff as rector; and praying that they might be restrained from prosecuting an action commenced by them for recovering rent in respect of the demise of tithes, and for a declaration that the plaintiff was entitled as rector to all the tithes and lands, parcel of the rectory, and for a discovery and delivery up of such tithes and lands and of the deeds and documents relating thereto. The defendants, by their answer, set up a case as to the tithes, that the plaintiff, though presented and inducted to what in the presentation was called "the rectory of B W," was in fact only presented to a moiety of the rectory, and that the lease was of tithes belonging to the other moiety, and they denied his title to the lands claimed by his bill, and refused to make any discovery of the particulars they were interrogated to as to such alleged lands:—Held, upon an exception to the answer as to the land, first by the Vice Chancellor, and then upon appeal by the Lord Justice Knight Bruce, that the answer was insufficient. *Bates v. the Master or Keeper and Scholars of Christ's College, Cambridge*, 26 Law J. Rep. (N.S.) Chanc. 449.

In answer to interrogatories to a bill filed by shareholders in an insurance company against the directors, requiring the defendants to set forth a list of various particulars relating to the business transacted by the company, the defendants referred generally to the books of the company, as containing all the information required:—Held, upon exceptions, that the answer was insufficient; it being the duty of the defendants to make the reference to the books as easy to the plaintiffs as possible, and refer specifically to the books and portions of books containing the information sought under each particular head of inquiry. *Drake v. Symes*, 29 Law J. Rep. (N.S.) Chanc. 849; Johns. 647; 2 De Gex. F. & J. 81.

Where plaintiff's right to relief at the hearing is clear, assuming the title stated by his bill, defendant, by his answer, denying that title, is, in certain cases, protected from discovery. *De la Rue v. Dickinson*, 3 Kay & J. 388.

Thus, in a suit to restrain an alleged infringement of a patent, the defendant, by his answer, denying the fact of infringement, is protected from making any discovery immaterial to that question, and which, when that question is decided, would be given under the decree; and it is necessary to set up a defence of this nature by plea. *Ibid.*

Where there is a specific averment, an interrogatory founded thereon must be specifically answered. A general denial is not a sufficient answer to a specific charge. Therefore, where the averment was, that land was conveyed to one J S, and the interrogatory was, whether such land was not conveyed to one J S, "or to some and what person or persons":—Held, that an answer stating conveyances to persons other than J S, and adding that "save as therein appeared, the person answering could not set forth whether the land in question was or not conveyed to one J S, or to some or what person or persons," was evasive. *Earp v. Lloyd*, 4 Kay & J. 58.

A bill alleged that money had been placed in the hands of defendants for certain payments, and inquired into the application of such money. The answer averred that the particular sum had been, by agreement, placed in the hands of the defendants, *without recourse from plaintiff*, and submitted that no discovery could be asked:—Held, that all the circumstances might be essential in deciding the construction of the agreement, and the answer was insufficient. *Bleckley v. Rymer*, 4 Drew. 248.

The joint answer of husband and wife may be read against the latter with reference to her separate estate. *Oliver v. Carey*, 1 Jo. & H. 199.

(D) PLEA.

To a bill against an executor for payment of a legacy the defendant pleaded that the testator was at the time of making his will and of his death domiciled in France, and all the bequests of personal estate affected to be made by the said will were by the laws of that empire null and void:—Held, that the plea was not double, as it did not state two bars to the suit, but two averments leading up to one bar. *Campbell v. Beaufoy*, 28 Law J. Rep. (N.S.) Chanc. 645; Johns. 320.

Although probate of a will is conclusive so far as relates to the appointment of executors, it is not conclusive as to the validity of the particular dispositions therein contained; and the above plea therefore was held not to be bad on that ground. *Ibid.*

A plea denying a negative allegation in the bill is informal. A B employed the plaintiff to sell a lease, and agreed that he should have one-fourth of the produce for his trouble. It was sold to a joint-stock company for a number of paid-up shares. The company accepted notice of the agreement between A B and the plaintiff, and promised to hold the plaintiff's proportion of the shares at his disposal. Afterwards A B sold all the shares to the company, who insisted on retaining the plaintiff's proportion. The plaintiff filed a bill against the company alone to recover them, stating that they had never been legally vested in A B, inasmuch as the certificates had never been delivered to him, and that he had never executed the deed of settlement of the company. The defendants put in a plea for want of parties, denying that A B did not execute the deed, and averring that his name appeared thereto. The plea was overruled. *Lakeman v. the Agua Fria Gold Mining Co.*, 22 Beav. 76.

A single plea of three outlawries allowed. *Fox v. Yates*, 24 Beav. 271.

POISON.

[The Law relating to the unlawful administering of Poison amended by 23 Vict. c. 8.]

POLICE CONSTABLES.

[The Police in Counties and Boroughs in England and Wales rendered more effectual by 19 & 20 Vict. c. 69.—The Act of the previous Session, to render more effectual the Police in Counties and Burghs in Scotland amended by 21 & 22 Vict. c. 65.—The Police in Counties and Burghs in Scotland rendered

more effectual by 20 & 21 Vict. c. 72.—The Law concerning the Police in Counties and Boroughs in England and Wales amended by 22 & 23 Vict. c. 32.—Amendment of the Laws relating to the Police District of Dublin Metropolis by 22 & 23 Vict. c. 52.—The Police of Towns Improvement Act amended so as to enable Towns and populous Places in Scotland to avail themselves of its Provisions for sanitary and other Improvements, without at the same Time adopting its Provisions as regards the Establishment and Maintenance of a Police Force, 23 & 24 Vict. c. 96.]

A man in the presence of a policeman raised a shovel as if to strike his wife, saying he would have murdered her were it not for the policeman. For twenty minutes afterwards he continued to use violent language towards his wife, and then left the house, professing an intention of going to his father's house to sleep. The policeman arrested him a few yards from his home as he was going from it:—Held, that the policeman was justified in so doing. *The Queen v. Light*, 27 Law J. Rep. (n.s.) M.C. 1; Dears. & B. 332.

A constable cannot legally take a person into custody on a charge of felony made by another, if the charge rests on no reasonable ground, or on grounds which are unreasonable. Therefore, where on the statement made to the constable, it ought to have appeared (from the lapse of time and other circumstances) doubtful whether a felony had been committed, and that there was no reason for suspecting the person charged, the arrest was held unjustified. *Hogg v. Ward*, 27 Law J. Rep. (n.s.) Exch. 443; 3 Hurl. & N. 417.

POOR.

[Office of Secretary to the Poor Law Commissioners in Ireland abolished by 19 & 20 Vict. c. 14.—The Law relating to the Relief of the Poor in Scotland amended by 19 & 20 Vict. c. 117.—The procuring of Sites for Workhouses, in certain Cases, facilitated by 20 & 21 Vict. c. 13.—The Act for charging the Maintenance of certain Paupers upon the Union Funds continued by 22 Vict. c. 29.—An Act to continue the Poor Law Board, 23 & 24 Vict. c. 101.—An Act to continue the Powers of the Poor Law Commissioners in Ireland, 23 & 24 Vict. c. 148.]

(A) GUARDIANS.

(B) AUDIT AND AUDITOR.

(C) RELIEF.

(D) SETTLEMENT.

(a) By Birth and Parentage.

- (1) Bastards.
- (2) Children under Sixteen.
- (3) Emancipation.
- (4) Evidence of.

(b) By Payment of Rates and Parochial Taxes.

- (c) By Estate.
- (d) By Apprenticeship.

(E) IRREMOVABLE POOR.

(F) ORDER OF REMOVAL.

- (a) Appeal against.
- (b) Evidence.
- (c) Suspension of.
- (d) Notice of Chargeability.

(A) GUARDIANS.

A judgment creditor of a board of guardians, in respect of a debt incurred prior to the year for which a rate was raised, had been restrained by order of one of the Vice Chancellors from levying upon money in the hands of the treasurer, or upon goods purchased since the commencement of the year for which the rate was raised, but, on appeal, the Lords Justices extended the injunction against the levying execution against the goods, chattels, lands, hereditaments, monies and property of the board, as prayed by a bill and information filed against the judgment creditor and sheriff. *The Attorney General v. Wilkinson*, 29 Law J. Rep. (n.s.) Chanc. 41; 28 Ibid. 392.

(B) AUDIT AND AUDITOR.

The right of a party aggrieved to apply under section 35. of the 7 & 8 Vict. c. 101. for a writ of *certiorari* to remove the allowance or disallowance by a poor law auditor of an attorney's bill is, by the operation of section 39, confined to cases in which the bill has been taxed by the clerk of the peace of the county before it is presented to the auditor, and if not so taxed, the decision of the auditor on the unreasonableness, as well as the legality, of the charges in the bill, cannot be questioned. *R. v. the Overseers of the Parish of Nampton, Warwickshire*, 25 Law J. Rep. (n.s.) Q.B. 296; a.c. nom. *R. v. Hunt*, 6 E. & B. 408.

Section 3. of 19 & 20 Vict. c. 112. has not repealed the proviso in the 197th section of the 18 & 19 Vict. c. 120. (Metropolis Local Management Act), which excepts from the operation of that act accounts subject to the audit of an auditor under the 4 & 5 Will. 4. c. 76. By a local act a select vestry was appointed, and these vestrymen elected annually forty of their own body to be directors of the poor; the vestrymen had the appointment and removal of all the parish officers, amongst them of visitors for inquiring into the circumstances of the poor, granting casual relief, &c. under the special directions of the vestrymen and directors; the vestrymen had also the making, assessing and levying of the poor-rates. The funds when collected were vested in the directors, and they had the distribution of them, and with the above exceptions, exercised all the powers of overseers of the poor; and the subordinate officers, including the visitors, were under the direct controul of the directors in all matters connected with the poor:—Held, that the directors were "guardians" within the definition of the 109th section of the 4 & 5 Will. 4. c. 76, and that an order of the Poor Law Board to appoint an auditor under section 46. was properly addressed to them alone. *R. v. Stockton and Directors of the Poor of St. Pancras*, 27 Law J. Rep. (n.s.) M.C. 281; E. B. & E. 583.

At an audit of the accounts of a poor-law union the auditor disallowed a sum of money charged by the guardians for certain expenses and surcharged three of the guardians who had authorized payment of the money. Those guardians refused to pay, but did not appeal against the disallowance. The auditor summoned them before a Justice, and proved so much as is required by section 9. of the 11 & 12 Vict. c. 91. The Justice dismissed the summons; and thereupon this Court made a rule absolute to

compel him to issue a distress warrant against the goods of the three guardians. *R. v. Finnis*, 28 Law J. Rep. (n.s.) M.C. 201.

The Poor Law Board have power, under section 46. of the statute 4 & 5 Will. 4. c. 76. to direct the guardians or directors of a parish regulated by a local act, which contains more than 20,000 inhabitants, and which had adopted the provisions of the statute 1 & 2 Will. 4. c. 60, and had appointed auditors under it, to appoint an auditor of the poor-rate accounts, although section 65. of the statute 7 & 8 Vict. c. 101. may prevent the Poor Law Board combining such parish with other parishes to form an audit district. *R. v. the Guardians and Directors of the Poor of the Parish of St. James, Westminster* (Ex. Ch.), 29 Law J. Rep. (n.s.) M.C. 4: affirming the decision below, 28 Law J. Rep. (n.s.) M.C. 172.

Three unions, C, H and L, of many townships each, were formed under Gilbert's Act, in different years, for maintenance of the poor. H and L, having no workhouse, by arrangement with C, kept their poor at the C workhouse, and each township of the H and L unions paid its proportion of the common charges of the C workhouse to the treasurer of the union. They also paid him part of the original charge of building and preparing the workhouse:—Held, that the townships of the H and L unions could not legally act as if incorporated into the union of C, and that the poor-law auditor was right in disallowing payments made by one of the townships of the H union to the treasurer of the C union, on the above-mentioned accounts. *The Queen v. Shaw*, 29 Law J. Rep. (n.s.) M.C. 211.

When a relieving officer is surcharged by the auditor of an audit district, and application is made to Justices to issue a distress warrant, if the statutable proof of the surcharge be complete, the Justices have no power to inquire into the grounds of the surcharge, but must issue the warrant. If they refuse to do so, the Court will compel them by a rule or a mandamus. *The Queen v. Linford*, 950.

(C) RELIEF.

An action cannot be maintained by the guardians of the poor of a union, against the guardians of another union, in respect of relief afforded to the non-resident poor of the latter union, unless the accounts of such relief have been transmitted quarterly, in conformity with the orders of the Poor-Law Board, notwithstanding that the relief was duly ordered and never countermanded. *The Guardians of the Poor of the Wycombe Union v. the Guardians of the Poor of the Eton Union*, 26 Law J. Rep. (n.s.) M.C. 97.

Quære—whether an action could be maintained against the guardians, even if the accounts had been duly transmitted. *Ibid*.

(D) SETTLEMENT.

(a) By Birth and Parentage.

(1) Bastards.

The provision in the 71st section of the 4 & 5 Will. 4. c. 76, that a bastard shall have and follow its mother's settlement until it attains sixteen, or acquires a settlement in its own right, is not limited to the lifetime of the mother; and therefore, where

the mother of a bastard dies before it has attained sixteen, the bastard may be removed to its mother's last place of settlement. *The Queen v. Sutton-under-Brasles*, 25 Law J. Rep. (n.s.) M.C. 57; a. c. nom. *The Queen v. Sutton-le-Brâile*, 5 E. & B. 814.

(2) Children under Sixteen.

A widow, having three children, went with them to live in the respondent parish, in the house of a man with whom she cohabited. Being unable to maintain her children, they were, at the instance of their uncle, and with their mother's consent, taken to the union workhouse, which was in the respondent parish, under an order of the relieving officer, as chargeable to that parish. The immediate object of taking them to the workhouse was to relieve them, and it was beneficial for them to be removed there. The ultimate object of their admission was their removal to their place of settlement. The children remained in the workhouse from November until February, when an order was obtained for removing them, without their mother, to the appellant parish. Two of the children were above the age of seven and under sixteen years. The third was under seven years:—Held, by Lord Campbell, C.J., Wightman, J. and Orompton, J., that the order was good as to the two elder children, section 3. of the 9 & 10 Vict. c. 66. not being complied with, as the children were not resident with the mother, and as she might lawfully be removed; and was good as to the youngest child, as it had been separated from its mother, without fraud, before the order was made:—Held, by Coleridge, J., that the order was good as to the two elder children, on the ground that the mother might have been removed, but not upon the ground that they were not, in point of law, resident with her; and that the order was bad as to the youngest child, who could not be removed from its mother, even with her consent. *The Queen v. the Inhabitants of Combe*, 25 Law J. Rep. (n.s.) M.C. 59; 5 E. & B. 892.

(3) Emancipation.

Service as a police-constable does not operate to cause the emancipation of an infant. Therefore, where A, being about seventeen years old, in the month of May 1844, engaged himself as a police-constable, and served until the 16th of May 1846, when he married, and during the time of such service his father gained a settlement in H, it was held, that he was not emancipated at the time of such settlement being gained by his father, and therefore that he could not be removed to S, where his father had been settled before he gained the settlement in H. *The Queen v. the Inhabitants of Selbourne*, 28 Law J. Rep. (n.s.) M.C. 11.

(4) Evidence of.

Proof of the marriage of the parents of B in a certain parish on the 26th of July 1779, of the baptism of B. on the 9th of June 1780, of the baptism of another child in 1782, and of another in 1790 in the same parish; and that the first recollection of this last child was of living with her parents in the parish, that B was then living with them, and that B was about ten years older than herself, is sufficient to support a birth settlement of B in the parish. *The Queen v. the Inhabitants of Crediton*

27 Law J. Rep. (N.S.) M.C. 265; E. B. & E. 231.

The validity of an order adjudicating, under the 16 & 17 Vict. c. 97. s. 97, the settlement of a pauper in confinement in an asylum as a lunatic, is not affected by the recital of an insufficient order of admission, as the jurisdiction of the Justices to adjudicate attaches on the lunatic being *de facto* in confinement, and the order for admission must be assumed to be in fact good until the contrary be shewn. *Ibid.*

An order of two Justices of a borough recited that, under an order of two Justices of the borough, made under the 16 & 17 Vict. c. 97, E T then resident in the parish of St. D within the said borough, being neither a pauper nor wandering, but a person not under proper care and control, and a proper person to be taken charge of, was, on &c., duly sent to the county lunatic asylum, and has been confined therein, as such pauper lunatic, ever since, at the charge of the said parish; and then proceeded to adjudicate the settlement of E T to be in the parish of C,—Held, good. *Ibid.*

An order for the maintenance of a lunatic pauper in confinement, addressed to the guardians of a union and to their clerk, and ordering the clerk to pay, is substantially an order on the guardians and in compliance with the 16 & 17 Vict. c. 97. s. 97. *Ibid.*

(b) *By Payment of Rates and Parochial Taxes.*

Where the landlord of a tenement under 30l. yearly value, occupied by R, was assessed to the poor-rate under a local act, rendering it obligatory on the parish officers to rate the landlord in such cases, but R having claimed to be rated under the Reform Act (2 Will. 4. c. 45. s. 30), his name was accordingly inserted, together with that of his landlord, in the rate, and he paid the rate,—Held, that R. gained a settlement by rating. *The Queen v. the Inhabitants of St. Giles's-in-the-Fields*, 26 Law J. Rep. (N.S.) M.C. 55; 7 E. & B. 205.

In order to gain a settlement under the 6 Geo. 4. c. 57. s. 2. by payment of parochial rates for a tenement not being the pauper's own property, there must be an occupation of the tenement for one whole year. A forty days' residence merely is not sufficient. *The Queen v. the Churchwardens and Overseers of the Parish of Westbury-upon-Trym*, 26 Law J. Rep. (N.S.) M.C. 76; 7 E. & B. 444.

In order to a person's gaining a settlement, under the 3 W. & M. c. 11. s. 6, by being charged with and paying parochial taxes, although the person's name need not appear on the rate, it is still necessary that there should be knowledge on the part of the parish officers that he is the party virtually charged and paying, notwithstanding the 35 Geo. 3. c. 101. ss. 1. and 3. *The Queen v. the Inhabitants of St. Anne, Westminster*, 29 Law J. Rep. (N.S.) M.C. 78.

A man and his wife had for some years lived apart, the wife living in the parish of M. In November 1841 she became possessed of a house by devise in that parish, and occupied and was rated for it in her own married name; a few months after the man came and cohabited with his wife for about four months, and a rate which had been made before he came into the parish was paid by the wife while he was living with her. The man then left, and never

returned, but was supported by his wife, who continued to be rated in her own name, and paid the rates, up to the time of his becoming lunatic and chargeable to another parish. The parish officers of M. had never dealt with or recognised the man as a ratepayer:—Held, on a case in which the Court were to draw inferences of fact, that the man had not obtained a settlement in M, under the 3 W. & M. c. 11. s. 6, as there was no knowledge of him shewn on the part of the parish officers. *Ibid.*

In September 1857 A entered into the occupation of a house in the township of E, and occupied the house until November 1858. In April 1858 one poor-rate was made for the whole of the ensuing year, in which A was assessed at 2l. 4s., but he paid only 14s., being in proportion to the period of his occupation after the rate was made: the house remained unoccupied until after the making of the next poor-rate. The township of E is wholly within the borough of L; during A's occupation a watch-rate was ordered by the town council to be made for the borough under the 5 & 6 Will. 4. c. 76. and 7 Will. 4. & 1 Vict. c. 81, the amount to be levied by a pound-rate; and it was ordered that a certain quota should be assessed and levied on the whole of the township of E, except such parts as were more than 200 yards from any street or continuous line of houses which was regularly watched in the borough under the provisions of the acts. The rate was made accordingly by the overseers of E upon the rateable parts of the parish, and collected by them, and in it A was properly assessed, and paid the amount:—Held, first, that A did not acquire a settlement, under the 3 W. & M. c. 11. s. 6, by reason of the above payment of the poor-rate, not having paid that with which he was charged; secondly, that the non-payment of the poor-rate did not prevent him from acquiring a settlement by being charged and paying any other distinct levy or tax of the township; and, thirdly, by *Cockburn, C.J. (Crompton, J. having doubt)*, that the watch-rate was a "public tax or levy of the township" of E, within the above section; and that A had therefore acquired a settlement in E. *The Queen v. the Overseers of Eberton*, 29 Law J. Rep. (N.S.) M.C. 165.

(c) *By Estate.*

On appeal against an order for the removal of the wife of J W to the place of settlement of the husband acquired before marriage, the following facts were stated for the opinion of the Court, under the 12 & 13 Vict. c. 45. s. 11. The woman being tenant of a cottage in the township of H, at the rent of 1s. per week, and residing in it, married J W; and from and after the marriage the husband resided with his wife, and occupied the tenement for seven years, during which he paid the weekly rent:—Held, that the husband was shewn to have acquired a settlement by estate in H; for that, the wife's tenancy from week to week having become vested in the husband by the marriage, no determination of that tenancy during the seven years was shewn, the payment of the rent by the husband being equally consistent with the continuance of the old tenancy as with the creation of a new one in him; and that the residence for forty days during the continuance of the estate acquired by marriage was sufficient, notwithstanding that the tenancy was not for forty days certain. *The Queen*

v. the Inhabitants of the Township of Thornton, 29 Law J. Rep. (N.S.) M.C. 162.

(d) *By Apprenticeship.*

The allowance of an indenture of apprenticeship appeared on the face of it to be made by two Justices of the county of Middlesex, and concluded "Given under our hands and seals at the Police Office, Hatton Garden, the day and year first above written." The statute 10 Geo. 4. c. 44. s. 4, constituting the Metropolitan Police District, described the Holborn division as in the county of Middlesex, and including the Liberty of Saffron Hill, Hatton Garden, and Ely Rents:—Held, that it sufficiently appeared that the allowance was made within the jurisdiction of the Justices. *Regina v. the Guardians of the Poor of the Holborn Union*, 25 Law J. Rep. (N.S.) M.C. 110; 6 E. & B. 715.

After due but fruitless search for an indenture, proof that a deceased person more than sixty years ago served A in the apparent position of an apprentice, raises the presumption that he was bound apprentice by indenture, and is sufficient to sustain a settlement by apprenticeship. *The Queen v. the Inhabitants of Fordingbridge*, 27 Law J. Rep. (N.S.) M.C. 290; E. B. & E. 678.

The statement of a deceased person respecting his indenture of apprenticeship is not admissible to prove that the deed ever existed. *Ibid.*

Hearsay evidence is sometimes admissible to satisfy the mind of the Court upon a preliminary inquiry, although the facts proved would not be evidence in the cause. *The Queen v. the Inhabitants of Braintree*, 28 Law J. Rep. (N.S.) M.C. 1; 1 E. & E. 51.

Therefore, whereat the hearing of an appeal against the removal of a pauper it was necessary to prove an apprenticeship, and in order to shew that a proper and reasonable search had been made for the indenture, it was proposed to ask witnesses what inquiries they had made of persons who were supposed to be likely to have it in their possession, and also what answers were given to these inquiries, and the Sessions refused to allow such evidence to be given, this Court held, that such questions and answers were receivable to prove that the search made was reasonable. *Ibid.*

Upon a question whether G W had acquired a settlement by service as a parish apprentice to P, it was proved that in 1824 he and his father were taken by the overseers before the Justices; that P and the overseers were there; that papers were drawn up; that the Justices asked the father whether he had any objection to his son being bound apprentice to P; that G W went the next day to P, and that he remained with him two or three years. It also appeared from the register-book that one G P W had, in 1824, been bound apprentice to P. The Sessions from these facts inferred that G W had been duly bound a parish apprentice to P:—Held, that they were right in drawing such an inference. *The Queen v. the Inhabitants of Broadthampton*, 28 Law J. Rep. (N.S.) M.C. 18; 1 E. & E. 154.

An articulated clerk to an attorney may, by being bound and inhabiting in a parish, gain a settlement therein as an apprentice, under 3 W. & M. c. 11. s. 8. *The Parish of Clapham v. the Parish of St. Pancras*, 29 Law J. Rep. (N.S.) M.C. 141.

(E) IRREMOVABLE POOR.

A pauper having acquired the status of irremovability from the parish of B, by reason of five years' residence, met with an accident in parish C, in September 1847, when passing through C on his way to B, which rendered his removal to the union workhouse necessary. The cost of his maintenance was charged to B until December 1849, and afterwards and until the 22nd of September 1854, to the common fund of the union, and between that date and the 27th of October 1854, to C, on which latter day an order for his removal to W, the place of his settlement, was obtained by C. Since the accident, the pauper had at different times been employed in picking oakum in the workhouse, and at the date of the order of removal he was permanently disabled, from rheumatism aggravated by the accident:—Held, that at the date of the order the pauper was to be considered as inhabiting in C, and not merely as casual poor, and was therefore removable to W, the place of his settlement, notwithstanding the status of irremovability acquired in B. *Regina v. the Churchwardens and Overseers of the Parish of Cuckfield*, 25 Law J. Rep. (N.S.) M.C. 4; 5 E. & B. 523.

A militiaman is a "soldier" within the meaning of the proviso in section 1. of 9 & 10 Vict. c. 66; and his absence out of a parish for the purpose of training as a militiaman is no break in his residence, so as to deprive him of his status of irremovability by reason of five years' residence. *The Overseers of the Poor of the Township of Horton v. the Overseers of the Poor of the Township of Leeds*, 25 Law J. Rep. (N.S.) M.C. 38; 5 E. & B. 595.

Pregnancy is not of itself "sickness" within the meaning of the 9 & 10 Vict. c. 66. s. 4. A single woman, therefore, who has become chargeable by reason of pregnancy merely, is removable. *The Queen v. the Inhabitants of Huddersfield*, 26 Law J. Rep. (N.S.) M.C. 169; 7 E. & B. 794.

Imprisonment in England under a sentence of penal servitude, is an imprisonment within the proviso in the 9 & 10 Vict. c. 66. s. 1, and is not a break in a five years' residence. *The Queen v. the Inhabitants of Potterhanworth*, 28 Law J. Rep. (N.S.) M.C. 56; 1 E. & E. 262.

Where, therefore, a man, having resided with his wife and children for more than five years in a parish, is sentenced to six years' penal servitude, the wife and children, continuing to reside in the same parish, are irremovable whilst he remains in prison in England in consequence of the sentence. *Ibid.*

A residence of five years in an extra-parochial place, part of which residence was before the coming into operation of the 20 Vict. c. 19, does not confer the status of irremovability; that act having no retrospective operation. *The Queen v. the Inhabitants of St. Sepulchre*, 28 Law J. Rep. (N.S.) M.C. 187.

Under the 9 & 10 Vict. c. 66. s. 1, and the 11 & 12 Vict. c. 111. s. 1, a widow, whose husband was irremovable at the time of his death, does not continue irremovable if she has not herself resided the five years. *The Queen v. the Inhabitants of Cudham*, 28 Law J. Rep. (N.S.) M.C. 105; 1 E. & E. 409.

A man, having resided more than five years in a parish, married a woman who had not before been resident in the parish; after the marriage they lived together in the same parish for about two years, when

the husband died, and the widow and two children of the marriage resided a year longer in the parish, and on their becoming chargeable, an order was made for their removal to the man's place of settlement:—Held, that the order was right. *Ibid.*

In January 1844 a child was born in the township of E, the father having resided there more than five years; the family continued to reside there, and, in July 1847, the mother becoming chargeable as a lunatic, an order was made adjudging her settlement to be in S. She remained in an asylum at the charge of S for some years, and was afterwards removed to S, where she was maintained by that parish as a lunatic till her death. The child and father continued to reside in E, where he died in December 1857, and the child remaining there became chargeable in February 1858. In October 1858 the mother died, and in December 1858 an order was made for the removal of the child:—Held, that the child was irremovable. *The Queen v. the Inhabitants of Elvet*, 29 Law J. Rep. (n.s.) M.C. 17.

Statute 11 & 12 Vict. c. 110, s. 8. (which enacts that the costs incurred for paupers rendered irremovable by statute 9 & 10 Vict. c. 66. shall, when the parish is comprised in an union formed under stat. 4 & 5 Will. 4. c. 76, be charged to the common fund of such union) is applicable to the case of a pauper whose settlement is not known, it not being known that he has no settlement, and who has resided without interruption for five years in a parish in union, so that, if his settlement were found to be elsewhere, he would still not be removable. *Re Bedminster Union*, 8 E. & B. 573.

(F) ORDER OF REMOVAL.

(a) Appeal against.

Appeals against orders of adjudication of settlement and maintenance of criminal pauper lunatics, under statute 3 & 4 Vict. c. 54. ss. 2, 5, are regulated, as to notice and time for appealing, by stat. 11 & 12 Vict. c. 31. s. 9. Where such an order was served on guardians of a union eighteen days before the next Sessions, and the guardians gave notice of appeal after that Sessions, nineteen days from the service,—Held, that the appeal was triable at the Sessions next following such notice of appeal. *Regina v. the Justices of Glamorganshire*, 8 E. & B. 694.

(b) Evidence.

On a case from Sessions, upon appeal against the removal of R from T to C in 1856, it was stated, that in 1837 a woman named S W, "and Ann, aged six weeks, her daughter," were removed by order from P to C, and that in fact C was then the place of settlement of both S W and Ann: that this order was not appealed against: and that Ann was born in P, and was the same person as R: that C, the appellant parish, on the trial of the appeal, offered proof of the illegitimacy of R, and that the Sessions held that C was precluded, by the order of 1837, from giving such proof, and affirmed the order of 1856. This Court quashed the order of Sessions, holding that C was not estopped from giving proof of the illegitimacy, inasmuch as, assuming the order of 1837 to assert the fact of legitimacy, that fact was immaterial to the removal of S W and Ann, and therefore was not admitted by not appealing against such removal. *Regina v. Caerwys*, 8 E. & B. 720.

(c) Suspension of.

The suspension of an order of removal on account of the sickness or infirmity of the pauper, must be made at the time the question of removal is being inquired into by the Justices. *The Queen v. the Inhabitants of Llanellchlid*, 29 Law J. Rep. (n.s.) M.C. 102.

Therefore, where an order of removal was made on the 28th of September 1849, and the Justices who made it, subsequently, on the 26th of October 1849, suspended the execution of such order, it was held (*Wightman, J. dissentiente*), that they had no power to do so, and that the order of suspension was bad. *Ibid.*

(d) Notice of Chargeability.

Notices of chargeability, &c., when sent by post, are "sent" within the meaning of the 11 & 12 Vict. c. 31. s. 9, on the day they are delivered. Therefore, where notice of chargeability, &c. was posted by the removing parish on the 28th of September, and received by the officers of the appellant parish on the 29th of September, and an application for copies of the depositions was posted by them on the 19th of October and received on the 20th of October,—Held, that the copies were applied for within twenty-one days after the notice had been sent. *R. v. the Recorder of Richmond*, 27 Law J. Rep. (n.s.) M.C. 197; E. B. & E. 253.

POST-OFFICE.

Upon forfeiture of a bond to the Crown for conveyance of the mails by a railway company, a plea that the company was prevented from performing their obligation by the neglect or default of a servant of the post-office would be a good defence at law. And accordingly, under the 13th section of the act, 1 & 2 Vict. c. 98, a railway company was ordered to execute a bond without any proviso protecting them against such an event. *The Attorney General v. the London and North-Western Rail. Co.*, Johns. 28.

Form of bond to be given by railway companies under that section. *Ibid.*

POWER.

- (A) CONSTRUCTION OF POWERS IN GENERAL.
- (B) POWER OF APPOINTMENT.
 - (a) Construction of.
 - (b) Exercise of.
 - (c) Revocation and Extinguishment of.
- (C) POWER OF SALE.

(A) CONSTRUCTION OF POWERS IN GENERAL.

A will executed in pursuance of a power reserved in two deeds is rendered inoperative by a re-settlement of the estates in pursuance of powers reserved in the same deeds, although the re-settlement was made to rectify mistakes and omissions in the original settlement and the second deed, and although with those exceptions and the omission purposely of

limitations rendered unnecessary by the lapse of time, the limitations were the same as were declared by the original settlement. *Walker v. Armstrong*, 25 Law J. Rep. (n.s.) Chanc. 402, 788; 21 Beav. 284.

Evidence to prove the intention or circumstances with or under which re-settlements were executed is inadmissible after the death of the settlor (one of the parties interested), and the execution of the uses under the last deed. *Ibid.*

The execution of a general power over real estates in settlement not only destroys the existing powers, but also all instruments executed under them. *Ibid.*

A testator empowered and directed the trustees of his real estate to raise by mortgage thereof any sum not exceeding 20,000*l.*, and to apply the same in paying such of the creditors of M as they should think fit. The trustees raised 6,000*l.*; and in their answer to a bill by a judgment creditor of M to enforce his lien, they stated that they had raised this sum, but had not further exercised their power, and refused to do so, except under direction of the Court. They then filed a bill to have the trusts carried into execution by the Court; and to this bill they made the judgment creditor a party, and stated in it that they intended to raise the whole 20,000*l.*:—Held, that the judgment creditor had an equity to sue to have the fund raised secured, if not to have the whole 20,000*l.* raised and distributed; and that the trustees were bound, if not by the will, by their answer, and the statement in their bill, to raise the whole 20,000*l.* Whether they had not given up their power of selection among the creditors—*quære*. *Joel v. Mills*, 3 Kay & J. 458.

A power to raise money by sale or mortgage held to authorize a mortgage with a power of sale. *Bridges v. Longman*, 24 Beav. 27.

Property was settled by A, with power for him to revoke the settlement by deed. A, by a deed which did not profess to execute the power, conveyed the property to his nephews beneficially:—Held, that the deed operated as a revocation. *Cowlishaw v. Hardy*, 25 Beav. 169.

A testator devised an estate upon the same trusts, &c. as his wife, by her will, should declare "with respect to the disposition of her residuary personal estate." The widow bequeathed the estate to A, and her residue to B, C and D:—Held, that the widow had an absolute, and not a restricted power; and that the estate did not pass with the widow's residue, but belonged to A. *Bristow v. Skirrow*, 27 Beav. 585.

(B) POWER OF APPOINTMENT.

(a) Construction of.

A testator gave a life interest in his residuary real and personal estate to his wife, and after her decease he directed the fund to be distributed to his relations in such shares as his wife should appoint:—Held, that the next-of-kin of the testator living at the death of the wife were the parties entitled, and that a distribution among them by the wife in unequal shares was a valid execution of the power. *Finch v. Hollingsworth*, 25 Law J. Rep. (n.s.) Chanc. 56; 21 Beav. 112.

A tenant for life, with a power of appointment

among his children, appointed to two, and then joined with them in a mortgage, the money being expressed to be advanced to all three:—Held, that this was no fraud on the power of appointment. *Cockcroft v. Sutcliffe*, 25 Law J. Rep. (n.s.) Chanc. 313.

Trustees raising a charge of fraud, and taking no steps to satisfy themselves when they might easily do so, will not be allowed their costs of the discussion in court if upon the evidence the Court considers there was no reasonable ground of suspicion. *Ibid.*

Under a deed of appointment the trustees were directed to pay the interest of the trust funds to the husband of the appointor for life; and after his death, to divide the property equally between all the children of A B, born or to be born, who should be living at the death of her husband, and the children of those who might then be dead, such children to stand in the place of their parents respectively, and to take such share as their parents, if living, would have been entitled to. A B left five children, one of whom died, leaving six children; and four of these six died before the husband of the settlor. The Court held, that the six children, or their representatives, were entitled equally to one-fifth of the trust funds. *Harcourt v. Harcourt*, 26 Law J. Rep. (n.s.) Chanc. 536.

A testator directed his trustee "to divide an estate among his, the testator's, first cousins, as he, in his discretion, might think proper, by dividing the whole equally among them, or between two or more, or giving the whole to any one for such estates and interests, and subject to such conditions and limitations, as he should think proper":—Held, that the trustee had a power of selection only, and that if he appointed to more than one, he must do so equally among them. *Ward v. Tyrrell*, 27 Law J. Rep. (n.s.) Chanc. 749; 25 Beav. 563.

A father, who had a power to appoint to his children and their issue born in his life, appointed 5,000*l.* to his daughter O, who, on the next day, settled it on herself, her husband and her children generally. Afterwards, by a deed, stating the appointment of 5,000*l.* to O for her separate use, with power to appoint it, the father appointed another fund to O "and her children," upon the trusts and subject to the same provisions as are hereinbefore declared of and concerning the sum of 5,000*l.* hereinbefore appointed unto and for the benefit of O, or as near thereto as circumstances will admit:—Held, that O took the second fund for her separate use, with power to appoint it, and that the children took nothing. *Hanbury v. Tyrrell*, 21 Beav. 322.

Under a power to appoint a sum of money to a daughter, an appointment to her husband is invalid—*semble*. *Ibid.*

Devise to the use of such of the children of A B and their heirs, "for such estates" and in such manner and form as A B should appoint:—Held, upon the context, to authorize an appointment to a grandchild. *Fowler v. Cohn*, 21 Beav. 360.

A power to appoint an estate authorizes an appointment to trustees to sell and divide the produce between the objects. *Ibid.*

A lady had a general power of appointing a trust fund by deed or will; and in default half was limited to A, and the other to B. By her will, she appointed the fund to her executor, and made it chargeable

with her debts and some legacies; and she gave half the residue, composed of the appointed and her own property, to A. A predeceased the testatrix, and the bequest to him lapsed:—Held, that the moiety of the fund, subject to the power thus appointed in favour of A, passed to the appointor's next-of-kin as part of her estate undisposed of, and not to the executors of A, as in default of appointment. *Chamberlain v. Hutchinson*, 22 Beav. 444.

A married woman died in 1849 possessed of savings of her separate estate amounting to 697*l.*, and having a power of appointment over 21,000*l.* consols, subject to her husband's life interest. By her will she directed "first," that all her debts should be paid, and she then specifically bequeathed all her ready money. Her debts were paid out of the 697*l.*:—Held, on the death of her husband in 1855, that the specific legatee was entitled to be repaid the 697*l.* out of the fund over which she had a power of appointment. *Laing v. Cowan*, 24 Beav. 112.

A testator gave his wife a power of appointment in favour of "his children, including grandchildren and more remote issue, such issue coming into being in the lifetime of his wife":—Held, that, under an appointment to grandchildren, a grandchild born after the decease of the testator's widow might take. *Thomas v. Lloyd*, 25 Beav. 620.

A power to appoint the "interest" of a fund held to authorize the appointment of the capital, notwithstanding subsequent powers over and limitations of the said "trust monies" and the "interest." *Philips v. Bryden*, 26 Beav. 77.

By the settlement of A B, and in the events which happened, two-thirds of the fund were limited to certain persons and three-fifths to the children of C D "living at the time of the decease of C D," and in default to C D's next-of-kin. Power was given to A B to revoke these trusts, and to appoint the trust fund among the persons who, under the trusts aforesaid, would have become entitled to the funds "in the proportion and manner aforesaid, or in such manner and form in all respects as A B should think fit." A B appointed to a child of C D, who survived A B, but died in the life of C D:—Held, that such child was not an object of the power. *Denning v. Ellerton*, 26 Beav. 231.

A deed of appointment containing a power of revocation and new appointment must be acted upon, although there is evidence of a subsequent appointment having been made, the contents of which it is impossible to ascertain. *Rawlins v. Rickards*, 28 Beav. 370.

[*Evans v. Sanders*, *Evans v. Evans*, 7 Law J. Dig. 556; 6 De Gex, M. & G. 654.]

(b) Exercise of.

A widow, under a power of appointing to her daughters real and personal property, in the will conferring which power was contained a direction that the fortune of each daughter should go to her children after her decease, in such proportions as the daughter should appoint, and in default among her children equally, gave the property to the daughters equally as each should appoint, and in default to them absolutely. The daughters settled their respective shares upon themselves and their respective husbands for life, with remainder to their children as they should appoint, and in default equally

among the children, with cross-remainders between the daughters in the event of either having no child who should attain a vested interest:—Held, varying a decree of the Master of the Rolls, that the widow had power to determine the nature of the interests as well as the proportion of the property which each daughter should take, and that the deed of appointment was, therefore, valid; and also that the settlement made by the daughters was valid, so far as it determined the interests of the daughters and their children. *Jebb v. Tugwell*, 25 Law J. Rep. (N.S.) Chanc. 109; 7 De Gex, M. & G. 663; 24 Law J. Rep. (N.S.) Chanc. 433; 20 Beav. 84.

But, *quære*, whether the life interests to the husbands were good? *Ibid.*

A testator, by his will, gave real estates to his son T D for life, remainder to trustees for a term, remainder to the first and other sons of T D in tail, and declared the trusts of the term to be to raise such sum not exceeding 8,000*l.* as T D should direct or appoint for the younger children of T D, to be paid in such proportions as T D should appoint, and in default of appointment equally. Upon T D's marriage in 1827, he appointed that the trustees should raise 6,000*l.* for the younger children of that marriage, reserving his power of apportioning, and directed the trustees, in case he should survive his then intended wife, and should die without being married again, or if so married should not have issue of that marriage, to raise in addition to the said portions thereinbefore provided 2,000*l.*, in case there should be two or more younger children. There were six younger children of the marriage. Upon the marriage of one of his daughters, T D, after reciting the will, appointed 2,000*l.*, part of the sum of 8,000*l.*, by the will made raiseable under the trusts of the term, in favour of this daughter. T D died without having made any further appointment, and leaving his wife and six younger children him surviving:—Held, that the whole sum of 8,000*l.* was to be raised by the trustees, and that the daughter in whose favour the 2,000*l.* was appointed was entitled also to share in the unappointed 6,000*l.* *Walmesley v. Vaughan*, 26 Law J. Rep. (N.S.) Chanc. 503; 1 De Gex & J. 114; 3 Sm. & G. 353.

R L, under his marriage settlement, appointed to W L, his son, more of the settled property than he would have been entitled to in default of appointment. R L, by his will, gave to his son W L the proceeds of all the policies of assurance on his life, and also all other property which he might have at the time of his death, and proceeded as follows:—"He will have to bring into hotchpot that portion of the fund settled on the marriage of his dear mother, which has already been received by him, and then, as I make no further appointment under the power for that purpose, the whole settled fund will be divided equally between him and my little grandson Robert":—Held, that this was no appointment to the grandson, and that the son was not bound to elect whether he would take under the will. *Langslow v. Langslow*, 25 Law J. Rep. (N.S.) Chanc. 610; 21 Beav. 552.

The execution of a power in favour of a stranger, confirmed by the only object of the power, was held to be valid; and though the deed contained a power of revocation, it was not revoked by a subsequent appointment in favour of the object of the power, it

being proved that the second deed was executed for a specific purpose only, and by mistake included the whole property comprised within the power. *Wright v. Goff*, 25 Law J. Rep. (n.s.) Chanc. 803; 22 Beav. 207.

A testatrix, after giving certain legacies to charities, and to persons, some of whom were of her blood and kindred, concluded her will in the following terms:—"I appoint as my executors A, B and C, requesting these my executors will see my last will and testament be fully and duly carried into effect." The testatrix, at the respective times of making her will and of her death, had, under her father's will, which bore date in 1842, a clear general power of appointment by will over a portion of certain funds therein specified, and over the remainder of such funds a power of appointment limited to persons of her blood and kindred; and either or both of the said portions were, in default of such appointment, to be in trust for such person or persons as at her decease would be entitled according to the Statute of Distributions, if she survived the testator, and died intestate and unmarried. The personal estate of the testatrix at her death, exclusive of the funds over which she had the powers of appointment above mentioned, was sufficient to meet only a small portion of the aggregate amount of the legacies given by her will:—Held, that the will of the testatrix operated as an execution of the general power of appointment given to her by her father's will, but not as an execution of the power of appointment limited to her in favour of persons of her blood and kindred. *Hawthorn v. Shelden*, 25 Law J. Rep. (n.s.) Chanc. 838; 3 Sm. & G. 293.

A feme covert had a power under her settlement to appoint by will certain trust funds. By her will, she bequeathed as follows: "I give to T S 2,600*l*." She had no other property, and the sum named was very near the ascertained amount of the trust fund:—Held, that this was a valid execution of the power. *Shelford v. Acland*, 26 Law J. Rep. (n.s.) Chanc. 141; 23 Beav. 10.

Donees may execute a power *bond fide*, though it tends partially to defeat a settlement made by the donor. *Beere v. Hoffmister*, 26 Law J. Rep. (n.s.) Chanc. 177; 23 Beav. 101.

Power was given to a husband and wife jointly to appoint a fund for all and every such one or more of the children of the wife, and in default it was given to the children of the wife, to be vested interests in sons at twenty-one, and in daughters at that age or marriage, with remainder in default of children to the next-of-kin of the wife. The husband and wife jointly executed the power absolutely in favour of their only daughter, but they reserved to themselves a joint power of revocation and new appointment. The daughter was then four years old and in good health, but she died about two years afterwards, leaving her father her sole next-of-kin:—Held, that the power was well executed, and that the fund formed part of the husband's personal estate. *Ibid*.

A feme covert having a remote contingent interest and accruing income arising from a life interest in settled property, made a will disposing of the property and income she was then or might become possessed of:—Held, that the will could not operate as an execution of powers of appointment vested in her. *Evans v. Evans*, 26 Law J. Rep. (n.s.) Chanc. 193; 23 Beav. 1.

The donee of a general power of appointment amongst children, exercised the same by will by appointing to one of the objects of the power, annexing, however, to the appointment a direction that on becoming entitled under the appointment the appointee should settle the property appointed to him in a particular way, and that in the event of non-compliance with such direction, the provisions in the will in favour of the appointee should cease, as if the appointee had died in the testator's lifetime:—Held, that the will was a valid appointment under the power to the appointee, notwithstanding the direction annexed thereto by the testator. *Watt v. Creyke*, 26 Law J. Rep. (n.s.) Chanc. 211; 3 Sm. & G. 362.

By a marriage settlement leasehold premises were assigned, upon trust for the wife for life, with remainder as the husband should appoint generally, and in default of appointment, and subject thereto, if any, for the next-of-kin of the husband. The husband, by will, after certain specific and pecuniary legacies not affecting the property comprised in the settlement, gave all other his estate, property and effects, subject, as to such parts thereof as were comprised in the settlement, to the settlement and the trusts thereby declared, and which indenture he thereby ratified and confirmed in all respects, to his wife absolutely:—Held, that this operated as an execution of the power of appointment. *Hutchins v. Osborne*, 27 Law J. Rep. (n.s.) Chanc. 421; 4 Kay & J. 252: on appeal, 3 De Gex & J. 142.

A donee of a power made an appointment in favour of objects of the power, and they, in pursuance of an understanding between them, executed a declaration of trust for the benefit of themselves, and of other persons not objects of the power:—Held, that such appointments could not be supported. *Birley v. Birley*, 27 Law J. Rep. (n.s.) Chanc. 569; 25 Beav. 299.

A married woman, whose husband was domiciled in England, had power, by any writing under her hand, or by her last will, to appoint, as if she were sole and unmarried, a sum of 3,226*l*. 12*s*. 1*d*. She resided in Paris, apart from her husband, for many years before her death without there having been any legal separation or divorce. She disposed of the fund by three several papers, signed by her. They were all unattested:—Held, that as the wife of a domiciled Englishman, she could not obtain a foreign domicile, and that the papers, though valid as a will in France, were invalid in England. *In re Daly's Settlement*, 27 Law J. Rep. (n.s.) Chanc. 751; 25 Beav. 456.

Held, also, that the contemplated appointment by will deprived the documents of any force as a writing under her hand, and that there had been no valid execution of the power. *Ibid*.

By a marriage settlement power was given to the wife to appoint certain real property at any time or times during her life, by any deed or instrument in writing, with or without power of revocation, to be sealed and delivered in the presence of and attested by two or more witnesses. The wife executed the power, by will, dated before the Wills Act, and it was expressed in the attestation clause to be signed sealed, published and declared, and also sealed and delivered in the presence of, and attested by, three witnesses:—Held, that the power was well executed.

Orange v. Pickford, 27 Law J. Rep. (N.S.) Chanc. 808; 3 Drew. 463.

The will was thirty years old from the date of execution, and came from the custody of the person in whose favour it was executed:—Held, that this was sufficient evidence of the fact of due execution. *Ibid*.

A father, on his son's marriage, conveyed a certain farm to the use of himself and his wife successively for life, with remainder to the children of the son. A power was reserved to the father by deed or will to charge all or part of the hereditaments thereby settled, with any sum or sums not exceeding 500*l.*, for the portions of his younger children, and to create a term for securing the same. The father, by his will, devised the said farm to his son in fee, charged with the payment of legacies of 200*l.*, 200*l.* and 100*l.* to the testator's three daughters respectively. The will contained no reference to the settlement, and no limitation of any term, nor did the father otherwise exercise the power:—Held, that the will operated as an execution of the power of appointment, of which the father was donee under the settlement. *Davies v. Davies*, 28 Law J. Rep. (N.S.) Chanc. 102.

Where a person having a power of appointment over a fund in favour of her children, made an appointment under such circumstances as led the Court to believe that the appointor intended to derive some benefit to herself, but it was not proved that she actually derived any benefit, excepting that the fund appointed was applied partly in payment of debts of the appointee for which the appointor was a surety, the Court of Appeal (reversing a decision of the Master of the Rolls) set aside the appointment. *Humphrey v. Oliver*, 28 Law J. Rep. (N.S.) Chanc. 406.

Where there is proof that an appointor at one time intended a benefit to herself, the *onus* of proof that at the time of the appointment she had abandoned that intention lies upon those who support the appointment. *Ibid*.

A testatrix having, under her marriage settlement, a power of appointment over a trust fund in favour of her children, by her will appointed the trust fund and also bequeathed her residuary personal estate, upon trust, after the marriage of her daughter C, to assign and transfer the same equally between her two sons and C; and by a codicil, after reciting the marriage of C, she directed that the income of any sums, &c. to which C might become entitled under her will should be enjoyed by her, for her separate use, during her life, and at her death the principal should become the property of her children:—Held, that C was entitled to her share of the trust fund, for her separate use, during the life of her husband, with remainder to herself absolutely, and that no case of election arose; and a declaration having been made to this effect, the Court declined to alter it, on the ground that the absolute interest, being in remainder, was inalienable during coverture. *Woodbridge v. Woodbridge*, 28 Law J. Rep. (N.S.) Chanc. 689; Johns. 63.

A testator had three sons. After referring to a power in his marriage settlement, he said of the settled fund "the sum of 2,000*l.* was settled at her marriage upon my daughter Mary"; and then he added, "the remainder I wish to be equally divided among my sons." One of the sons died in the testa-

tor's lifetime:—Held, a good appointment; and that it was made to them as a class. *Pitroy v. the Duke of Richmond*, 28 Law J. Rep. (N.S.) Chanc. 750; 27 Beav. 186.

By a marriage settlement personal property was settled in trust for the husband for life, remainder to the wife for life, remainder upon trust after the decease of the wife for such children of the marriage and their issue who should be then living, as the husband should appoint; in default of such appointment, to such children and their issue living at the death of the husband as the wife should appoint. There were five children of the marriage, all living at the husband's death, and the wife survived her husband. The husband appointed four-fifths to four of these children, omitting any appointment of the remaining fifth. The fifth child died before the wife, leaving three children, one only of whom was born at the husband's death. The wife then appointed the remaining fifth to the only child of the deceased son, who was living at the husband's death, omitting the two children subsequently born, who were the plaintiffs in this suit:—Held, overruling *Simpson v. Paul*, that the partial execution of the primary power by the husband did not preclude the wife from exercising the secondary power in appointing the unappointed fifth; that both the appointments were valid, and that the plaintiffs could take no share in the fund. *Mapleton v. Mapleton*, 28 Law J. Rep. (N.S.) Chanc. 785; 4 Drew. 515.

A married woman, having a power of appointment in favour of any one or more of her children, appointed the whole fund to one child absolutely; and there was evidence to shew that an arrangement had been entered into, that such child should hand over one half of the fund to her father absolutely, and should give him a life interest in the other half. No notice of such arrangement was, however, given to the appointee during the life of the mother:—Held, that the execution of the appointment was in fraud of the power, and therefore void. *In re Marsden's Trust*, 28 Law J. Rep. (N.S.) Chanc. 906; 4 Drew. 594.

A power to appoint among such of the testator's children as should be living at the death of the donee of the power, in such proportions as the donee of the power should direct, does not authorize an exclusive appointment to one or more of the objects. *Re David's Trusts*, 29 Law J. Rep. (N.S.) Chanc. 116; Johns. 495.

A testatrix having a power of appointment over a fund originally invested in 3*l.* 10*s.* per cent. reduced annuities, which at the date of her will were reduced to 3*l.* 5*s.* per cent. annuities, bequeathed to two objects of the power 10*l.* sterling each, and to C E D, the other object of the power, "all the residue of her property to be found in the 3*l.* 10*s.* per cent. reduced Bank annuities, now reduced to 3*l.* 5*s.* per cent., and all other property whatsoever and wheresoever to be by the said C E D possessed and enjoyed absolutely during the term of her natural life, and to be disposed of as she should think fit at her death:—Held, first, that the power of appointment was well exercised; and, secondly, that C E D was absolutely entitled to the fund, subject to payment thereof of the two sums of 10*l.* each to the other objects of the power. *Ibid*.

The Master of the Rolls having decided that the

execution of a power of appointment by deed, containing a reference generally to all powers, could be supported in aid of the clear intention of the donee of the power, although the deed recited two invalid appointments under the authority of which this deed was professed to be executed, but one of which invalid appointments recited the original power, giving the donee power to dispose of the estate; upon appeal, the Lords Justices affirmed the decision. *Carver v. Richards*, 29 Law J. Rep. (N.S.) Chanc. 169, 357; 27 Beav. 488; 1 De Gex, F. & J. 548.

A deed executed by two persons, in exercise of a joint power of appointment which required their execution to be attested by two witnesses, was attested in the following form: "Signed, sealed and delivered, in the presence of us, G B and E C." The *prima facie* presumption was, that each witness attested the execution by both donees of the power. *Re Ricketts's Trusts*, 29 Law J. Rep. (N.S.) Chanc. 712; 1 Jo. & H. 70.

A testator having power to appoint real estate amongst specified objects, devised and bequeathed all his real and personal estate, whereof he had power to dispose, to trustees, upon trust for sale, and with power to give receipts, and upon trust, out of the proceeds, to pay his debts and funeral and testamentary expenses, and, subject thereto, upon certain trusts for the objects of the power:—Held, first, that there was upon the will sufficient indication of an intention to execute the power; and, secondly, that the attempt to charge the proceeds with the testator's debts did not invalidate the execution. *Cox v. Foster*, 29 Law J. Rep. (N.S.) Chanc. 886; 1 Jo. & H. 80.

Under a marriage settlement, the husband and wife had a power of appointing a fund among their children, and in default of appointment, or so far as it did not extend, the fund was to go to the children equally. There were three children of the marriage. An appointment of one-third of the fund was made in favour of one of the children, yet so as not to affect the same power further than to the extent specified. And also in case of no complete exercise or execution of the same power or authority as to the share of the fund not affected by the appointment, so as not to prejudice or affect the right or contingent interests of the appointee under the proviso for accruer, in case of the death of any or either of the other children in such manner as specified in the settlement, and notwithstanding that in case of no complete appointment the "then appointment was intended to be made in lieu of all claims and demands" of the appointee to or for any original or principal share of the fund:—Held, that the appointors must be taken by necessary implication to have appointed the other two-thirds to their two other children, and that the appointee was not entitled to share in such two-thirds. *Foster v. Cusley*, 6 De Gex, M. & G. 55; varying 24 Law J. Rep. (N.S.) Chanc. 252; 3 Sm. & G. 96.

Where a power to appoint among children was in default of any joint appointment by the husband and wife to be exercised by the survivor after the death of the other,—Held, that a will made during their joint lives by the one who survived did not speak at his death so as to be an execution of the power. *Cave v. Cave*, 8 De Gex, M. & G. 131.

Appointment by a father to his son, then in a state of mental and bodily disease, of which he died within

a year, set aside, the Court inferring from the evidence as to the father's knowledge of his son's state of health and pecuniary circumstances, as to the circumstances attending the preparation and execution of the appointment, and as to its not having been communicated to the persons to whom it ought to have been communicated, that the appointment was made by the father, not for the benefit of his son, but for his own benefit, and was a fraud upon the power. *Wellesley v. the Earl of Mornington*, 2 Kay & J. 148.

A testator being entitled to certain personal property, derived indirectly through the wills of A and of his father, settled part of it on his marriage, with a power of appointment among his children, leaving a fractional part in himself. He made his will, "giving and bequeathing" all the personal estate that he derived through the will of his father to his two daughters exclusively of his other children:—Held, that the fractional part reserved to himself satisfied the language of the gift, and that it was not an execution of his special power. *Noel v. Noel*, 4 Drew. 624.

Where a definite fund is subject to a power of appointment by a will, and by a will purporting to be made in exercise of the power, one sum, part of the fund, is appointed to one person and another sum, other part of it, to another, and "all the real" or "all the remainder" of the fund to a third, the third appointee cannot claim a share which may lapse in consequence of the death of either of the former appointees in the lifetime of the testator. But if there is upon the will a plain indication of an intention to appoint the whole that may remain strictly in the shape of residue, or to appoint the entire fund charged only with the sums specified in the preceding appointments, then the residuary clause will be read as an appointment, not of the mere balance of the fund after the sums so previously appointed have been deducted from it, but of the entire fund, subject to the preceding appointments; the Court acting upon the manifest intention of the testator to dispose of the entire fund over which he has a power of appointment. *In re Harries's Trust*, Johns. 199.

Appointment by will of "the residue and remainder of the said monies" (meaning thereby the sums accrued by certain policies of assurance, and all bonuses and other sums of money which had accrued or should accrue by virtue of the same), "after payment of" certain sums specified in previous appointments contained in the will:—Held, upon the whole of the will to pass a sum which had lapsed by reason of the death of an appointee in the lifetime of the testator. *Ibid.*

Hereditaments were, by deed of 1836, conveyed to a trustee for sale, the produce to be held as A & B should appoint. Part of the property was taken by a railway company, and the purchase-money was laid out in the purchase of cottages, which, in 1850, were conveyed to the trustee. In 1851, by deed-poll reciting that by the settlement the property (describing it) had been conveyed to the uses above mentioned, A & B appointed all the monies to arise from the sale of the aforesaid hereditaments and the said hereditaments until such sale:—Held, that the cottages were not included in the appointment. *Collinson v. Collinson*, 24 Beav. 269.

A testatrix having a power over a sum of money, appointed it to A & B on certain trusts, and she also gave them on trust her residuary personal estate, after payment of her debts. She made no beneficial bequest of her residue, and appointed two other sons her executors. The trusts declared of the appointed fund did not exhaust it:—Held, that the surplus fell into the residue, and did not pass as unappointed. *Lefevre v. Freeland*, 24 Beav. 408.

A B had under her father's will a power to appoint 10,000*l.* By changes in the investment the fund had increased to 11,495*l.*, of which 10,000*l.* was lent on mortgage to C, and 1,495*l.* on mortgage to A B. By her will, after reciting that under her father's will she had power to appoint 10,000*l.*, A B in exercise of her power appointed "the said sum of 10,000*l.* now secured on mortgage of C's estate and any other monies representing the same":—Held, that the whole 11,495*l.* was well appointed. *Ibid.*

A testatrix having property of her own, and a power to appoint to her children other property of which she was tenant for life, gave "the whole of the residue of her property" &c. ("except her freehold property" disposed of by a contemporaneous codicil) to A. The excepted freehold property was part of the subject of the power:—Held, in consequence of the exception, that the residue of the property subject to the power passed. *Reid v. Reid*, 25 Beav. 469.

A testatrix had ground-rents of her own and ground-rents of which, under the will of her husband, she was tenant for life, with power to appoint to her children. By her will, she gave a son an annuity payable "out of my ground-rents." The Court having held on another clause of the will that "my property" included the husband's also, came to the conclusion that "my ground-rents" also included the husband's. *Ibid.*

Appointment to one of several objects of a power in payment of a debt due to her from the appointor, held void. *Ibid.*

An appointment was made to a person not an object of the power, with remainder to an object. The first appointment being void, it was held that the second was not accelerated, but failed with the first. *Ibid.*

Appointment to A B (an object of a power) to be settled for her separate use and to be divided at her death amongst her children. The gift to the children being void (they not being objects),—Held that A B took for life only, and not an absolute interest ineffectually attempted to be cut down. *Ibid.*

A B had a power to appoint "by his will or any writing in the nature of or purporting to be his will, or any codicil thereto." On his death the third and fourth sheets of a will were alone discovered, and which were in the handwriting of and signed by A B, and were attested by two witnesses; one of them contained in words a perfect appointment. Probate having been refused,—Held, that this was not a valid execution of the power to appoint by writing "purporting to be a will." *Gullan v. Grove*, 26 Beav. 64.

Power to appoint to children "with such directions or regulations for maintenance, education and advancement as their mother should appoint." The mother appointed the income to the children's father until the youngest attained twenty-one, "in or towards the maintenance and education" of all her children:—Held, that the appointment was invalid. *Lloyd v. Lloyd*, 26 Beav. 96.

A tenant for life had power to appoint to any of his children an estate which, in default, was limited to his eldest son in fee. The eldest son attained twenty-one in January 1841, and in February the father appointed the estate to him absolutely. In May the father and the son mortgaged the estate for the father's debts, and in July the father and eldest son conveyed the estate to a trustee to indemnify the son against the mortgage debts and then to sell and divide the surplus between all the children equally. *Seemle*—that the latter deed was not void as part of a transaction constituting a fraud on the power; but held, that the deed of July must be treated as valid until set aside by an independent proceeding for that purpose in a suit by a younger child to carry it into execution. *Beddoes v. Pugh*, 26 Beav. 407.

(c) Revocation and Extinguishment.

A sum of money was vested in trustees for a husband for life, unless he should become insolvent; with remainder, on that event or at his death, to his wife for life; with remainder, on determination of the trusts thereinbefore created, for the children of the marriage as the survivor should by deed or will appoint; with remainder, after the death of the husband and wife or the sooner determination of the interest limited to them respectively, for the children of the marriage. The husband became insolvent; his wife afterwards died leaving issue of the marriage. Upon a petition by the children,—Held, that the power of appointment reserved to the husband surviving was extinguished by his insolvency, and that the fund was divisible among the children. *Harwell v. Harwell*, 29 Law J. Rep. (N.S.) Chanc. 421: affirmed 30 Law J. Rep. (N.S.) Chanc. 97.

A father had an exclusive power of appointment in favour of his children over a fund, which in default was limited to them equally, and as representative of a deceased son, he was in default of appointment entitled to one-third of the fund. The father released the power to his mortgagees:—Held, that the power had been effectually destroyed, and the Court declared the rights of the parties consequent on such destruction. *Smith v. Howblon*, 26 Beav. 482.

(C) POWER OF SALE.

A testator devised an estate (which was subject to the life interest of the wife of the former owner) to trustees for his own wife for life, with remainder in strict settlement; and he declared that his trustees, with the consent of the tenant for life or tenant in tail, when in possession, might sell the estate, and receive the purchase-money. The trustees sold the estate, and the first tenant for life conveyed her life estate to the second tenant for life:—Held, that the power to sell was accelerated, and that the trustees, with the consent of the second tenant for life, could exercise the power of sale, and make a title to the estate. *Truett v. Tyssen*, 25 Law J. Rep. (N.S.) Chanc. 801; 21 Beav. 437.

PRACTICE, AT LAW.

[See AFFIDAVIT—VENUE.]

[The Court of Session constituted the Court of Exchequer in Scotland, and the Procedure in matters connected with the Exchequer, regulated by

19 & 20 Vict. c. 56.—The Law and Practice of the Court of Chancery in Ireland in relation to the Appointment of Receivers over Real Estate amended, and the Sale of Estates in the said Court expedited, by 19 & 20 Vict. c. 77.—A Court of Appeal in Chancery constituted, and the Law relating to Appeals from the Incumbered Estates Court in Ireland amended, by 19 & 20 Vict. c. 92.—The Procedure in, and to enlarge the Jurisdiction of, the Superior Courts of Common Law in Ireland further amended by 19 & 20 Vict. c. 102.—The Constitution and the Procedure of the Court of Exchequer Chamber in Ireland altered and amended by 20 & 21 Vict. c. 6.—Procedure in the Bill Chamber in Scotland regulated by 20 & 21 Vict. c. 18.—The Course of Procedure in the High Court of Chancery, the Court of Chancery in Ireland, and the Court of Chancery of the County Palatine of Lancaster, amended by 21 & 22 Vict. c. 27.—The Institution of Suits at the Instance of the Crown and the Public Departments in the Courts of Scotland regulated by 20 & 21 Vict. c. 44.—The Distribution of Business in the Court of Session in Scotland regulated by 20 & 21 Vict. c. 56.—Facilities afforded for the more certain Ascertainment of the Law administered in one Part of Her Majesty's Dominions when pleaded in the Courts of another Part thereof, by 22 & 23 Vict. c. 63.—An Act to amend the Provisions of "The Common Law Procedure (Ireland) Act Amendment (1853)," 23 & 24 Vict. c. 82.—The Process, Practice and Mode of Pleading in and Enlarging the Jurisdiction of the Superior Courts of Common Law at Westminster, further amended by 23 & 24 Vict. c. 126.—The Lord Chancellor and Judges of the Court of Chancery enabled to carry into effect the Recommendations and Suggestions of the Chancery Evidence Commissioners by General Rules and Orders of the Court, 23 & 24 Vict. c. 128.]

(A) RULES AND ORDERS FOR REGULATING.

(B) PROCESS.

(a) *Writ of Summons.*

- (1) *Special Indorsement.*
- (2) *Indorsement of Plaintiff's Residence.*
- (3) *Striking out Plaintiff's Name.*
- (4) *Concurrent Writs.*

(b) *Service of.*

- (1) *On Public Bodies.*
- (2) *On Lunatics.*
- (3) *When Defendants without the Jurisdiction.*
- (4) *When Personal Service cannot be effected.*
- (5) *Irregularity in.*
- (6) *Disproving.*

(C) PARTICULARS.

- (a) *In Actions of Tort.*
- (b) *Further and Better.*

(D) DECLARATION.

(E) PLEA.

- (a) *Issuable Plea.*
- (b) *Several Matters.*
- (c) *Embarrassing Plea.*

(F) PLEADING AND DEMURRING TOGETHER.

(G) DEMURRER.

(H) NOTICE TO ADMIT.

(I) INTERROGATORIES.

(K) TRIAL.

- (a) *Notice of Trial.*
- (b) *Proceedings at the Trial.*
 - (1) *Undefended Cause.*
 - (2) *Reserving Points.*
 - (3) *Addressing the Jury.*
- (c) *Postponing.*
- (d) *Verdict.*
- (e) *By Judge without a Jury.*
- (f) *Proceedings where Plaintiff neglects to try.*

(L) SUGGESTION ON THE ROLL.

(M) NEW TRIAL.

(N) SUING IN FORMA PAUPERIS.

(O) SPECIAL CASE.

(P) STAYING AND SETTING ASIDE PROCEEDINGS.

(Q) CONSOLIDATION OF ACTIONS.

(R) MOTIONS AND RULES.

(S) JUDGE'S ORDER.

(T) APPEALS TO THE EXCHEQUER CHAMBER.

(U) COURT OF PROBATE.

(A) RULES AND ORDERS FOR REGULATING.

The notice required by the indorsement on writs under 20th L., to oppose an application for costs on judgment by default, must be in writing, being a notice within rule 181. of Hil. Term, 1853, which provides that all notices required by those rules, or by the practice of the Court, shall be in writing. *Woodward v. North*, 29 Law J. Rep. (n.s.) Exch. 471; 5 Hurl. & N. 790.

(B) PROCESS.

(a) *Writ of Summons.*(1) *Special Indorsement.*

Where an action is brought on a judgment debt, the particulars of the claim may be indorsed on the writ of summons, under section 25. of the Common Law Procedure Act, 1852, for it is a debt or a claim in the nature of a debt; and, therefore, if the defendant does not appear, final judgment may be signed at once under section 27. of the statute. *Hodsoll v. Baxter*, 28 Law J. Rep. (n.s.) Q.B. 61; E. B. & E. 884.

Where a writ of summons is specially indorsed under the Common Law Procedure Act, 1852, and the defendant does not appear, but before judgment makes payments on account, judgment under the 27th section of the act should be signed only for the balance remaining due, and not for the whole amount claimed. *Hodges v. Callaghan*, 26 Law J. Rep. (n.s.) C.P. 171; 2 Com. B. Rep. N.S. 306.

Where the debt indorsed exceeded 20^{l.}, but by payments before judgment it was reduced below that amount, the defendant, having been arrested, was held entitled to be discharged out of custody, under the 7 & 8 Vict. c. 96. s. 57; the sum recovered in the action not exceeding 20^{l.} *Ibid.*

(2) *Indorsement of Plaintiff's Residence.*

Where a writ of summons is issued by the plaintiff (an attorney) in person, it is sufficient in the indorsement to describe him as residing at the place where he carries on his business. *Ablett v. Basham*, 25 Law J. Rep. (n.s.) Q.B. 239; 5 E. & B. 1019.

(3) *Striking out Plaintiff's Name.*

The name of a person having been inserted in a deed, as trustee, without his authority, and it having been decided, in an action on the deed, that it was necessary to join him in suing, and his name having been accordingly inserted as co-plaintiff in a new writ, without his authority, the Court upheld an order of a Judge to strike it out. *Langton v. Wetherell*, 27 Law J. Rep. (n.s.) Exch. 400.

(4) *Concurrent Writs.*

Under the Common Law Procedure Act, 1852, a concurrent writ can only be issued within six months from the first commencement of the action by the original writ, although the original writ has been renewed. *Coles v. Sherrard*, 25 Law J. Rep. (n.s.) Exch. 59; *nom. Cole v. Sherrard*, 11 Exch. Rep. 482.

If a writ, issued before the Common Law Procedure Act, 1852, came into operation, be renewed under that act, it becomes *quasi* the original writ, on which a concurrent writ may be issued within six months. *Ibid*.

Where, therefore, a writ of summons, issued before the Common Law Procedure Act, 1852, was renewed from time to time under that act, and within six months of the last renewal, but more than six months after the first renewal, the plaintiff issued, for the first time, a concurrent writ for service abroad, that writ was set aside as irregular. *Ibid*.

(b) *Service of.*(1) *On Public Bodies.*

The defendants, a joint-stock company duly registered in London and incorporated, carried on business there by B, their agent, and in Dublin by their agent there. A writ of summons, issued out of the Court of Queen's Bench in Ireland against the company, and pursuant to an order of that Court made according to their practice, under the statutes 43 Geo. 3. c. 33. s. 8. and the 13 & 14 Vict. c. 18. s. 9, was served by delivering a copy personally to R, together with a copy of the order, and by sending similar copies by post to B, the London agent. The company not having entered an appearance, the plaintiff, by leave of that Court, entered one for them, and took other proceedings to judgment:—Held, affirming the judgment below, 26 Law J. Rep. (n.s.) C.P. 801; 2 Com. B. Rep. N.S. 211, in an action on the judgment, that supposing the writ was not well served, it was only an irregularity, and did not affect the validity of the judgment. But, *semble*, that the service was regular, and warranted by section 9. of the statute 13 & 14 Vict. c. 18. *Sheeley v. the Professional Life Assur. Co. (Ex. Ch.)*, 27 Law J. Rep. (n.s.) C.P. 233; 3 Com. B. Rep. N.S. 597.

The 53rd section of the Joint-Stock Companies Act, 1856 (19 & 20 Vict. c. 47), enacts, that any summons or notice requiring to be served on the company may, except in cases where a particular mode of service is directed, be served, *inter alia*, by giving it to any director of the company. By section 16. of the Common Law Procedure Act, 1852, a writ of summons against a corporation may be served on certain officers there mentioned, not including a director:—Held, that such 53rd section

does not apply to a writ of summons, and that service of a writ of summons against an incorporated company, registered under 19 & 20 Vict. c. 47, upon a director of such company, was bad service. *Towne v. the London and Limerick Steam-ship Co. (Limited)*, 28 Law J. Rep. (n.s.) C.P. 217; 5 Com. B. Rep. N.S. 730.

(2) *On Lunatics.*

Where a lunatic cannot be served, leave cannot be granted to proceed without service. *Williamson v. Maggs*, 28 Law J. Rep. (n.s.) Exch. 5.

(3) *When Defendant without the Jurisdiction.*

A British subject resident abroad was sued in the manner pointed out by the 15 & 16 Vict. c. 76. s. 18, and not having appeared, a Judge's order was made for leave to the plaintiff to proceed in the action, upon an affidavit which did not shew that the cause of action arose within the jurisdiction of the superior Courts or was in respect of the breach of a contract made within the jurisdiction. *Semble*—that the affidavit was insufficient, and its insufficiency a good ground for setting the order aside. *Bayne v. Slack*, 27 Law J. Rep. (n.s.) C.P. 14; 3 Com. B. Rep. N.S. 363.

The writ, which was in the general form prescribed by section 18, No. 2, Schedule A, issued on the 12th of September, and was served on the defendant abroad on the 17th; the order to proceed was made on the 27th of October, but was not served; the declaration was filed on the 28th of October, and the indorsement thereon required the defendant to plead within twenty-one days, and before the expiration of that time took the declaration out of the office of the Court, and on the 17th of November applied to set aside the order and subsequent proceedings:—Held, that the application was made in reasonable time. But, inasmuch as the defendant, when he took the declaration out of the office of the Court, had the means of knowing, and it did not appear that he did not know the contents of the affidavit on which the order to proceed was made, and that the plaintiff's proceedings were open to the objection now taken,—Held, that he came within that branch of the 135th Practice Rule, Hilary Term, 1853, which prescribes "that no application to set aside process or proceedings for irregularity shall be allowed, if the party applying has taken a fresh step after knowledge of the irregularity." *Ibid*.

Sections 16, 17, 18, and 19. of the Common Law Procedure Act, 1852, do not apply to the case of a foreign corporation resident abroad. *Ingate v. the Austrian Lloyd's Company*, 27 Law J. Rep. (n.s.) C.P. 323; 4 Com. B. Rep. N.S. 704.

Where a writ has been issued and served abroad under section 18. of the Common Law Procedure Act, 1852, the Court will set aside the writ and service if it appears that the cause of action did not arise within the jurisdiction. *Binet v. Picot*, 28 Law J. Rep. (n.s.) Exch. 244; 4 Hurl. & N. 365.

When the defendant, by affidavit, states that the cause of action arose abroad, the plaintiff must, to support the writ, distinctly shew such facts as, if true, would shew that the cause of action arose, or the contract was made, within the jurisdiction. *Ibid*.

(4) *When Personal Service cannot be effected.*

To obtain an order under section 17. of the Common Law Procedure Act, 1852, for leave to proceed as if personal service of the writ of summons had been effected, it must be distinctly shewn that the defendant is wilfully evading service; and it is not enough to shew that he is abroad, and that his address cannot be found. *Kitchin v. Wilson*, 27 Law J. Rep. (N.S.) C.P. 253; 4 Com. B. Rep. N.S. 483.

The affidavit in support of an application for an order to proceed as if personal service had been effected, must, when the calls have not been made at the residence of the defendant, shew to the satisfaction of the Judge, not only that the writ has come to the knowledge of the defendant, but that reasonable efforts have been made to ascertain his residence. *Davies v. Westmacott*, 29 Law J. Rep. (N.S.) C.P. 150; 7 Com. B. Rep. N.S. 829.

(5) *Irregularity in.*

Service of a writ of summons in a court of justice on a party attending his cause is not irregular or void. *Poole v. Gould*, 25 Law J. Rep. (N.S.) Exch. 250; 1 Hurl. & N. 99.

(6) *Disproving.*

An application to discharge a defendant out of custody, on an affidavit that he had never been served with process, and that it had not been brought to his knowledge, having been made at chambers, and answered by an affidavit of the party who had made the common affidavit of service, fixing the place and circumstances of the supposed service, the defendant was allowed, on a subsequent application to the Court, to use fresh affidavits, disproving the supposed service by shewing a mistake as to identity on the occasion alluded to; and this being clearly shewn,—Held, that the defendant was entitled to be discharged without any terms. *Moseley v. Blake*, 28 Law J. Rep. (N.S.) Exch. 35.

(C) PARTICULARS.

(a) *In Actions of Tort.*

In an action of tort for an injury to the person, as by careless driving, particulars will be ordered as to the nature and extent of the injuries, or of the claim for compensation, on an affidavit shewing reasonable ground for the application. *Wicks v. Macnamara*, 27 Law J. Rep. (N.S.) Exch. 419; 3 Hurl. & N. 568.

(b) *Further and Better.*

The indorsement on a writ of summons was as follows: "The following are the particulars of the plaintiff's claim: 500*l.* for principal money due upon a warrant of attorney executed by the defendant E S's wife (before her marriage with him), bearing date the 5th of February 1855; interest thereon at the rate of 5*l.* per cent. per annum from the said 20th of February to the day of obtaining judgment in this cause. The plaintiff will also seek to recover the same sum of 500*l.* upon an account stated between the plaintiff and the said E S's wife before her marriage." Upon a Judge's order for a further or better account, with dates and items of the particulars of the plaintiff's demand, the following was delivered: "1855. February 25th. Amount

due to the plaintiff upon an account stated on this date between the plaintiff and the defendant E G before her marriage 500*l.* Above are the further and better particulars of the plaintiff's demand in this action, delivered in pursuance of the order of Creswell, J." &c.:—Held, no compliance with the order. *Baynham v. Sackell*, 17 Com. B. Rep. 383.

(D) DECLARATION.

The rules of pleading do not permit a plaintiff to declare in one count for breaking his close and taking his cart, in a second for entering a stable and taking his horse and cart, and in a third for entering his yard and taking a horse, the same special damage being laid in each count. *Mercer v. Stanbury*, 25 Law J. Rep. (N.S.) Exch. 316.

Quære—whether the county court Judge has jurisdiction on an interpleader application, besides adjudging in favour of the claimant as to the right to the goods, to give damages for breaking and entering his house or premises, or for special damage arising from the taking of the goods. But the Court will not, on motion in an action for such trespass, where it does not appear that the county court Judge has exercised such jurisdiction, stay the action or even strike out of the declaration such part as relates to the taking of the goods, and the special damage laid as resulting therefrom. *Ibid.*

(E) PLBA.

(a) *Issuable Plea.*

By indenture between A and B, it was covenanted that A should at his own expense procure a suitable vessel, and stow on board thereof a certain submarine telegraphic cable which was then at Morden's Wharf, East Greenwich, and rig, fit and provision the ship with all proper and sufficient masts, &c., and provide and pay competent officers, crew and workmen for laying down the cable, &c., and have the said ship fully equipped in all respects and ready for sea, at the Nore, on or before the 15th of July then next, and would as soon as the said ship should be ready for sea at the Nore as aforesaid, cause the same to proceed with the said cable on board to the northern coast of Africa, and with all convenient despatch proceed to lay down the said cable, and B covenanted to pay a certain sum on certain specified days, &c. In an action by A against B for breach of the covenants contained in this indenture, the declaration contained specific averments of the performance or readiness by A to perform all the stipulations on his part, except the ship's being at the Nore ready for sea by the 15th of July; and it also contained a general averment of performance of all things on his part to be performed to entitle him to a performance of the covenants on the part of the defendant. The defendant (being under terms to plead issuably) pleaded several pleas, traversing every material allegation in the declaration, amongst others, sixthly, "that the plaintiff did not have such ship or vessel, &c. fully equipped in all respects according to the terms and conditions of the said indenture, and ready for sea, at the Nore, on or before the 15th of July 1855, according to the said indenture." The plaintiff having signed judgment, on the ground that some of the pleas were not issuable, the Court held, that the sixth plea was clearly not an issuable plea; but some of the other pleas presenting

a substantial defence, they set aside the judgment, upon terms. *Roberts v. Brett*, 17 Com. B. Rep. 534.

Judgment having been signed on the ground that a plea was not issuable, the Court set aside the judgment only upon the terms of the defendant bringing the amount claimed into court. *Sinian v. Miller*, 1 Com. B. Rep. N.S. 686.

(b) *Several Matters.*

In an action against a joint-stock insurance company, on a deed of annuity granted by three directors of the company, the defendants were allowed to plead, along with *non est factum*, two special pleas, the abstract of one of which was, "that the deed was invalid under the 29th section of the Joint-Stock Companies Registration Act" (7 & 8 Vict. c. 110), the plea shewing it was one in which directors were interested, and that it had not been confirmed at any meeting of the shareholders"; and the abstract of the other being, "that the directors in making the deed had no power to bind the company; that it was in excess of their authority, and to the prejudice of their shareholders; and that the plaintiff knew this when he took it." But an affidavit was required. *Curtis v. the Anchor Assur. Co.*, 27 Law J. Rep. (N.S.) Exch. 14; 2 Hurl. & N. 537.

The 80th and 81st sections of the Common Law Procedure Act, 1852, as to pleading several matters, and pleading and demurring together, apply to actions of *quare impedit*. *Marshall v. the Bishop of Exeter*, 28 Law J. Rep. (N.S.) C.P. 300; 6 Com. B. Rep. N.S. 716.

A plea of payment of money into court will not be allowed together with pleas denying or justifying the whole cause of action in respect of which the payment is pleaded: even on the terms of the defendant consenting, if plaintiff accept the money, to withdraw the other pleas and suffer judgment, although the complaint in the declaration appear to be oppressively multifarious. *Gales v. Lord Holland*, 7 E. & B. 336.

To an action for goods sold and delivered, &c. the defendant was allowed to plead, first, never indebted; secondly, payment; thirdly, that the goods were exciseable liquors, to wit, wine, sold by retail, to be consumed by the defendant and others on the plaintiff's premises, she not being licensed; fourthly, that the goods were wines and suppers supplied to the defendant in a brothel kept by the plaintiff, for the purpose of being consumed there by the defendant and divers prostitutes in a debauch, to incite them to riotous, disorderly and immoral conduct. But this Court refused to allow the defendant to plead, together with the above pleas, that he was entirely deprived of understanding by intoxication when he made the contracts, as the plaintiff well knew, and that the goods were liquors supplied to increase his intoxication, and that he derived no benefit from them. *Hamilton v. Grainger*, 5 Hurl. & N. 40.

In an action on a contract, a special plea of payment into court in respect of the breach of a contract set out in the plea, and varying from that stated in the declaration, cannot be pleaded together with pleas in bar of the action. *Hart v. Denny*, 1 Hurl. & N. 609.

Declaration, on an indenture of assignment of certain leasehold messuages, by way of mortgage to secure 1,500*l.*, containing covenants that the defendant would, during the continuance of the terms and while the 1,500*l.* should be unpaid, or until the messuages should be sold under the power in the indenture contained, pay the rents and observe the covenants contained in the leases on the lessees' part to be performed, and keep the premises insured from loss by fire, &c. The covenants in the leases were, that the lessees should repair, &c. Breaches, that defendant did not pay the rents or perform the covenants, but made default in repairing and insuring. The Court refused to permit the defendant to plead that the cause of action accrued before the defendant became bankrupt, together with a plea, on equitable grounds, that the defendant did what was complained of by the plaintiff's licence. *Grest v. Webb*, 5 Hurl. & N. 599.

(c) *Embarrassing Plea.*

Motion to strike out embarrassing plea. *Fountain v. Chamberlain*, 18 Com. B. Rep. 660.

(F) PLEADING AND DEMURRING TOGETHER.

[See ante, (E) (b), *Marshall v. the Bishop of Exeter*.]

The plea of fraud in the usual form, to the common counts for goods sold, &c. is good, and leave was refused to reply and demur. *Lawton v. Elmore*, 27 Law J. Rep. (N.S.) Exch. 141.

(G) DEMURRER.

Where there is a demurrer to a declaration, and there are also demurrers to the pleas pleaded to that declaration, the plaintiff's counsel begins the argument. *The Mayor, &c. of Blackburn v. Parkinson*, 28 Law J. Rep. (N.S.) M.C. 7; 1 E. & E. 71.

Where there are cross-demurrers the plaintiff's counsel begins. *Barter v. the Midland Rail. Co.*, 25 Law J. Rep. (N.S.) C.P. 184; 18 Com. B. Rep. 46.

The defendant's attorney having delivered all the demurrer-books, upon the plaintiff's default, the Court refused to allow the plaintiff's counsel to be heard, or (his attorney not being at hand to pay for the books) to postpone the argument. *Simmons v. Siggers*, 1 Com. B. Rep. N.S. 583.

(H) NOTICE TO ADMIT.

A notice to admit documents pursuant to the Common Law Procedure Act, 1852, section 117, called on the defendant to admit the authority by which the documents were written:—Held, that the party called on to make the admissions had a right to reject the whole, and having done so, and a verdict having been obtained by the defendant, the plaintiffs, who proved these documents at the trial, had no right to the costs of such proof under the section in question. Each admission sought is to be treated as a separate part of the notice. *The Oxford, Worcester and Wolverhampton Rail. Co. v. Scudamore, Secretary of the Rhymney Iron Co.*, 1 Hurl. & N. 666.

(I) INTERROGATORIES.

The Court will order a plaintiff, though a foreigner resident abroad, to answer interrogatories, under the

Common Law Procedure Act, 1854. *Pohl v. Young*, 25 Law J. Rep. (N.S.) Q.B. 23.

Under section 51. of the Common Law Procedure Act, 1854, either party to an action may by interrogatories inquire into matters that are common to the case of both parties, though the answers sought may disclose the case relied upon by the party interrogated. But one party cannot interrogate as to matters that relate exclusively to the case of his opponent. *Whateley v. Crawford*, and *Carew v. Davies*, 25 Law J. Rep. (N.S.) Q.B. 163; 5 E. & B. 709.

Where a case is brought within the statute, the Court is bound to grant an application for leave to exhibit interrogatories. *Ibid*.

After an application at chambers it cannot be objected that the affidavit used in support of it is not made by the attorney. *Ibid*.

The costs of the proceedings under the Common Law Procedure Act, 1854, both of an examination upon interrogatories and of an inspection, are in the discretion of the Judge making the necessary orders, and where the orders are silent as to costs, the party on whose application they were made, afterwards becoming entitled to the costs of the cause, has no right to the costs of such proceedings. *Smith v. the Great Western Rail. Co.*, 25 Law J. Rep. (N.S.) Q.B. 279; 6 E. & B. 405.

The 51st section of the Common Law Procedure Act, 1854, applies to actions of ejectment. To a motion for leave to deliver interrogatories, it is no answer that they are such as the party would be privileged from answering: that objection must be made when the party is called upon to answer the interrogatories on oath. *Chester v. Wortley*, 25 Law J. Rep. (N.S.) C.P. 117; 17 Com. B. Rep. 410.

Quære—whether, the action being ejectment to enforce a forfeiture, if the interrogatories tend to disclose a forfeiture of the estate of the party interrogated, he would be privileged from answering? *Ibid*.

A plaintiff will be allowed to deliver interrogatories after plea without a special affidavit. *James v. Barnes*, 25 Law J. Rep. (N.S.) C.P. 182; 17 Com. B. Rep. 596.

In an action for infringement of a patent, where the defendants did not deny the infringement, it was held no ground for their refusing to answer interrogatories, that the answers would expose persons to whom they had sold the patented articles to actions. *Tetley v. Easton*, 25 Law J. Rep. (N.S.) C.P. 293; 18 Com. B. Rep. 643.

The intention of the 51st section of the Common Law Procedure Act, 1854, in permitting parties to deliver interrogatories to their adversaries, was to prevent the necessity of going to a Court of equity; and its provisions are applicable when either party to an action has a specific case which he wishes to set up, and some of the materials for making it out are in the possession of his adversary, but not when his object is to discover how his adversary is going to shape his case, or to see whether there are any defects in it, or to fish for a defence. *Moor v. Roberts*, 26 Law J. Rep. (N.S.) C.P. 246; 2 Com. B. Rep. N.S. 671.

Interrogatories, too, which are put for the purpose of contradicting a written instrument are inadmissible. *Ibid*.

The Court will, on a rule to allow a party to exhibit interrogatories, determine any question of principle as to the right to exhibit them, but will leave the particular form of them to be settled at chambers. *Zariyi v. Thornton*, 26 Law J. Rep. (N.S.) Exch. 214.

In an action on a policy of insurance, on a cargo of wheat, claiming for a total loss, the pleas denying the policy, the interest, the loading and the loss, and also setting up an unreasonable delay in sailing, interrogatories were allowed, which went to support the latter plea, and also such as were directed to the question of damage; but not such as were merely calculated to disclose the case which the plaintiff would have to prove on the pleas in denial. *Ibid*.

The jurisdiction of the Court under section 53. of the Common Law Procedure Act, 1854, in case of omission without just cause to answer sufficiently written interrogatories under section 51. to direct an oral examination of the interrogated party, as it is a jurisdiction to be exercised at the discretion of the Court, will be exercised with caution, and with a due regard to the nature and circumstances of the action; and, *quære*, whether, where upon the answers given to the written interrogatories, it is extremely doubtful in law whether the defendant is liable to be sued at all, the application will be acceded to; but in such a case, at all events, it will not be granted, where there is no affidavit in support of the application, even although the objection is not raised by the opposite party. *Swift v. Num*, 26 Law J. Rep. (N.S.) Exch. 365.

Thus, where the defendant was sued as administrator, and answered to written interrogatories that he had not taken out administration in this country, nor administered nor intermeddled with any of the effects in this country, the Court refused a rule that the defendants should be orally examined, there being no affidavit in support of the application; although the plaintiff shewed cause in the first instance, and waived the objection. *Ibid*.

Where a party to whom interrogatories have been allowed to be administered under the Common Law Procedure Act of 1854, sect. 51, has neglected to answer at all, without just cause, it may be admissible to apply for an order, under section 53, for his oral examination, instead of proceeding by way of attachment for contempt; at all events, where there is a question whether by reason of illness or on account of co-parties to the suit having sufficiently answered, or otherwise, the neglect is not altogether without "just cause," and certainly is not wilful or contumacious in the sense of a defiance of the authority of the Court. But the rule for an oral examination is only *nisi* in the first instance. *Turk v. Syne*, 27 Law J. Rep. (N.S.) Exch. 54.

Interrogatories must be confined, as closely as possible, to the matter in controversy between the parties; and if altogether too large, and travelling into irrelevant matter, they will not be moulded, but entirely disallowed. Thus, where the defendant was sued as acceptor of a bill, accepted by his partner in the name of the firm, but, as the defendant alleged, for private purposes, and without authority, interrogatories, not directed to the particular bill, but entering generally into the transactions between the parties, and which two Judges had already refused to allow, were entirely disallowed. *Robson v. Cooke*,

or *Crawley*, 27 Law J. Rep. (N.S.) Exch. 151; 2 Hurl. & N. 766.

Where an order has been made that a party to a suit, a foreigner, shall answer interrogatories, and there has been no answer, but it does not appear that the party was in this country when the order was made, it being doubtful whether he is in contempt, a rule for an attachment will not be granted. *Von Hoff v. Hoerster*, 27 Law J. Rep. (N.S.) Exch. 299.

The right to interrogate under the 51st section of the Common Law Procedure Act, 1854, being governed by the same rules as the right to file a bill for a discovery in a court of equity, the right to discovery is limited to those matters which bear upon the case of the party seeking the discovery, and such right is one depending upon the answer of the party that he has such deeds or documents as are referred to, in his possession, and if he denies having possession of them, his denial is conclusive, and the right cannot exist. *Adams v. Lloyd*, 27 Law J. Rep. (N.S.) Exch. 499; 3 Hurl. & N. 350.

Written interrogatories were allowed to be delivered under the Common Law Procedure Act, 1854, asking a defendant, whom it was sought to make liable as a shareholder of a company, whether he had subscribed to the undertaking of the company, and whether he had executed the subscription contract (such document not being forthcoming), there being however, a *prima facie* case established that it was lost; but the Court ordered that the answers should not be used unless such loss should be proved at the trial to the satisfaction of the Judge. *The Wolverhampton New Waterworks Company v. Hawksford*, 28 Law J. Rep. (N.S.) C.P. 198; 5 Com. B. Rep. N.S. 703.

The Court also allowed an interrogatory, asking the defendant whether he had received from a certain person "any writing relating to his becoming a shareholder," such description of the writing being no more than requisite for identifying it. *Ibid.*

Interrogatories under the Common Law Procedure Act, 1854, section 51, may be administered to the public officer of a banking company, suing in the name of the company. *M'Kewen v. Rolt*, 28 Law J. Rep. (N.S.) Exch. 330; 4 Hurl. & N. 738.

Where a party has substantially answered interrogatories delivered to him, but there are defects or flaws in any of his answers, which render them formally insufficient, but which the Court has no reason to think were intentional, the proper course is to apply to have them amended at chambers; and a rule for his oral examination will be discharged, and the costs will be made his costs in the cause. *Bender v. Zimmerman*, 29 Law J. Rep. (N.S.) Exch. 244.

Where a party ordered to answer interrogatories has not done so in due time, but the Court sees that (although there is in strictness no sufficient excuse) there has been no intention to disobey the Court, and the answers are ready for delivery, a rule for an attachment will not be made absolute, and the Court may, in its discretion, make the costs of the rule costs in the cause. *Windle v. Lane*, 29 Law J. Rep. (N.S.) Exch. 245.

When a defendant has been ordered to answer interrogatories in support of the plaintiff's right of action, he cannot excuse himself from answering by swearing to some matter of fact which involves the existence of the right of action; for that is the very

question to be tried upon the whole of the evidence, and, *inter alia*, upon his answers to the interrogatories. *Geary v. Buxton*, 29 Law J. Rep. (N.S.) Exch. 280.

Therefore, where a plaintiff sued for money had and received, being the proceeds of goods of his, sent to the defendant, and had been allowed to interrogate the defendant as to his sales of the goods (especially as to the purchasers and the prices), the plaintiff's case being, that they were sold on his account; and the defendant had excused himself from answering, on the ground that he had himself purchased the goods of the plaintiff, so that the sales were on his own account, and that, therefore, he was not bound to answer.—Held, that the excuse was insufficient; that he was bound to answer; and that unless he did so he would be liable to attachment for not answering. *Ibid.*

The party applying for leave to deliver interrogatories under the Common Law Procedure Act, 1854, (17 & 18 Vict. c. 125, s. 51), must shew the nature of his case so far as to enable the Judge or the Court to form an opinion on the propriety of the proposed interrogatories. Where the plaintiff seeks to deliver interrogatories before declaring, he must for this purpose do more than produce an affidavit in the terms prescribed by section 52. *Crookes v. Morrison*, 5 E. & B. 984.

Seem—that the answers to interrogatories under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, s. 52), ought not to be general, but should answer, or assign reasons for refusing to answer, each interrogatory specifically. *Chester v. Wortley*, 18 Com. B. Rep. 239.

The Court will not allow interrogatories under the 51st section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), for the purpose of obtaining from the plaintiff information which the defendant has the means of obtaining from his own agents. *Bird v. Malzy*, 1 Com. B. Rep. N.S. 308.

(K) TRIAL.

(a) Notice of Trial.

A notice of trial originally dated the 2nd of April 1856, was given for the first sittings "in next Easter term." It was afterwards altered by dating it on the 18th of April, and making it a notice for the second sittings "in next Easter term":—Held, that it was a good notice for Easter term, 1856.—*Benthall v. West* (1) overruled. *Fenn v. Green*, 25 Law J. Rep. (N.S.) Q.B. 353; 6 E. & B. 656.

(b) Proceedings at the Trial.

(1) Undefended Cause.

Where the defendant has appeared by attorney, and has not regularly displaced him, notice to such attorney, after an intimation from him that he has no instructions to defend the action, that it will be taken as an undefended case, will, if there is time for counter notice of an intention to defend, warrant the plaintiff in taking the case as undefended, although out of its order, on the morning of the day after the opening of the commission. *Lett v. Watkins*, 27 Law J. Rep. (N.S.) Exch. 319.

(2) Reserving Points.

A Judge at Nisi Prius, holding a document admissible which has been objected to for insufficiency

of stamp, ought not, since the Common Law Procedure Act, 1854, to reserve the question of sufficiency for the Court. *Siordet v. Kucinski*, 25 Law J. Rep. (n.s.) C.P. 2; 17 Com. B. Rep. 251.

(3) *Addressing the Jury.*

[*Hodge v. Acraman*, 11 Exch. Rep. 214; 7 Law J. Dig. 566.]

(c) *Postponing.*

The Court will not at the instance of a defendant postpone the trial of a cause, on the ground of the absence of a material and necessary witness, where the witness is a captain in the service of the defendant, and the defendant has been guilty of laches in abstaining from securing the testimony of the witness when within his power. *Wright v. M'Guffie*, 4 Com. B. Rep. 441.

(d) *Verdict.*

On a trial, where the issue was on defendant who accordingly began, plaintiff, at the end of defendant's case, claimed a verdict on the ground that there was not evidence to support the issue for the defendant. The Judge refused to direct a verdict, but gave plaintiff leave to move to enter one. The plaintiff then called evidence; and, on the evidence which followed, the issue for the defendant was proved:—Held, that the plaintiff was not entitled to enter a verdict on the ground that there was no proof for the defendant at the close of the defendant's original case. *Allen v. Cary*, 7 E. & B. 463.

(e) *By Judge without a Jury.*

[*Boyle v. Wiseman*, 11 Exch. Rep. 360; 7 Law J. Dig. 567.]

The parties to an action having verbally consented to try issues of fact before a Judge without a jury, and both parties having appeared and tried before a Judge who decided the issues, it was held not to be competent to either party to object to the proceedings on the ground that there had been no consent in writing, nor any order of the Court or a Judge allowing such trial, pursuant to the 17 & 18 Vict. c. 125. s. 1. *Andrews v. Elliott*, 25 Law J. Rep. (n.s.) Q.B. 1; 5 E. & B. 502.

(f) *Proceedings where Plaintiff neglects to try.*

Where a plaintiff has proceeded at law and in equity, and has elected to proceed in equity after issue joined in the action, the defendant may, under the 101st section of the Common Law Procedure Act, 1852, give notice to the plaintiff to bring the issue on to be tried; and if the plaintiff neglects to do so, the defendant may enter a suggestion on the record, and sign judgment for his costs. *Mortimore v. Soares*, 28 Law J. Rep. (n.s.) Q.B. 133; 1 E. & E. 399.

(L) *SUGGESTION ON THE ROLL.*

In an action *in forma pauperis*, the plaintiff, in 1854, recovered a verdict, with 150*l.* damages. Upon taxation, the Master refused to allow fees to her counsel or remuneration to her attorney, and such refusal was confirmed by the Court:—Held, upon an application by the plaintiff for the entry of a suggestion upon the roll, for the purpose of having the judgment considered by a Court of error, that this

was not a case in which the Court of error could interfere, and that no such suggestion ought to be entered. *Dooley v. the Great Northern Rail. Co.*, 29 Law J. Rep. (n.s.) Q.B. 83.

(M) *NEW TRIAL.*

[See *INSURANCE*, 4. (E).]

The affidavit of a jurymen to the effect that he would not have agreed to the answers given by the foreman of the jury to the Court if he had known they would have entitled the plaintiff to a verdict, —Held, if admissible, no ground for disturbing the verdict. *Raphael v. the Bank of England*, 25 Law J. Rep. (n.s.) C.P. 33; 17 Com. B. Rep. 161.

To entitle a party to a new trial on the ground of the rejection of evidence, it must appear not merely that it was offered and not received, but that the Judge was given to understand that its reception was pressed, and that he deliberately rejected it. *Whitehouse v. Hemmant*, 27 Law J. Rep. (n.s.) Exch. 295.

Semble—that if a document has been rejected as not being evidence, a new trial will not be refused merely because it is not duly stamped (especially if the point is doubtful), supposing it is possible to remove that objection by stamping it at the trial, under the Common Law Procedure Act, 1854, section 27, for the party might, at a second trial, elect so to remove the objection. *Ibid.*

On a rule for a new trial, on the ground of rejection of evidence, the affidavit in answer alleging that it was withdrawn and not rejected, an affidavit in reply, stating how it came to be withdrawn, is not receivable, as stating new matter arising out of the affidavit in answer. *Ibid.*

Where the jury on a writ of inquiry, after having retired, covertly procured victuals and liquor, the Court ordered a new trial, on ground of misconduct on the part of the jury. *Cooksey v. Haynes*, 27 Law J. Rep. (n.s.) Exch. 871.

Where a jurymen, who might have been challenged on the ground of interest, had served, a new trial was refused, there being no evidence of misconduct, injustice, or contrivance. *Williams v. the Great Western Rail. Co.*, 28 Law J. Rep. (n.s.) Exch. 2; 3 Hurl. & N. 869.

At the Sittings after Term in London, a cause was entered in the list of causes for trial in the second Court of Nisi Prius. Notice was given in that court, during the temporary absence of the defendant (who appeared in person), that it would be taken in the first Court, and, after some interval of time, it was accordingly there called on, and (the defendant not appearing) was taken as undefended. It did not appear that the defendant had been called in the second Court. The Court granted a new trial. *Cook v. Beardsall*, 29 Law J. Rep. (n.s.) Exch. 85.

After a verdict of not guilty, upon an indictment for obstructing a highway, the Court will not grant a new trial upon the ground that the verdict was against the weight of evidence. *The Queen v. Johnson*, 29 Law J. Rep. (n.s.) M.C. 183.

A verdict in ejectment having been taken for the plaintiff by consent, subject to a special case, and a long period having elapsed without the plaintiff delivering a case, the Court, notwithstanding the alleged insolvency of the defendants (a corporation), and notwithstanding proceedings in equity were pend-

ing as to the property, made absolute a rule to set aside the verdict, and for a new trial, unless within a certain time the plaintiff delivered a case. *Seymour v. the Corporation of Brecon*, 29 Law J. Rep. (N.S.) Exch. 296.

A held a farm as tenant from year to year, upon a written agreement by which it was stipulated, amongst other things, that he should cultivate the farm "in the same way and manner, or as near thereto as circumstances would admit of, as H Parsons (the outgoing tenant) had used and cultivated the same during his occupation thereof, and in all events according to the rules of good husbandry used and accustomed in the neighbourhood." In an action against A, alleging for breach, amongst others, the cutting and carrying away of ash-poles,—such user not being as near to the way and manner in which Parsons used and cultivated the farm as circumstances admitted, and being contrary to the rules of good husbandry used and accustomed in the neighbourhood,—it appeared that the poles in question consisted of shoots growing from old stools, which were seasonable and fit for cutting about every seventeen or eighteen years; that, by invariable custom, they belonged to the landlord, in the absence of a special agreement to the contrary; that, whilst Parsons held the farm, these poles had never been in a fit state for cutting; that two tenants who had preceded Parsons in the occupation of the farm had cut and sold them as crops; and that A had, whilst he occupied, paid the rates for the whole farm, including the wood or spinney in which the poles grew. The Judge having omitted to leave to the jury upon what terms Parsons had held the farm,—the Court granted a new trial. *Hood v. Kendall*, 17 Com. B. Rep. 260.

In an action on a promissory note, by indorsee against maker, the defendant pleaded that he was induced to make the note by the fraud of the payee, and that it was indorsed by the payee to the plaintiff without consideration, and that the plaintiff sued thereon as trustee. The defendant having closed his case, the Judge told the jury that there was no evidence to sustain the plea. The jury, however, returned a verdict for the defendant:—The Court granted a new trial, without examining whether the direction of the Judge was right or wrong. *Wood v. Cox*, 17 Com. B. Rep. 280.

A rule for a new trial in a cause tried before the sheriff cannot in any case be drawn up unless there be an affidavit verifying the sheriff's notes, produced within the time allowed for moving. *Santé v. Hicks*, 17 Com. B. Rep. 528.

A, as agent of B, sold a mare to C, and, having no express authority from B to warrant her, refused to do so, but, at the time of the sale, told C that, "if the mare was not all right, she was not his." C thereupon paid the price, which was received by B. The mare proving unsound, C returned her to A, and sued B in the county court for a return of the money. The Judge left the following questions to the jury,—1. Was the mare sound or unsound at the time of the sale? 2. Was there a warranty given by A to C? 3. Was the warranty given by the authority of B? 4. When the mare was sent back to A, was she received by him for B or for C? The jury answered the first and third questions in the negative, and the second in the affirmative; and, to

the last, that the mare was not received back by A on B's account. The Judge thereupon entered a verdict for the defendant. The Court directed a new trial, on the ground that the proper question to leave to the jury was, whether it was part of the contract that the mare should be returned if she proved unsound. *Poster v. Smith*, 18 Com. B. Rep. 166.

In an action for negligently driving against and killing a horse of the plaintiff proved to be worth 30*l.*, the jury,—there being strong evidence to negative negligence on the part of the defendant, and some evidence the other way,—contrary to the opinion of the Judge, found for the plaintiff, damages 15*l.*:—The Court refused to grant a new trial on the ground of the verdict being perverse. *Hawkins v. Alder*, 18 Com. B. Rep. 640.

The Court refused to grant a new trial on the ground that the damages were excessive, where the jury had given 750*l.* in an action for defamatory words spoken of a beneficed clergyman to his curate. *Higmore v. the Earl and Countess of Harrington*, 3 Com. B. Rep. N.S. 142.

Upon a motion for a new trial in an action for breach of promise of marriage, on the ground of surprise and excessive damages, the affidavit of the defendant, though required for the purpose of pledging himself to the *bona fides* of the application, cannot be looked at for the purpose of explaining or contradicting the evidence given at the trial. *Smith v. Woodfine*, 1 Com. B. Rep. N.S. 669.

(N) SUING IN FORMA PAUPERIS.

A party is not entitled to sue *in forma pauperis*, if, on his own affidavit, the Court can see that he has no cause of action. *In re Cobbett*, 27 Law J. Rep. (N.S.) Exch. 199; 3 Hurl. & N. 155.

(O) SPECIAL CASE.

[*Elliott v. Bishop*, 11 Exch. Rep. 321; 7 Law J. Dig. 568.]

The Court has no power hostilely to vary a special case which has been stated by consent, for the purpose of raising a different question from that which the parties originally contemplated. *Mersey Docks Trustees v. Jones*, 8 Com. B. Rep. N.S. 124.

(P) STAYING AND SETTING ASIDE PROCEEDINGS.

It is only in actions of ejectment that the Court ordinarily interferes to stop a second action till the costs due from the plaintiff in a former action for the same matter have been paid; but the Court might interfere in a second action of trespass, if it appeared to have been brought vexatiously and oppressively. *Dawson v. Morgan*, 25 Law J. Rep. (N.S.) C.P. 144; 17 Com. B. Rep. 530.

Where, after an agreement in writing to refer disputes on a contract, one of the parties brought an action, the Court, in its discretion, refused to stay the proceedings, under the 11th section of the Common Law Procedure Act, 1854, the plaintiff *bona fide* alleging that the question raised was one of fraud. *Wallis v. Hirsch*, 26 Law J. Rep. (N.S.) C.P. 72; 1 Com. B. Rep. N.S. 316.

Where a Judge's order is made for payment of debt and costs, with leave to sign judgment on default, there must be a reasonable time allowed for payment, after taxation of costs: and, *semble*—that, as the Master's office is not a proper place for pay-

ment of money, and an attorney is not bound to authorize every one of his clerks to pay or receive money, there must at least be an application at the office of the defendant's attorney, although it does not appear that any time for communication with the client is allowable. But, clearly, an immediate demand of the money, at the Master's office, is unreasonable, and non-payment by an attorney's clerk, on such a demand, is not a default which authorizes the plaintiff in signing judgment, even although the order stays proceedings only "on payment of debt and costs," and expresses that judgment may be signed on default in payment of debt or costs: and, *semble*—that on such an order the plaintiff could not sign judgment for the debt before taxation of costs. *Perkins v. the National Investment Soc.*, 26 Law J. Rep. (n.s.) Exch. 182; 2 Hurl. & N. 71.

A Court of law will not stay an action on the ground that there is a suit in equity pending in which the same demand comes in question (even although the demand is for a debt, as to which and other demands the plaintiff at law has, in the suit in equity, consented to a decree for an account), where the Court of equity has not stayed the action by injunction; the Court at common law having no jurisdiction to stay proceedings on such a ground, and the provision in the Common Law Procedure Act, 1852, (15 & 16 Vict. c. 76.) s. 226. only applying where the Court of equity has stayed the action by injunction. *Pearce v. Robins*, 26 Law J. Rep. (n.s.) Exch. 188.

The Court will stay proceedings in an action where the plaintiff's claim is, in fact, for less than 40s., by reason of his right of action for a sum beyond that amount being satisfied or suspended when the action was brought. The defendants, who were indebted to the plaintiffs in 6l. 8s. 6d., sent the plaintiffs an order on certain bankers for 6l. 8s. 6d., payable seven days after sight, disputing their liability to pay more. After this order had been presented to, and accepted by the bankers, the plaintiffs informed the defendants, by letter, that unless 5s. more was paid, they would return the order. The 5s. was not paid. The plaintiffs, however, kept the order, and before it became payable sued the defendants for 6l. 8s. 6d. The Court thereupon made a rule absolute for a stay of proceedings. *Stewart v. Cause*, 27 Law J. Rep. (n.s.) C.P. 193; 5 Com. B. Rep. N.S. 737.

By a contract for sale of seed, warranted when shipped of fair merchantable quality, it was provided that any dispute arising out of it should be settled by the usual mode of arbitration. An action having been brought by the purchaser for the breach of such warranty, the declaration alleged fraudulent conduct on the part of the shipper of the seed, but who was not shewn to be the defendant, and stated that, by reason of such fraudulent conduct, the seed was not such as warranted, and it also alleged, by way of damage, a loss sustained by the plaintiffs in converting into oil part of the seed before the breach of warranty was discovered. The Court granted a stay of the proceedings under section 11. of the Common Law Procedure Act, 1854, as it did not appear that the brokers, who would be arbitrators in such a case, could not form an estimation of the quality of the whole of the seed by examining what remained unconverted into oil; and also as no ques-

tion of fraud could arise with relevancy to any issue that could be taken on the declaration. *Hirsch v. Im Thurn*, 27 Law J. Rep. (n.s.) C.P. 254; 4 Com. B. Rep. N.S. 569.

When judgment has been signed for want of appearance to a writ specially indorsed according to the Common Law Procedure Act, 1852, the affidavit in support of an application under the 27th section of that act to let in the defendant to defend must not merely state that the defendant has a good defence on the merits, but must shew what the nature of his defence is, and that it is an answer to the action. *Whiley v. Wiley*, 27 Law J. Rep. (n.s.) C.P. 305; 4 Com. B. Rep. N.S. 658.

The 11th section of the Common Law Procedure Act, 1854, which, "wherever the parties to any deed or instrument in writing agree that any then existing or future differences between them shall be referred to arbitration," gives power to the Court to stay proceedings in any "action brought in respect of the matters so agreed to be referred," only applies to a case in which the agreement to refer is contained in the instrument itself on which the cause of action arises. *Blythe v. Lafone*, 28 Law J. Rep. (n.s.) Q.B. 164; 1 E. & E. 435.

A foreigner, against whom an action of contract was pending in his own country at the suit of the plaintiff, having come over to this country, was sued here by the plaintiff for the same demand:—Held, that the pendency of the action in the foreign country was not a sufficient ground for staying proceedings in the action here. *Cox v. Mitchell*, 29 Law J. Rep. (n.s.) C.P. 38; 7 Com. B. Rep. N.S. 55.

A British subject residing out of the jurisdiction, having been served with a writ of summons, under the 18th section of the Common Law Procedure Act, 1852, and not having appeared, a Judge's order was made that the plaintiff should be at liberty to proceed. Judgment was signed on the 28th of November. The defendant, on the 12th of March, applied to set aside the proceedings on the ground that the cause of action did not arise within the jurisdiction of the Court:—Held, that the Judge's order was not void, and the defendant not having come within a reasonable time, the rule was refused. *Hutton v. Whitehouse*, 1 Hurl. & N. 32.

In November, 1852, the plaintiff's attorney issued against the defendant a writ of summons in the form prescribed by the 18th section of the Common Law Procedure Act, 1852, for service on a British subject residing out of the jurisdiction. In the following March the defendant's attorney entered an appearance. The plaintiff's attorney not being aware that an appearance was entered, from time to time renewed the writ, and on the 31st of March served the defendant, who had always resided in England, with a copy of the renewed writ:—Held, that there was no ground for setting aside the proceedings. *Green v. Braddyll*, 1 Hurl. & N. 69.

(Q) CONSOLIDATION OF ACTIONS.

Where an attorney did different kinds of professional work for a client, and after all the business was transacted sent in a bill for one part of the business, and subsequently sent in a bill for the other part, and commenced an action for the first part of the business before the expiration of the month in respect of the delivery of the second bill, and after

the expiration of that month commenced an action for the other part, the Court (*dissentiente Erle, J.*) made an order for the consolidation of the two actions. *Beardsall v. Cheetham, Same v. Same*, 27 Law J. Rep. (N.S.) Q.B. 367; E. B. & E. 848.

The Court ordered several actions, by the same plaintiff, against different underwriters, upon mutual insurance policies, to be consolidated, according to the usual practice in actions upon ordinary policies. *Lewis v. Banks or Barnes*, 27 Law J. Rep. (N.S.) C.P. 247; 4 Com. B. Rep. 330.

On an application to consolidate a number of actions in which the cause of action and the ground of defence appear *prima facie* to be the same, it is not a sufficient answer that possibly the position of some of the parties may be different and raise different questions (especially if such questions will be only as to the amount of their respective liabilities), although the extent of the consolidation must depend on the circumstances. *Syers v. Pickersgill*, 27 Law J. Rep. (N.S.) Exch. 5.

Thus, where upwards of forty actions were brought against underwriters of three policies of insurance, one of which had been assigned by a memorandum of transfer signed by some of them, before the bankruptcy of the assured, the Court made an order for consolidation, the general principle laid down being that all actions should be stayed except such as might be really necessary to determine the liability of distinct defendants in each class of cases, the defendants to be bound by the result, but not the plaintiffs. The Court ultimately settled that there were two classes of cases; and that two actions should be allowed to proceed. *Ibid.*

Separate actions being brought on a joint and several bond, conditioned for payment of principal a certain time after demand, and interest, the breach being in non-payment of interest, and there having been no demand of principal, the Court has no jurisdiction to stay proceedings on payment of the interest due, nor to consolidate the actions. *Wheelhouse v. Ladbroke*, 27 Law J. Rep. (N.S.) Exch. 307; 8 Hurl. & N. 291.

(R) MOTIONS AND RULES.

Service of a rule calling upon an attorney for payment of money pursuant to his undertaking, on a clerk not in his employ, although at the place registered at the Master's office as the place for serving the attorney with rules, &c., held not sufficient. *Bragg v. Hatchard*, 28 Law J. Rep. (N.S.) Exch. 35.

An issue went down for trial, when an arrangement was made between the parties (under a rule of Court), but through inadvertence the plaintiff did not ask for the costs of the issue. The Court refused to allow the rule to be amended in this respect in a subsequent term. *Hayne v. Robertson*, 17 Com. B. Rep. 548.

Service of a rule under the 60th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, upon the wife of the party, without shewing that it came to his knowledge, is not sufficient. *Mason v. Muggersidge*, 18 Com. B. Rep. 642.

Non-performance of a condition in a rule of Court is no ground for an application to rescind it. *Baynton v. Baynton*, 1 Com. B. Rep. N.S. 220.

Where a rule cannot be served, it may be amended and enlarged, even though it has run out. *Grimold*

v. Harding, Official Manager of the Royal British Bank, 1 Com. B. Rep. N.S. 556.

Service of a notice or rule by putting it under the door of the attorney's office, is not good service, without some evidence that it has duly come to hand. *Burdett v. Lewis*, 7 Com. B. Rep. N.S. 791.

(S) JUDGE'S ORDER.

The defendant consented to a Judge's order to pay debt and costs by instalments, on the 25th of every month; and in default the plaintiff to be at liberty to sign judgment. The day on which the fourth instalment fell due was a Sunday, and the defendant tendered the money to the plaintiff on the Monday after; the latter refused to accept it, and then signed judgment. The Court made absolute a rule to set aside the judgment, on the ground that it was not authorized by the Judge's order reasonably construed. *Morris v. Barrett*, 29 Law J. Rep. (N.S.) C.P. 102; 7 Com. B. Rep. N.S. 139.

(T) APPEALS TO THE EXCHEQUER CHAMBER.

On an application for further time to deliver notice of appeal from a decision on a motion for a new trial, within four days from the time of the decision, it is necessary not only to shew sufficient reason to account for the default, but likewise to satisfy the Court that, supposing they had originally a discretionary power to allow an appeal, they could have allowed it in the particular case. And it is not a sufficient reason for the default that the attorney inadvertently allowed the time to elapse. *Watson v. Lane*, 25 Law J. Rep. (N.S.) Exch. 240.

When the Court below has refused a rule, the proper time for taking a preliminary objection to the right of the appellant to appeal is on shewing cause after the rule *nisi* has been granted in the court of appeal on the case stated. It is most convenient that cause be shewn in the first instance. Only one counsel will be heard on each side. *Kingsford v. Merry* (Ex. Ch.), 26 Law J. Rep. (N.S.) Exch. 83; 1 Hurl. & N. 503.

Where a motion for a new trial has been made, not only on the ground that the verdict was against the weight of evidence, but also on the ground that the Judge has not ruled according to law, the alleged misdirection being in not directing the jury to find a verdict for the party applying as to a certain part of the claim: if the rule is refused on the former ground, as to the weight of evidence, the Judge certifying that he is not judicially dissatisfied with the verdict, and the point depends upon a question of fact, arising on the evidence, which he was not asked specifically to leave to the jury, an appeal will not be allowed. *Holden v. Mordach*, 27 Law J. Rep. (N.S.) Exch. 27.

An appeal in error lies, under section 84. of the Common Law Procedure Act, 1854, to the Court of Exchequer Chamber, to review the decision of the Court below on a rule obtained on the trial of an interpleader issue to enter a verdict, pursuant to leave reserved at the trial. *Withers v. Parker* (Ex. Ch.), 28 Law J. Rep. (N.S.) Exch. 383; 4 Hurl. & N. 810.

Under the 87th section of the Common Law Procedure Act, 1854, the Court have a discretionary power, after the lapse of the four days for giving notice of appeal from a judgment upon an applica-

tion for a new trial, to enlarge the time for giving such notice. Where the point had been reserved, and it was sworn that there was an intention to give the notice, and that it had been omitted within the four days by mere mistake, and there had been verbal notice of the intention, and the application was made promptly, the Court allowed the formal notice to be given. *Ward v. Lumley*, 29 Law J. Rep. (n.s.) Exch. 372; 5 Hurl. & N. 686.

Where a verdict was found for the plaintiff, leave being reserved for the defendant, on a point taken at the trial, to move to enter a verdict or for a nonsuit, and he obtained a rule nisi to enter a verdict, or for a nonsuit, or for a new trial on the ground of misdirection; and the Court made absolute the rule for a new trial.—Held (*dissentiente Williams, J.*), that no appeal lay to the Exchequer Chamber, under sections 34 or 35 of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. *Abbott v. Feary* (Ex. Ch.), 29 Law J. Rep. (n.s.) Exch. 475.

(U) COURT OF PROBATE.

A motion by the heir-at-law, the defendant in a suit, in the late Prerogative Court, of proving in solemn form a will, to stay publication of evidence taken in that court and an ejectment commenced by him, and to quash the suit, with a view to a fresh suit in this court for trial by a jury of the question of the intestacy of the testator, both as to real and personal estate, refused; the Court of Probate having no power either to stay the ejectment or to decline hearing the cause. *Drake v. Morgan*, 27 Law J. Rep. (n.s.) Prob. & M. 1.

All motions before the Court must be made by counsel. *Ibid.*

A testator died leaving personal estate, part being situate in the province of Canterbury, the residue in the diocese of Chester. A grant of probate was obtained from the Prerogative Court of Canterbury only, before the commencement of 20 & 21 Vict. c. 77.—Held, that by section 87. of that act such grant was rendered effectual with respect to the property in the diocese of Chester, without any order of the Court; such probate duty being payable as would have been chargeable on the diocesan probate. *In the goods of Freckleton*, 27 Law J. Rep. (n.s.) Prob. & M. 6; 1 Sw. & Tr. 16.

In a suit transferred from the Prerogative Court of Canterbury, in which the defendant opposed a will propounded by the plaintiffs, an application was made by the plaintiffs, under section 61. of the Probate Act, for leave to cite the defendant and F, the co-heirs of the deceased. At the time the act came into operation the defendant had appeared, but had not given in any answer or allegation:—Held, first, that it was no ground for rejecting the application that F was the infant son of the wife of one of the plaintiffs. Secondly, that as the plaintiffs were in a condition to call for the primary answer of the defendants when the Probate Act came into operation, they were entitled to cite the heir under section 61. *Nichols v. Binns*, 27 Law J. Rep. (n.s.) Prob. & M. 14; 1 Sw. & Tr. 19.

A person suing *in forma pauperis*, who has had counsel assigned to him by the Court, cannot appear by another counsel. *Hamer v. Boreham*, 27 Law J. Rep. (n.s.) Prob. & M. 107; 1 Sw. & Tr. 26.

After service of a citation, the certificate of ser-

vice given in Form 3. to the Rules for Contentious Business should be indorsed on it. *Goodburn v. Bainbridge*, 29 Law J. Rep. (n.s.) Prob. M. & A. 163.

Where an issue has been tried at the assizes, the parties are not bound by the 35th rule, which directs that an application for a new trial must be made within ten days of the trial, or on the first sitting of the Court after the trial. *Charlton v. Hindmarsh*, 29 Law J. Rep. (n.s.) Prob. M. & A. 163; 1 Sw. & Tr. 519.

PRACTICE, IN EQUITY.

(A) BILLS.

- (a) *In general.*
- (b) *Supplemental.*
- (c) *Service of Copy of.*
- (d) *Amendment of.*
- (e) *Taking pro Confesso.*
- (f) *Dismissal of.*

(B) CLAIMS.

(C) SUIT BY SUMMONS.

(D) PROCESS.

(E) CONTEMPT.

(F) APPEARANCE.

(G) ANSWERS.

(H) DEMURRER.

(I) TRAVERSING NOTE.

(K) PETITIONS.

(L) MOTIONS.

- (a) *In general.*
- (b) *Notice of.*
- (c) *For Decree.*
- (d) *Abandoned.*

(M) PRODUCTION OF DOCUMENTS.

- (a) *General Points.*
- (b) *Privileged Documents.*

(N) DISCOVERY.

(O) INTERROGATORIES.

(P) AFFIDAVITS.

(Q) SPECIAL EXAMINER.

(R) EXAMINATION OF WITNESSES.

(S) EVIDENCE.

(T) DISCLAIMER.

(U) COMPROMISE OF SUIT.

(W) STAYING PROCEEDINGS.

(X) SETTING DOWN AND HEARING CAUSE.

(Y) TRANSFER OF CAUSE.

(Z) INTERLOCUTORY APPLICATIONS.

(AA) TRIAL BY JURY.

(BB) CASE STATED BY TRUSTEES.

(CC) CHIEF CLERK'S CERTIFICATE.

(DD) ORDERS AND DECREES.

- (a) *In general.*
- (b) *To revise.*
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(EE) ISSUE AND CASE SENT TO LAW.

(FF) REFERENCES.

(GG) EXCEPTIONS.

- (a) *Answers.*
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(HH) IN CHAMBERS.

(II) SALES AND PURCHASES UNDER DIRECTION OF THE COURT.

- (a) *Conduct of the Sale.*
- (b) *Opening Buildings.*

(KK) PAYMENT INTO COURT.
 (LL) PAYMENT OUT OF COURT.
 (MM) RECEIVER.
 (NN) INFANTS' SUITS.
 (OO) GUARDIAN AD LITEM.
 (PP) NEXT FRIEND.
 (QQ) PAUPER.
 (RR) CREDITORS' SUITS.
 (SS) SPECIAL CASE.
 (TT) SUBSTITUTED SERVICE.
 (UU) REHEARING.
 (WW) PROHIBITION.
 (XX) FOREIGN JUDGMENTS.
 (YY) PETITION OF RIGHT.
 (ZZ) OUTLAWRY.
 (AAA) APPEAL.
 (BBB) ENDORSEMENT OF DECREE.
 (CCC) RECTIFYING PROCEEDINGS.
 (DDD) ABATEMENT.
 (EEE) REPRESENTATION OF DECEASED DEFENDANT.
 (FFF) ATTACHMENT.
 (GGG) SEQUESTRATION.

(A) BILLS.

(a) In general.

A written bill was filed, and, without culpable negligence on the part of the plaintiff or his advisers, no printed bill was filed within the time required by the 3rd Order of the 7th of August 1852. The record and writ clerk had taken the written bill off the file; but the Master of the Rolls ordered it to be restored, and gave leave to file a printed copy; and, upon appeal, the same was affirmed. *Ferrand v. the Corporation of Bradford*, 25 Law J. Rep. (n.s.) Chanc. 389; 8 De Gex, M. & G. 93; 21 Beav. 422.

The Court has power to dispense with the General Orders if the circumstances and justice of the case require it. The authority of the 46th Order of the 7th of August 1852 does not, by expressly reserving power to the Court to enlarge the time for doing certain specified acts, abridge the inherent authority of the Court to dispense with the Orders in cases where that Order does not apply. *Ibid.*

A bill is not sustainable, under the 50th section of the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86.) for a mere declaratory order, where the plaintiff is not entitled to consequential relief. *Rooke v. Lord Kensington*, 25 Law J. Rep. (n.s.) Chanc. 795; 2 Kay & J. 753.

By a mortgage, after reciting that the mortgagor was seised of or entitled to the messuages, lands, hereditaments and premises thereinafter described, certain messuages, lands, hereditaments and premises at K, in the county of M, were mortgaged by a particular description, and by reference to schedules; and after the description came the following general words, "And all other the lands, tenements and hereditaments (if any), in the county of M aforesaid, whereof or whereto the said (mortgagor) is seised or entitled for an estate of inheritance." At the date of the mortgage the mortgagor was seised in fee of a manor at K, in the county of M. The Court, having no power under the circumstances to make

a decree, expressed an opinion that the manor was not comprised in the mortgage. *Ibid.*

(b) Supplemental.

A supplemental bill, with the original bill annexed by way of schedule, permitted to be filed. *The Governors of the Gray-Coat Hospital v. the Westminster Improvement Commissioners and others*, 27 Law J. Rep. (n.s.) Chanc. 52; 2 De Gex & J. 61.

If judgment creditors, not parties to a suit, neglect or refuse, when served with notice, to come in under a decree for the sale of a mortgaged estate,—Held, that they may be brought before the Court by supplemental bill. *Knight v. Pocock*, 27 Law J. Rep. (n.s.) Chanc. 297.

Held, also, that in their absence a good title cannot be made to a purchaser.

Plaintiff was tenant for life with contingent remainders to his children, with remainder to a defendant for life, with contingent remainder to his first son, who should attain twenty-one and survive him. After bill filed and before decree, the defendant's eldest son was born. After decree plaintiff died without having had any issue. On an application on behalf of the infant son of the defendant for a revivor order,—Held, that a bill in the nature of a bill of supplement and revivor was necessary. *Watts v. Watts*, Johns. 631.

(c) Service of Copy of.

A suit respecting property, realty in Scotland and personality in England (the latter of which had been permitted to be taken into Scotland), was instituted in England, as was another suit in the Court of Session in Scotland. Three of the defendants to the English suit were resident in Scotland, and one of the Vice Chancellors permitted a copy of the bill to be served on them under the 33rd Order of the 8th of May 1845, and on appeal the same was affirmed (*dubitante Lord Justice Turner*). *Innes v. Mitchell*, 26 Law J. Rep. (n.s.) Chanc. 719, 625; 1 De Gex & J. 423; 4 Drew. 141.

Where a company amalgamated with another, and ceased to have either officers or any place of business, the Court, upon a bill being filed, ordered the service to be made upon the late deputy-chairman and secretary, and directed that it should be good service upon the company. *Gaskell v. Chambers*, 28 Law J. Rep. (n.s.) Chanc. 385; 26 Beav. 252.

An order to serve a defendant out of the jurisdiction with a copy of the bill is wholly in the discretion of the Court, but it will look into the bill to see that the case made by the plaintiff is not such as *prima facie* will not obtain relief at the hearing of the cause, notwithstanding that the 33rd Order of May 1845 does not require evidence of the merits or truth of the case. *Maclean v. Dawson*, 28 Law J. Rep. (n.s.) Chanc. 742; 4 De Gex & J. 150; 27 Beav. 25.

(d) Amendment of.

The original bill sought relief against the defendant as mortgagee in possession. The defendant by his answer claimed under a conveyance from the plaintiff. By amendment, the plaintiff, abandoning the relief under the mortgage title, sought to avoid the conveyance. A motion by the defendant that the amended bill might be taken off the file, or that the

plaintiff might pay the costs up to the amendment, was refused. *Allen v. Spring*, 22 Beav. 615.

(e) *Taking pro Confesso.*

The motion for leave to take a bill *pro confesso* against an absconding defendant may be saved on the day mentioned in the advertisement in the *Gazette*, until the next seal, without mentioning such saving expressly to the Court. *Torr v. Torr*, Johns. 660.

To set down a bill to be taken *pro confesso* against a sole defendant, the records and writs clerks must grant a certificate that the cause is in a fit state to be set down, and a petition for the fiat of the Lord Chancellor is not necessary. *Ibid.*

Form of decree *pro confesso* against a sole defendant to raise a legacy charged on real estate. *Ibid.*

When a decree is made on a bill taken *pro confesso* against a defendant out of the jurisdiction, the summons to proceed upon the decree, as well as the decree itself, ought to be served upon the defendant; and no proceedings in chambers under the decree ought to be taken until the expiration of the time limited for setting aside the decree. *Golden v. Newton*, Johns. 720.

A plaintiff advertised that he would move to take the bill *pro confesso* at the end of six weeks. The notice was advertised once in every one of the first four weeks, but not in the two last:—Held, that this was a sufficient compliance with the exigency of the 79th General Order of May 1845. *Millar v. Elwin*, 25 Beav. 674.

(f) *Dismissal of.*

[*Bottomley v. Squire*, 7 Law J. Dig. 575; 7 De Gex, M. & G. 246.]

The Court has jurisdiction, notwithstanding the statute 4 Ann. c. 16. s. 23, to dismiss a bill, without costs, on the application of the plaintiffs before the hearing. *Lister v. Leather*, 26 Law J. Rep. (n.s.) Chanc. 557; 1 De Gex & J. 361.

After the institution of a suit to restrain the infringement of a patent, the plaintiffs disclaimed a portion of their specification. At the hearing of the cause the Court ordered that the plaintiff should be at liberty to withdraw the replication and amend the bill, paying the whole costs of the suit up to and including the order. The costs were paid and accepted, and the bill was amended; but upon motion for an injunction, the defendant raised an objection to the suit which existed at the original hearing. Under these circumstances, the Court, upon the application of the plaintiffs, dismissed the bill, without costs; and on appeal to the Lords Justices, the order was confirmed. *Ibid.*

A motion for an injunction having been ordered to stand over, with liberty for the plaintiffs to bring an action, an action was commenced, and shortly afterwards an answer was put in. No further proceedings having been taken in the action for nine months after answer, the bill was dismissed for want of prosecution. *Baker v. McClellan*, 27 Law J. Rep. (n.s.) Chanc. 57.

A defendant is not entitled to dismiss a bill, upon conceding all that the plaintiff demands, without paying the costs, and the Court will not upon a motion for such dismissal go into the merits of the

case. *Wallis v. Wallis*, 28 Law J. Rep. (n.s.) Chanc. 441; 4 Drew. 458.

In consequence of the doubtful expressions in the authorities, the costs of the motion were reserved to the hearing. *Ibid.*

When a plaintiff becomes insolvent, and a vesting order is made by the Insolvent Court, this Court will, on the provisional assignee expressing his desire to prosecute the suit, make an order that he do bring himself before the Court within a time limited in the order, or that the bill be dismissed without costs. *Meiklam v. Elmore*, 28 Law J. Rep. (n.s.) Chanc. 515; 4 De Gex & J. 208.

If a bill filed in this court is not duly prosecuted, it will, though the defendant has taken the benefit of the Insolvent Act, be dismissed, with costs. *Lever v. Heritage*, 28 Law J. Rep. (n.s.) Chanc. 704; *nom. Levi v. Heritage*, 26 Beav. 560.

Notice of motion to dismiss a bill for want of prosecution having been served, the plaintiff filed replication, but made no tender of the costs until four o'clock p.m. on the day preceding the seal; when he tendered 20s., which the defendant's solicitor refused to accept:—Held, that the defendant was entitled to the costs of the motion to dismiss. *Hughes v. Lewis*, 29 Law J. Rep. (n.s.) Chanc. 424.

There is no definite rule that 20s. is a sufficient tender of the costs; but, *semble*, that the proper costs to be tendered are the costs properly incurred. *Ibid.*

After a decree merely directing accounts and inquiries, a bill may be dismissed on further consideration. *Barton v. Barton*, 3 Kay & J. 512.

A defendant who has applied for his discharge under the Insolvent Debtors Act may regularly move for and obtain an order to dismiss for want of prosecution; and when the plaintiff afterwards moved to discharge the order to dismiss obtained by the insolvent, the plaintiff's motion was refused, with costs.—*Blanchard v. Drew*, 10 Sim. 240, founded on an erroneous construction of *Monteith v. Taylor*, 1 M. & G. 80. *Robson v. the Earl of Devon*, 3 Sm. & G. 227.

Where a defendant, in contempt, filed his answer, and the plaintiff, having taken an office copy, filed no exceptions, the answer becoming sufficient,—Held, that the plaintiff having thus accepted the answer, without insisting on his costs, the defendant was entitled to move to dismiss the bill for want of prosecution. *Herrett v. Reynolds*, 2 Giff. 409.

The plaintiff required A, but not B, to answer the amendments. B, who did not desire to answer, moved after fourteen days to dismiss:—Held, that the case was not within the 115th Order of May 1845. *Brown v. Butler*, 21 Beav. 615.

An order was made to dismiss in default of the plaintiff filing a replication within fourteen days; but nothing was said as to the costs of the suit. The plaintiff filed a replication a few days after the time appointed. On a subsequent application, the Court dismissed the bill, and with costs. *Stephenson v. Mackay*, 24 Beav. 252.

The plaintiff set down the cause, but neglected to serve a subpoena to hear judgment within time. The cause became afterwards abated by the death of a defendant:—Held, under these circumstances, that an order to dismiss was regular. *Williams v. Page*, 24 Beav. 490.

At the hearing a suit was found defective for want of parties, and was ordered to stand over, with liberty to amend by adding parties. It was brought on a second time, still defective for want of parties. The Court dismissed it as against all the defendants. *Williams v. Page* (No. 4), 28 Beav. 148.

(B) CLAIMS.

At the hearing of a claim, the plaintiff was ordered to bring the representatives of a deceased person before the Court. Not having done so, the defendant, after considerable delay, moved to dismiss:—Held, that the proper order was, that the plaintiff should comply within a fortnight, or in default that the claim should be dismissed. *Pearce v. Wrigton*, 24 Beav. 253.

(C) SUIT BY SUMMONS.

A testator devised all his real estate to the defendant, subject to the payment of his debts, funeral and testamentary expenses:—Held, that the devisee must be considered a trustee for sale within the meaning of the 47th section of the Chancery Practice Amendment Act, and might be called upon by summons in chambers to administer the testator's estate. *Ogden v. Lowry*, 25 Law J. Rep. (N.S.) Chanc. 198.

Where, by the order made in an administration suit, commenced by summons at chambers, the common accounts have been directed to be taken, a trustee cannot on further consideration be charged with wilful default. *Re Fryer's Estate; Martindale v. Picquot*, 26 Law J. Rep. (N.S.) Chanc. 398; 3 Kay & J. 317.

An order for injunction and receiver as against the administratrix of a deceased intestate was granted on motion, after the common decretal order made upon summons for taking the simple administration accounts; a case of misconduct and wilful default against the administratrix having come to light in the course of the proceedings under such decretal order. *Brooker v. Brooker; In re Brooker's Estate*, 26 Law J. Rep. (N.S.) Chanc. 411; 3 Sm. & G. 475.

The only administration decree which can be obtained upon summons in chambers under the 45th section of the 15 & 16 Vict. c. 86. is the usual decree to make an executor or administrator account for the personal estate which he may have received. The Court cannot in any stage of a suit engraft upon such a decree, whether made upon bill, or upon claim, or upon summons in chambers, a decree to make an executor or administrator account for what he might, without his wilful neglect or default, have received: a decree of this nature being totally different in its principle from the usual decree. *Partington v. Reynolds*, 27 Law J. Rep. (N.S.) Chanc. 505; 4 Drew. 253.

Where a summons, taken out at chambers, was adjourned into court, and then abandoned by the plaintiff, the defendant was held entitled to the taxed costs of such summons. *Lister v. Bell*, 28 Law J. Rep. (N.S.) Chanc. 162.

In a suit commenced by summons, the Court may decide questions between parties entitled to the residuary estate, if those questions are founded upon the decree, but it cannot go out of the decree; and if that did not extend beyond estate not specifically

bequeathed, the Court cannot determine nor direct inquiries as to a question of conversion of leaseholds, involving the assumption of their being specifically bequeathed. In such a case, under a decree made on a summons, as well as on bill, if the decree is insufficient, it must be reheard. *West v. Laing*, 3 Drew. 331.

Where a bill was filed for the administration of the testator's estate, and sought to charge the representative of the testator's executrix on the balance of an account, and such representative had offered to pay a sum in full, but had refused to account, and there was a question on the construction of the will to be decided,—Held, that the suit was properly instituted by bill, and that the case was not one for an administration summons, under the 45th section of the 15 & 16 Vict. c. 86, and therefore that the plaintiff was entitled to his costs. *Smith v. Spilsbury*, 1 Dr. & Sm. 151.

A residuary legatee, after mortgaging his share and taking the benefit of the Insolvent Debtors Act, obtained the usual order for administration on a summons not disclosing the above facts. The mortgagee afterwards brought them to the attention of the chief clerk, whereupon proceedings in the suit were stayed, and the mortgagee filed a bill for administration. An order was then obtained in the summons suit, giving the conduct of it to another legatee, and making the provisional assignee under the insolvency a party. Notice of this order was given to the mortgagee, who nevertheless continued his own suit:—Held, that he ought not to have done so, and an order staying further proceedings in it was affirmed, on appeal. *Whittington v. Edwards*, 3 De Gex & J. 248.

(D) PROCESS.

On the 4th of June 1827 A was ordered to pay certain sums of money within eight days after the date of the chief clerk's certificate. The certificate was made, and was dated the 8th of August following. The certificate was not approved until after the long vacation, and was not served on A until November. A refused to pay on account of this irregularity. A notice of motion was served on him to obtain an order for him to pay. He did not appear, and on the 19th of November, on affidavit of service, an order was made for him to pay the amount mentioned in the certificate, "on or before the 1st of December next, or within four days of service upon him of this order." The order was not served on A or his solicitor, and was not passed and entered until the 2nd of December. After a month's delay from the last-named day a writ of *fi. fa.* was issued for each sum mentioned in the certificate, under which the sheriff levied on the goods of A, who on the 17th of February 1858, moved to set aside the writs and to have the money levied repaid to him. Vice Chancellor Stuart refused to make any order other than that A should pay the costs of the sheriff of the motion:—Held, upon appeal, reversing that decision, that the order of the 19th of November, not being perfected till the 2nd of December, was until that time a nullity, and A had no opportunity of complying with the first part of it, and the order not being served upon A the period limited in the latter part had never arrived, wherefore the writs were wholly irregular and void. *Adkins v. Bliss; Vale v. Bliss*,

27 Law J. Rep. (n.s.) Chanc. 486; 2 De Gex & J. 286.

A party to a suit cannot abandon one proceeding for another to obtain the examination of a witness who was also a party to the suit without first paying the costs of the first proceeding. *Davey v. Durrant*; *Smith v. Durrant*, 27 Law J. Rep. (n.s.) Chanc. 504; 24 Beav. 411; affirmed, on appeal, 2 De Gex & J. 506.

(E) CONTEMPT.

[*Hackwood v. Lockerby*, 7 Law J. Dig. 579; 7 De Gex, M. & G. 238.]

Threatening letter addressed and sent, pending the suit, to the defendant by the plaintiff, held a contempt of Court, upon which to found an order for committal. *Smith v. Lakeman*, 26 Law J. Rep. (n.s.) Chanc. 305.

The Court will punish as for a contempt those who make the publication of its proceedings the vehicle of a libel; but, although it has the power of restraining the publication of its proceedings pending litigation, it will not restrain the publication of every unfair report purporting to represent what takes place in open court. *Brook v. Evans*, 29 Law J. Rep. (n.s.) Chanc. 616.

A plaintiff in contempt is entitled to be heard on his motion to discharge an order made against him at chambers. *Futvoyle v. Kennard*, 2 Giff. 110.

(F) APPEARANCE.

A plaintiff entered an appearance for a defendant, and he afterwards amended his bill:—Held, that it was unnecessary to enter a second appearance, but that the defendant being served with the amended bill, his time to demur or put in a voluntary answer ran from the time of such service. *Cheeseborough v. Wright*, 28 Beav. 173.

(G) ANSWERS.

A defendant having obtained several enlargements of the time for answering the plaintiff's bill, and being unable to obtain further time, filed an answer, which was intentionally insufficient. The Court, upon motion, ordered the document to be taken off the file, with costs to be paid by the defendant. *Reed v. Barton*, 26 Law J. Rep. (n.s.) Chanc. 284; 3 Kay & J. 166.

An answer, referring to a printed document kept in the defendant's possession, and praying that such document may be taken as part of the answer, is irregular, although such document is marked as an exhibit at the time of swearing the answer and the plaintiff is willing to accept it as part of the answer; and where the record and writ clerk, having allowed the answer to be filed, afterwards discovered the irregularity and refused to file the replication, the Court declined to direct him to do so. *The Falkland Islands Co. v. Lafone*, 26 Law J. Rep. (n.s.) Chanc. 414; *nom. Lafone v. the Falkland Islands Co.*, 3 Kay & J. 267.

Upon motion for decree, the Court having submitted several questions of practice to the Registrar, decided that a plaintiff may read an answer of a defendant against that defendant, without notice; that a plaintiff cannot read an answer of one defendant against another defendant without notice; that a

defendant cannot read his own answer against the plaintiff without notice, and that, if a plaintiff reads part of a defendant's answer against him, that defendant is entitled to read the whole of his answer against the plaintiff. *Stephens v. Heathcote*, 29 Law J. Rep. (n.s.) Chanc. 529; 1 Dr. & Sm. 188.

An answer will be entered as read, in a decree, if a plaintiff may read it without notice, as such right makes it imperative upon the defendant to give a brief of the answer to his counsel, even though he has given no notice to read it. *Bright v. Legerton*, 29 Law J. Rep. (n.s.) Chanc. 856.

Where the plaintiff in the original suit had obtained the usual order, giving him time to answer a cross-bill after the plaintiff in the cross-suit should have put in a "full and sufficient answer" to the original bill:—Held, that for the purpose of computing the time so given the answer must be considered sufficient from the time of its being put in, unless proved insufficient upon exceptions. *Lafone v. the Falkland Islands Co.*, 2 Kay & J. 276.

The Record and Writ Clerks ordered to certify a printed answer in which some trifling errors of the press had been corrected in writing, and to alter the printed copy left with them so as to make it correspond with the corrected copy and with the written copy previously certified by the record and writ clerks. *Lee v. Dawson*, 1 Jo. & H. 37.

To a bill to set aside a conveyance as fraudulent under the statute of Elizabeth, the defendant by his answer refused to answer any portion of it on the ground that the statute imposed a forfeiture and six months' imprisonment. After the time for excepting had expired, the plaintiff amended his bill by striking out the allegations of fraud and by attempting to remove the objection, and he again filed the interrogatories. The defendant by answer again insisted on the objection and that the proceeding of the plaintiff was a mere snare, and he refused to answer any portion of the bill. The Court came to the conclusion, that the two bills were substantially the same, and the answer to the first being deemed sufficient, the defendant was not bound to answer the second. *Wick v. Parker*, 22 Beav. 59.

(H) DEMURRER.

Where a defendant has filed a demurrer and answer to a bill, and the demurrer is allowed, the Court will not give the plaintiff leave to amend his bill on the ground that the answer is on the file. *Osborne v. Jullion*, 26 Law J. Rep. (n.s.) Chanc. 6; 3 Drew. 596.

After the time for filing the interrogatories has elapsed a defendant may demur to part of a bill without answering or pleading to the rest. *Burton v. Robertson*, 29 Law J. Rep. (n.s.) Chanc. 747.

The 20s. paid by the plaintiff to a defendant who has demurred on obtaining leave to amend before the demurrer has been set down for argument, covers all the costs of preparing and filing such demurrer. But the costs of preparing a demurrer which was prepared but not filed before amendment are costs of suit. *Bainbrigg v. Moss*, 3 Kay & J. 62.

On argument of a demurrer, the documents set out in the bill must be taken as therein stated; and no reference to the original documents is permitted to contradict the averments in the bill. *Cuddon v. Tite*, 1 Giff. 395.

(I) TRAVERSING NOTE.

An order for substituted service of a traversing note will be drawn up, though it is not shewn that the defendant is within the jurisdiction. *Hunt v. Niblett*, 27 Law J. Rep. (N.S.) Chanc. 295; 25 Beav. 124.

(K) PETITIONS.

A petition cannot be brought on merely for the purpose of ascertaining what parties are to be served. The petitioner must serve such persons as he thinks proper, and state in the foot-note who have been served. *In re Green's Trust*, 29 Law J. Rep. (N.S.) Chanc. 716; 1 Dr. & Sm. 68.

(L) MOTIONS.

(a) *In general.*

An application in an injunction suit for leave to bring an action at law, should be supported by an affidavit of the plaintiff's title; such an affidavit, however, will be sufficient to found the application upon, although the defendant may have had no opportunity of cross-examining the plaintiff upon it. *Mayer v. Spence*, 29 Law J. Rep. (N.S.) Chanc. 552; 1 Jo. & H. 87.

(b) *Notice of.*

Application for leave to serve a notice of motion for an injunction, prior to the bill being filed, refused, the Court declining to do more than give leave to serve the notice of motion with the copy of the bill. *Simmons v. Heavyside*, 22 Beav. 412.

(c) *For Decree.*

The 15 & 16 Vict. c. 86, and the orders made in pursuance thereof, do not so far change the practice of taking evidence in equity as to make it essential that the defendant should know all the plaintiff's evidence before he adduces his own. *Marchioness of Londonderry v. Bramwell*, 3 Kay & J. 162.

Therefore the Court will not, on a motion for a decree enlarge the time for the defendant to file his affidavit, simply to cross-examine the plaintiff's witnesses before doing so. *Ibid.*

But it would probably grant this indulgence if the defendant could not afford the expense of a special examiner, and if his application for enlargement of time were made without delay. *Ibid.*

(d) *Abandoned.*

The Court will not, under the 123rd Order of May 1845, fix the amount of costs to be paid in respect of an abandoned motion, except where the parties are poor and anxious to put an end to the matter. *The London and Blackwall Rail. Co. v. the Board of Health for the Limehouse District*, 26 Law J. Rep. (N.S.) Chanc. 164; 3 Kay & J. 123.

Semble—it is too late to ask for the costs of an abandoned motion at the hearing. Certainly too late on speaking to the minutes. Notice of motion having been given, the motion was ordered to stand over to a day named. In the interval the bill was amended, a new notice given, and the original motion was not again brought on:—Held, that this was an abandoned motion. *Eccles v. Liverpool Borough Bank*, Johns. 402.

Where the plaintiff after answer gave notice of

motion for a receiver, but filed no affidavits, and he ultimately abandoned it, the question of whether the defendant is entitled to more than 40s. costs depends on whether the plaintiff has given notice to use the answer. *Semble*—where on a notice of motion no affidavit has been filed, it may be abandoned on payment of 40s. costs, although the motion has on a former occasion been served. *Gorely v. Gorely*, 25 Beav. 234.

(M) PRODUCTION OF DOCUMENTS.

(a) *General Points.*

The day after the defendant had put in his answer he applied for an order upon the plaintiff to produce documents under the 15 & 16 Vict. c. 86. s. 20:—Held, that such an order may be made before the expiration of the six weeks allowed for excepting to an answer, but the plaintiff will be given time to look into the answer to ascertain whether it is sufficient. *Walker v. Kennedy*, 26 Law J. Rep. (N.S.) Chanc. 397.

In a suit to set aside a mortgage deed, as having been obtained by the mortgagee under circumstances of pressure and surprise, which alleged circumstances were, however, denied by the answer of the mortgagee, the Court, upon motion, ordered the production of the mortgage deed, it appearing that the mortgagee was a solicitor, and that he had been the mortgagor's only professional adviser in the transaction of the mortgage. *Davis v. Parry*, 27 Law J. Rep. (N.S.) Chanc. 294.

A suit was commenced by bill to which no interrogatories were filed and no answer was required. The defendant obtained leave to file a voluntary answer, and moved, before putting in such answer, that the plaintiff might be ordered to produce documents:—Held, that as no discovery was prayed by the bill and no answer required, the defendant was entitled to the order. *Bailey v. Dunkerley*, 27 Law J. Rep. (N.S.) Chanc. 816.

A legatee under a will filed a bill against the trustee who had raised money to pay legacies, and against the mortgagee, who had lent the money, charging that the trustee had effected a certain mortgage; that he had borrowed the money for his own purposes, and not to pay off the legacies; and that the mortgagee knew of the alleged breach of trust. The mortgagee admitted the mortgage-deed, "and for greater certainty as to the contents thereof craved leave to refer to it when produced to the Court," but denied the other allegations. The plaintiff obtained an order in chambers for production of the mortgage-deed:—Held, upon an adjourned summons, that the plaintiff, who did not allege that the deed contained anything which would support his case, was not entitled to the production, except upon redeeming the mortgage. *Howard v. Robinson*, 28 Law J. Rep. (N.S.) Chanc. 670; 4 Drew. 522.

A defendant by his answer stating that he was a purchaser for value without notice, is not bound to produce the title-deeds of an estate to a mortgagee whose security preceded the purchase, though the bill charged that the deeds were fraudulently retained by the mortgagor. *Hunt v. Elmes*, 28 Law J. Rep. (N.S.) Chanc. 680; 27 Beav. 62.

If the defendant, in his answer, sets out partially the conveyance made to his vendor, he must produce the deed to verify the statement. *Ibid.*

A corporation were sole defendants to a suit, no officer of the company being party for the purpose of discovery. On a motion by the plaintiff that the defendants might file an affidavit, as directed by the 18th section of the statute 15 & 16 Vict. c. 86. (the Chancery Amendment Act), as to the documents in their possession, it was ordered that the company should, before a day named, file an affidavit, made by one or more of its officers, as to such documents, unless they should in the mean time satisfy the Court that they could not procure such officer or officers to make the affidavit. *Ranger v. the Great Western Rail. Co.*, 28 Law J. Rep. (N.S.) Chanc. 741; 4 De Gex & J. 74.

Where a plaintiff set out in his bill a letter written by the defendant, and stated that it was the plaintiff's intention to prove and put in evidence all letters which had passed between him and the defendant on the subject of the transactions in question, if so advised,—Held, that the defendant was not entitled, before putting in his answer, to move for the production of the plaintiff's documents. *Halliday v. Temple*, 8 De Gex, M. & G. 96.

In a suit by the heir-at-law for discovery in aid of an action of ejectment brought by him against persons in possession claiming as devisees of the ancestor,—Held, that the defendants, whether bound to produce any documents or not, must make the usual affidavit in answer to a summons for production by the plaintiff. *Rumbold v. Forreath*, 3 Kay & J. 44.

Where the issue is, whether a piece of ground called O is or is not identical with a part of land called F, the plaintiff averring the negative is entitled to production of whatever documents may aid him in establishing his negative averment, notwithstanding such documents may also be evidence of the defendant's title. *Karp v. Lloyd*, 3 Kay & J. 549.

Therefore in a case of this description the defendant was ordered to produce all maps, plans and terriers, and all deeds and other documents relating to the matters at issue, but with liberty to seal up such parts of the deeds and other documents as did not describe or relate to the parcels. *Ibid.*

Upon motion on behalf of a defendant in a suit for production by the plaintiff of a document, of which the plaintiff had obtained production by an order against his co-defendant, the Court refused to make an order in the absence of the latter. *Reynolds v. Godlee*, 4 Kay & J. 88.

But the mere circumstance of the plaintiff having obtained the document for a specific and limited purpose would not have entitled him to have it protected, on the ground of an implied confidence that it should not be used for any other purpose—*semble*. *Ibid.*

It is a matter of course to allow a defendant's books in use for daily business to be produced at the place where the trade is carried on, instead of being deposited at the Record and Writ Clerks' Office: this indulgence may be refused when there is ground for a suspicion that the books will be tampered with; but the fact of alterations alleged to be fraudulent having been made,—Held, not to be a sufficient ground for such refusal where the alterations were discovered by the plaintiff a year and a half before any attempt to have the books removed from the defendant's custody. *Mertens v. Haigh*, Johns. 735.

Form of special order for production of books at the place of business. *Ibid.*

The usual order was made for the deposit by the defendant of all documents in his possession. Some of them consisted of the court rolls of a manor, of which the defendant acted as steward, but his right to that office was contested. The Court released the defendant from the necessity of depositing them in court, and ordered the production at the steward's. *Carew v. Davis*, 21 Beav. 213.

A B settled property on trust for the plaintiff and others, but he reserved power of defeating it. The plaintiff alleged that the trusts had been partially defeated by a subsequent deed, and called upon the trustee to produce the trust deed. The trustee, in his answer, stated that the plaintiff's interest had been totally defeated by the subsequent deed, which he did not object to produce, but he said that A B (who was not a party to the suit) objected to the production:—Held, that the plaintiff was entitled to inspect it, but that the order could not be made in the absence of A B. *Bugden v. Tylee*, 21 Beav. 545.

An undertaking to produce documents to the plaintiff means to him, his solicitor and agents. *Williams v. the Prince of Wales's Life, &c. Co.*, 23 Beav. 338.

A plaintiff obtaining information from the production of documents in the defendant's possession, is not at liberty to make it public, and an injunction will, if necessary, be granted to restrain him. A plaintiff, having published statements relative to the matters in question, was as a condition for making an order for production of documents, required to undertake "not to make public or communicate to any stranger the contents of such documents." *Ibid.*

A witness is bound to produce a document in order that it may be given in evidence, notwithstanding he may have a lien on it. *In re the Cameron's Coalbrook, &c. Rail. Co.*, 25 Beav. 1.

Distinction between the production of documents at the instance of the party who created the lien, and of a stranger, and between production and parting with the possession. *Ibid.*

A solicitor in the presence of his client objected to produce a document on the ground of professional confidence. The Court, being of opinion that the document was not privileged as regarded the client himself, ordered its production. *Ibid.*

(b) Privileged Documents.

Letters passing between co-defendants are not privileged from production. *Betts v. Menzies*, 26 Law J. Rep. (N.S.) Chanc. 528.

Letters written two years before the institution of a suit by a country solicitor to one of a firm acting as his London agents are not privileged, though the firm afterwards acted as his solicitors in a suit which involved the subject-matter of the letters. *Hampson v. Hampson*, 26 Law J. Rep. (N.S.) Chanc. 612.

Before the institution of a suit, but in expectation that proceedings would be taken against them, the defendants, acting on the advice of their solicitor, employed an agent to collect evidence at a great distance from this country. The communications made by the agent were held to be privileged from production. *Lafone v. the Falkland Islands Co.*, 27 Law J. Rep. (N.S.) Chanc. 25; 4 Kay & J. 34.

Protection will not be withheld from communications made in apprehension of litigation, on the ground that the precise form which the litigation afterwards assumed was not foreseen. *Ibid.*

An affidavit in support of a claim to seal up certain passages in a book not being sufficiently explicit, the Court inspected the disputed passages in order to determine their right to protection. *Ibid.*

A testatrix devised an estate to trustees for fifteen years, and directed them to deliver up possession to such person as within that time should, to the satisfaction of her trustees, make out a right to the estate as heir-at-law to her uncle, who died owner of the estate; but in default of any such right being made out, the testatrix devised the estate to L W. There were two claimants to the estate; but the surviving trustee, after laying various cases before counsel and taking their opinions, was satisfied with neither. After the expiration of the fifteen years, L W filed his bill against the trustee and the two claimants to obtain possession of the estate; and upon a motion by one defendant, a claimant,—Held, that the trustee was not bound to produce the cases laid before counsel, or their opinions, or any of the documents affecting the title to the estate. *Wynne v. Humberston*, 28 Law J. Rep. (n.s.) Chanc. 281; 27 Beav. 421.

If a solicitor, party to a suit, admits by his answer the custody of papers relating to a company, he will, if the directors and the company are before the Court, be compelled to produce them, notwithstanding, by their answers, the directors say that the papers are in the hands of a third party, and the solicitor says that he has the documents, but that in his hands they are privileged. *Gaskell v. Chambers*, 28 Law J. Rep. (n.s.) Chanc. 388; 26 Beav. 808.

A and B had dealings together. B afterwards became bankrupt, and A filed a bill against B's assignees to establish the dealings. The defendants admitted the possession of copies of the examination of A before the Commissioners, but refused to produce them, on the ground of privilege, as being evidence given in support of the defence. The Court (overruling a decision of the Master of the Rolls) discharged an order for their production, considering that they ought not to be produced until the hearing of the cause. *Gandee v. Stansfeld*, 28 Law J. Rep. (n.s.) Chanc. 486; 4 De Gex & J. 1.

In a suit by the heir and general devisee of the client against the devisees and executors of the solicitor, to set aside a purchase by him from his client, on the grounds of its being at an undervalue, and the client being then in embarrassed circumstances:—Held, that copies of subsequent conveyances from the solicitor to purchasers from him, and a valuation of the estates, and mortgages made by the vendor were not privileged documents. *Gresley v. Mousley*, 2 Kay & J. 288.

Held, that, for the purpose of an application for production of documents, it must be assumed that the plaintiff's case as alleged in the bill is true, in order to test whether he is entitled to production of documents upon that assumption; because if the Court must wait until the fate of the litigation is known, that would be equivalent to refusing production. *Ibid.*

Held, that the executors of the solicitor could not

claim privilege against the real representative of the vendor for any documents as confidential communications with the vendor. *Ibid.*

The defendants suggesting that the executors of the vendor, who were also defendants, had an interest in some of the scheduled documents,—Held, that they should be served. *Ibid.*

(N) DISCOVERY.

A bill was filed against the executors of a testator for an account of his estate, and the Bank of England were made defendants. The bill alleged that the testator had been possessed, during certain periods of his life, of various sums of stock standing in his name in the Bank, and it sought discovery as to these particular sums, but no relief was prayed against the Bank:—Held, upon demurrer by the Bank, that neither an individual nor a public company who had no interest in the subject-matter of the suit, and against whom no relief was prayed, could be made a party to the suit. *Saunders v. Saunders*, 25 Law J. Rep. (n.s.) Chanc. 26; 3 Drew. 387.

Persons assuming to act as brokers of the city of London, and believed to be duly qualified as such, cannot protect themselves from a discovery of dealings and transactions between themselves and their principals by alleging that they may be rendered liable to penalties for having acted in such transactions without having been duly admitted as brokers of the city of London, under the provisions of the 57 Geo. 3. c. 60. *Robinson v. Kitchen*, 25 Law J. Rep. (n.s.) Chanc. 441, 354; 8 De Gex, M. & G. 88; 21 Beav. 365.

Confidential communications involving fraud are not privileged from disclosure. *Gartside v. Outram*, 26 Law J. Rep. (n.s.) Chanc. 113.

In answer to a bill filed for an injunction to restrain a former clerk of the plaintiffs from disclosing any of their dealings and transactions, the defendant stated that the plaintiffs were in the habit of conducting their business in a fraudulent manner, and specified a particular instance. In support of his answer the defendant filed interrogatories for the examination of the plaintiffs as to the fraudulent transactions, which the plaintiffs declined to answer. On exception to the answer of the plaintiffs,—Held, that there was no privilege to protect them from answering, the discovery being material to support the defendant's answer, which, if proved, would be a complete defence to the bill. *Ibid.*

A compulsory reference to arbitration, under the 3rd section of the Common Law Procedure Act, 1854, is different from a reference by consent, and in such a case a bill of discovery, in aid of the proceedings before the arbitrator, will lie. *The British Empire Shipping Co., Limited, v. Somerset*, 26 Law J. Rep. (n.s.) Chanc. 759; 3 Kay & J. 433.

Upon a bill, filed by the representative of the deceased partner in a firm of wine-merchants against the surviving partner for an account and for particulars of all transactions for a period of six months, the defendant referred to a book containing the particulars required, but refused to set them out in the form of a schedule. He also claimed protection against disclosing the names and private dealings of the customers of the firm. Exceptions to the answer allowed on both grounds. *Telford v. Ruskin*, 29 Law J. Rep. (n.s.) Chanc. 867; 1 Dr. & Sm. 148.

(O) INTERROGATORIES.

A plaintiff having let the time go by for filing interrogatories does not by amending his bill become entitled afterwards to file them to the whole bill. The proper course is to apply to the Court for an extension of time. *Dennis v. Rochussen*, 27 Law J. Rep. (N.S.) Chanc. 368.

(P) AFFIDAVITS.

An affidavit, instead of being headed as usual, "We A B, C D and E F severally make oath and say," was headed "The joint and several affidavit of A B, C D and E F. We the said A B, C D and E F say as follows." Leave to file it was refused. *In re Newton*, 2 De Gex, F. & J. 3.

A party to a cause filing or giving notice to read an affidavit before the evidence is closed, may be cross-examined upon such affidavit at once, without waiting until the evidence is closed. *Clarke v. Lass*, 2 Kay & J. 28.

A party having filed or given notice to read an affidavit is not at liberty to withdraw it. *Ibid*.

Upon a petition by a widow for payment out of court of money to the payment of which she has become entitled since the death of her husband, the Court requires an affidavit that no settlement was made on her marriage with her late husband. *Elrington v. Elrington*, 4 Drew. 545.

On a motion for a decree the answer is an affidavit, and the defendant may be cross-examined upon it. *Wightman v. Whetton*, 28 Beav. 397.

No weight is to be attached to an affidavit where the opposite party has had no opportunity to cross-examine the witness. *Ibid*.

On a motion for an injunction the plaintiff, who has compulsorily obtained an answer, cannot cross-examine the defendant on it, unless it is to be used on the defendant's behalf. *Ibid*.

An affidavit was made in favour of the plaintiff, who, after a long delay, filed it after the death of the witness, whereby no cross-examination could be had. A motion to take it off the file was refused, though the Court intimated that it would have less weight. *Abadom v. Abadom*, 24 Beav. 243.

(Q) SPECIAL EXAMINER.

A special examiner will not be appointed on the mere ground that a witness resides more than twenty miles from London. *Alves v. Sherwin*, 27 Law J. Rep. (N.S.) Chanc. 725; 2 De Gex & J. 92.

This Court will not order original documents to be taken out of the jurisdiction of the Court for the purpose of their being produced before a special examiner, on the examination of witnesses in the cause, unless a special case be made for that purpose. But the Court has jurisdiction, upon a special case being made, to make such an order—*semble*. *Lafone v. the Falkland Islands Co.*, 4 Kay & J. 39.

Disinclination of the Court to appoint special examiners, on account of the great expense it entails on the suitor. The Master of the Rolls will not appoint one, except in cases of absolute necessity. *Brocas v. Lloyd*, 21 Beav. 519.

(R) EXAMINATION OF WITNESSES.

Where country witnesses who had sworn affidavits in London were required to be cross-examined, the

Court, on affidavit of inconvenience, dispensed with their attendance at the examiner's office, and issued a commission. *Ogilby v. Gregory*, 25 Law J. Rep. (N.S.) Chanc. 32.

A defendant had, upon the application of the plaintiff, made an affidavit as to the documents in his possession, pursuant to the 18th section of the statute 15 & 16 Vict. c. 86:—Held, overruling *Kay v. Smith* (20 Beav. 566; s. c. 24 Law J. Rep. (N.S.) Chanc. 788)—that the defendant is not liable, under the 40th section of the same statute, to be cross-examined, unless he gives notice to use the affidavit as evidence for himself. *Manby v. Bewicke*, 26 Law J. Rep. (N.S.) Chanc. 20; 8 De Gex, M. & G. 470, 472.

The scale of allowance for the expenses of a witness does not depend upon any valuation of the particular witness's time, but the same scale of compensation is to be allowed to a witness examined in a Court of equity as to a witness examined in a Court of common law. *Nokes v. Gibbon*, 26 Law J. Rep. (N.S.) Chanc. 208.

An order was obtained *ex parte* for the attendance of a witness to give his evidence at his own expense, and the order also contained a direction for him to pay the costs of obtaining it:—Held, that such direction was wrong. *Ibid*.

One of the Vice Chancellors having made an order *ex parte* that a person ordered to attend as a witness should pay the costs, the order was discharged as irregular. *Cast v. Poyser*, 26 Law J. Rep. (N.S.) Chanc. 353, 93; 3 Sm. & G. 369.

A creditor's affidavit filed in support of his claim for a debt, under a decree in an administration suit, is one upon which, under the 40th section of the statute 15 & 16 Vict. c. 86, he can be cross-examined. *Ibid*.

A witness summoned before a chief clerk to give evidence has no right to refuse to be sworn. He may, however, make any special application to the chief clerk to have the assistance of counsel, or to have the question adjourned into court. *In re the Electric Telegraph Co. of Ireland, ex parte Bunn*, 26 Law J. Rep. (N.S.) Chanc. 614; 24 Beav. 137.

A party to a suit is entitled to his expenses and allowance as a witness before he can be required to be cross-examined on an affidavit filed by him under a decree. *Davey v. Durrant, Smith v. Durrant*, 27 Law J. Rep. (N.S.) Chanc. 503; 24 Beav. 493.

Under the 39th section of the 15 & 16 Vict. c. 86, an order for the production of a witness at the hearing of a cause may be obtained without the order of the Court. *Holden v. Holden*, 7 De Gex, M. & G. 397.

On a motion for a decree, the plaintiff's affidavit in reply was filed on the 4th of August. The defendant took no steps to cross-examine until after the long vacation, and he then asked that the cause might stand over to enable him to cross-examine the plaintiff:—Held, that he was not entitled as of right, and that it was matter of discretion, and the Court, having heard the cause, and seeing no necessity for a cross-examination, made a decree. *Bourdillon v. Baddeley*, 26 Beav. 255.

(S) EVIDENCE.

The deposition of a witness examined *de bene esse* when about to go abroad, ordered, after the dismissal

of the bill, to be published for the purposes of another suit instituted against the same defendant, upon certain terms and saving just exceptions. *M'Intosh v. the Great Western Rail. Co.*, 7 De Gex, M. & G. 737.

Upon a motion by way of appeal from granting an injunction, the respondent may adduce fresh evidence in support of the injunction. *Pole v. Joel*, 2 De Gex & J. 285.

The proper time for an application under 15 & 16 Vict. c. 86. s. 39. for an examination *vidē voce* in court is at the hearing of the cause. *Raymond v. Brown*, 4 De Gex & J. 530.

The practice as to closing evidence does not apply to motions for decree, and a notice to cross-examine, given after the seven days for filing affidavits in reply, is regular. *Bedwell v. Prudence*, 1 Dr. & Sm. 221.

Where an affidavit is sworn before a notary public of a foreign country not under the dominion of the Queen, the signature of the notary must be verified before the affidavit can be filed unless by consent; and the Court cannot take judicial cognizance of the notarial seal alone as a sufficient verification. *In re Earl's Trust*, 4 Kay & J. 300.

What evidence will be required on a petition under the 56 Geo. 3. c. 60. and 8 & 9 Vict. c. 62.—*quære*. *Howard v. Kay*, 4 Drew. 151.

Application for substituted service of a *subpoena ad testificandum*, or in the alternative, that a solicitor might produce his client before the examiner, refused. *Spicer v. Dawson*, 22 Beav. 282.

Where a charge against a defendant is struck out by amendment, the defendant is not justified in entering into evidence on the subject. The original bill insisted on the invalidity of the appointment of new trustees made by the defendant on the ground of her mental incapacity. Though the charge as to mental incapacity was struck out by amendment, the defendant nevertheless entered into evidence on the subject:—Held, that the course was improper, and though the appointment was upheld, and the plaintiff was ordered to pay the costs relating to that matter, yet the defendant was ordered to pay the costs of the evidence as to her mental capacity. *Stewart v. Stewart*, 22 Beav. 393.

Under the old practice a disputed will could not be proved *vidē voce* at the hearing; but liberty was given under the new practice, to prove a will in Court, and the heir was allowed to cross-examine the witnesses. *Chichester v. Chichester*, 24 Beav. 289.

Whether any part of the evidence in chief can be taken orally on a motion for a decree, *quære*. *Pellatt v. Nicholls*, 24 Beav. 298.

(T) DISCLAIMER.

Three parties claimed a fund, and a suit was instituted by one of them against the other two: one of the co-defendants disclaimed, but contended that the Court upon deciding against the plaintiff could not go on to declare the rights of his co-defendant:—Held, (affirming the decision of the Master of the Rolls,) that the disclaiming defendant ought to have brought his case before the Court, and that as he had disclaimed, the Court would decide the question between the two other claimants as if they were the only litigating parties. *Jolly v. Arbuthnot*, 28 Law J. Rep. (N.S.) Chanc. 547; 4 De Gex & J. 224; 21 Beav. 283.

Parties properly made defendants to a suit in the first instance, and afterwards giving notice to plaintiff that they do not claim any interest, are not entitled to their costs, notwithstanding such notice was given before putting in their answer, unless they have gone on to offer their consent to have the bill dismissed against them without costs up to the date of such notice. And it rests with defendants to offer such consent, and not with plaintiffs to ask it. *Talbot v. Kemshead*, 4 Kay & J. 93.

(U) COMPROMISE OF SUIT.

Any man who is not a lunatic must be considered competent to agree to a compromise of litigation in which he is engaged, the circumstances under which the compromise was made not being such as to afford evidence of fraud. *Manby v. Bowditch*, 3 Kay & J. 342.

An agreement to compromise a suit, containing a stipulation that it may be made a rule of Court, may now be enforced on petition supported by affidavit where the whole matter is before the Court.—*Forsyth v. Manton* (5 Madd. 78) considered. *Dawson v. Newsome*, 2 Giff. 272.

(W) STATING PROCEEDINGS.

Two suits for the administration of the same estate having been instituted in different branches of the Court, and a decree having been made in the latter of the suits, the proper course for a party wishing to stay proceedings in the other is to get it transferred to the Judge who pronounced the decree and to make an application in both suits before that Judge. *Duffort v. Arrowsmith*, 7 De Gex, M. & G. 434.

Motion by defendants to stay proceedings in a suit upon certain terms on the ground that the same questions were in issue in a suit instituted by them against the plaintiffs in Scotland, and which the Court had refused to stay, refused with costs.

A proceeded against the executors of B in Scotland. In a creditors' suit in this country by the executors, A's proceedings were restrained by injunction, but after three years' delay the order was reversed on appeal. In the meanwhile the executors had instituted a suit here against A on the same subject. It having been held that A had a right to proceed in Scotland, he moved to stay the executors' proceedings here until the question had been decided in Scotland. The motion was held irregular, and refused with costs. *Stainton v. the Carron Co.*, 21 Beav. 500.

The common administration decree having been made in a suit by one of the next-of-kin, a second suit was instituted, six months after, by another next-of-kin, praying additional relief. The Court stayed the second suit, on the defendant in the first undertaking not to object to any additions to the decree which the Judge in chambers might think reasonable. *Gwyer v. Peterson*, 26 Beav. 83.

Where the matters in dispute have been disposed of by an independent proceeding, the plaintiff may apply to stay proceedings, and the Court will then dispose of the costs. But where the suit has been dismissed against some of the defendants for want of prosecution, the Court is no longer able to adjudicate as to the costs, in the absence of the dismissed parties, and in default of prosecution, the bill will be dismissed in the usual way, with costs. *Troward v. Atwood*, 27 Beav. 85.

(X) SETTING DOWN AND HEARING CAUSE.

Where a motion for an injunction is, by arrangement, turned into a motion for a decree, it must be set down by order to save the month's delay. *Green v. Low*, 22 Beav. 395.

A decree was taken by default in consequence of the negligence of the clerk of the defendant's solicitor. The Court refused to restore the cause. *Flower v. Gedge*, 23 Beav. 449.

The last cause in the paper is no longer privileged. *Ibid*.

(Y) TRANSFER OF CAUSES.

When two suits are instituted for the same object in different courts, the parties ought themselves to apply to the Lord Chancellor to have them transferred to one Court. If they do not, the Court itself will apply to the Lord Chancellor for that purpose. *Swale v. Swale*, 22 Beav. 401.

(Z) INTERLOCUTORY APPLICATIONS.

An order having been made on motion before the hearing, giving the plaintiff liberty to enter the defendant's ground for the purpose of inspection and for the same purpose to break up the soil in the manner therein specified,—Held, on appeal, that the latter part of the order ought to be discharged, it not being according to the course of the Court that such liberty should be given on an interlocutory application before the hearing. *Ennor v. Barwell*, 1 De Gex, F. & J. 529.

(AA) TRIAL BY JURY.

In cases requiring a jury under the 21 & 22 Vict. c. 27, the practice of the Court in granting issues will be followed; and therefore before the hearing the Court will not summon a jury without the consent of the defendant. *George v. Whitmore*, 28 Law J. Rep. (N.S.) Chanc. 720; 26 Beav. 557.

A cause being ready for hearing upon bill and answer and affidavits, a preliminary motion was made under the statute 21 & 22 Vict. c. 27, that a jury might be summoned to try certain disputed questions of fact:—Held, in conformity with a decision of the Master of the Rolls, that the act was only intended to apply to cases in which, under the old practice, an issue would have been directed at the hearing. *Bradley v. Bevington*, 28 Law J. Rep. (N.S.) Chanc. 799; 4 Drew. 511.

(BB) CASE STATED BY TRUSTEES.

Where a trustee states a case for the advice of the Court, under the 22 & 23 Vict. c. 36, he need not obtain the concurrence of his co-trustees, and should not serve any of the parties beneficially interested, but should in such case bring his petition or statement before the Court in the first instance, and take the directions of the Judge as to the parties to be served. All the facts upon which the advice of the Court is asked should appear on the face of the petition or statement, and the costs of affidavits in support will not be allowed. *Re Murgerridge's Settlement*, 29 Law J. Rep. (N.S.) Chanc. 288; Johns. 625.

(CC) CHIEF CLERK'S CERTIFICATE.

When the certificate of the chief clerk is filed it

is absolute after eight days, and will not be discharged or varied, except under very special circumstances. *Howell v. Kightley*, 25 Law J. Rep. (N.S.) Chanc. 341; 8 De Gex, M. & G. 325.

Where, in a vendor's suit for specific performance of a contract to purchase land, the chief clerk had certified against the title of the plaintiff, and the plaintiff's solicitor, through misapprehension of the practice on the part of his clerk, had allowed the eight days after the filing of the certificate, within which (according to the practice prescribed by the 51st of the General Orders of the 16th of October 1852) the plaintiff ought to have applied to vary the certificate, to expire; the Court nevertheless gave leave to apply by motion to vary such certificate, the plaintiff paying 5*l.* by way of costs. *Ashion v. Wood*, 26 Law J. Rep. (N.S.) Chanc. 275.

A summons to vary the chief clerk's certificate is a sufficient application within the 51st Order of the 16th of October 1852, and therefore, where such summons was obtained within eight days from the filing of the certificate, although not returnable within the eight days, it was held to be in time. *Wycherley v. Barnard*, 28 Law J. Rep. (N.S.) Chanc. 562; Johns. 41.

(DD) ORDERS AND DECREES.

(a) In general.

Defendants in the same interest as the plaintiffs, but out of the jurisdiction, were served with a printed copy of the bill. They refusing to appear, the plaintiffs entered an appearance for them, and then (without any further service) filed replication, brought the cause to a hearing, and upon production of the certificate of the Clerk of Records and Writs, that said defendants had not appeared, obtained a decree. The registrar refusing to draw up the decree,—Held, that the plaintiffs' proceedings had been irregular, and that they ought either to have served the said defendants with notice of the replication and with *subpoena* to hear judgment, or else to have obtained orders for substituted service of such notice and *subpoena*. *Lanham v. Pirie*, 26 Law J. Rep. (N.S.) Chanc. 80.

Held, also, that the defect in the proceedings could not be remedied under the 51st section of the Chancery Jurisdiction Improvement Act, 15 & 16 Vict. c. 86, by striking out the names of the said defendants as parties, and by dating the decree after such amendment and serving it upon them. *Ibid*.

Where part of a sum of money directed by order of the Court to be paid by the defendant to the plaintiff had been levied under a *f. fa.* issued pursuant to the Orders of the 10th of May 1839, and the amount of the levy appeared upon the return to the writ, the Court refused to order payment of the balance within four days; but directed an order to be taken on affidavit of service of notice, that the chief clerk should ascertain and certify the amount which was due to the plaintiff from the defendant, and that the defendant, within ten days after the date of the certificate, should pay to the plaintiff what should be so certified to be due. *Hipkins v. Hipkins*, 26 Law J. Rep. (N.S.) Chanc. 512.

Where a bill has been ordered to be retained for a twelvemonth, with liberty to the plaintiff to bring an action, the Court will extend the time, if satisfied that there is a *bona fide* intention to proceed

with the action, and that there has been promptness in bringing the matter to an adjudication. *Farina v. Silverlock*, 26 Law J. Rep. (N.S.) Chanc. 790; 1 De Gex & J. 434.

A testator in 1815 devised an estate to A for life, remainder to his sons successively in tail, remainder to B in tail, and in 1818 made another will, devising the estate to A for life, remainder to his sons successively in tail, remainder to C in tail:—Held, that a decree establishing the will of 1818 made in a suit to which B was not a party, but A and his first son were parties as representing the inheritance, was not binding as between B and C. *Arnold v. Bainbrigg*, 2 De Gex, F. & J. 92.

The 51st section of the Chancery Procedure Act enables the Court to direct the administration of one or more of several specific trusts created by the same instrument, without directing the performance of the whole of the trusts. *Parnell v. Hingston*, 3 Sm. & G. 337.

A testator in 1823 directed his trustees to apply such part of a moiety of the surplus rents as they in their discretion should see fit, for the maintenance, &c. of his younger children during his widow's life, and at her decease to pay them 1,000*l.* a piece. Subject thereto, A B was absolutely entitled to the estate. In a suit for the performance of the trusts the estate was sold, and a fund was set apart to provide for the widow's dower which was ordered to be charged with the legacies payable at her death, and A B was declared entitled to the remaining fund. The widow died in 1854, and no provision having been made for the children's maintenance under the discretionary direction, a younger child sought to obtain payment out of the dower fund, but the Court held, that whatever his rights might be they had been concluded by the previous orders made in the cause. *Livesey v. Harding*, 21 Beav. 227.

Declaration of rights, as between co-defendants, refused. *Thomas v. Lloyd*, 25 Beav. 620.

It is not proper to enter in a decree evidence as "read *de bene esse*, saving just exceptions." If its admissibility be disputed, the point should be determined by the Court. *Drake v. Drake* (No. 1), 25 Beav. 641.

When at the hearing liberty is given to mention the case again on the minutes, it must be done at least within a fortnight, otherwise the parties must give notice of motion specifying the alterations. *Hood v. Cooper*, 26 Beav. 373.

An order drawn up in the Registrar's office in the absence of a defendant, will not be set aside where no error is shewn. *Smith v. Acton* (No. 2), 26 Beav. 559.

(b) To Revive.

By a decree a defendant was ordered simply to pay a sum of money, and the costs of the suit; but before doing so he died. The plaintiff thereupon obtained the common order to revive; but as the executors of the deceased defendant, after such order had been obtained, refused to make the payments ordered by the decree, the plaintiff, subsequently to such refusal, filed a supplemental bill against the executors:—Held, that, as the decree directed simple payment of a sum of money and the costs of the suit, the common order to revive was regular; and that the executors must pay the costs of the sup-

plemental suit, as such suit had been occasioned by their own conduct. *Collard v. Roe*, 29 Law J. Rep. (N.S.) Chanc. 329; 1 Giff. 311.

The form of order in *Edwards v. Batley* does not deprive the suitor of the right to file a bill where there is a risk that he may, by adopting the ordinary practice, fail to obtain redress. *Ibid.*

A motion to discharge an order to revive, obtained by the assignees of a sole plaintiff, under the 15 & 16 Vict. c. 86, s. 52, was refused, with costs. *Jackson v. the Riga and Dunaburg Railway Company*, 29 Law J. Rep. (N.S.) Chanc. 571; 28 Beav. 75.

A defendant having been served with *subpoena* died before appearance:—Held, that the suit could not be revived against his heir, but that the remedy against him, if any, was by original bill. *Bland v. Davison*, 21 Beav. 312.

A suit which has been abated for more than twenty years cannot be revived. *Ibid.*

One of several plaintiffs was dead at the date of the decree, and the suit had in consequence abated. On motion the representatives appearing and submitting to be bound, the Court revived the suit and authorized the surviving plaintiffs to prosecute the decree. *Smith v. Horfall*, 24 Beav. 331.

The right to revive an administration suit after decree is not barred by lapse of time, but the Court exercises a discretion, and in cases of gross negligence or laches may refuse to allow the suit to be revived. *Alcop v. Bell*, 24 Beav. 451.

(c) Supplemental Orders.

The sole plaintiff in a suit to restrain waste, died after decree, having devised all his real estate to his son, the Court upon the *ex parte* application of the devisee, made the usual supplemental order under the 52nd section of the statute 15 & 16 Vict. c. 86. *Jackson v. Ward*, 28 Law J. Rep. (N.S.) Chanc. 515; 1 Giff. 30.

A married woman obtained a protection order from a magistrate, under the provisions of the Divorce Act, on the ground of desertion. A suit was then instituted against her as a *feme sole*. The protection order was afterwards discharged, on application by the husband, who proved there had been no desertion on his part. The plaintiff in the suit then obtained a supplemental order as of course, under the Chancery Amendment Act, to bring the husband before the Court:—Held, that the protection order was void *ab initio*, and there having been no "change or transmission of interest or liability" the supplemental order was wrong, and must be discharged. *Rudge v. Weedon*, 28 Law J. Rep. (N.S.) Chanc. 889.

A married woman obtained an order from a magistrate, protecting her property, on the ground of desertion by her husband, under the Divorce and Matrimonial Causes Act (20 & 21 Vict. c. 86). A bill was filed against her (her husband not being a party), and she obtained leave to put in a separate answer, and a decree was made against her. Another suit was instituted for the same purposes as the former suit, and she and her husband were made defendants. On his application to the magistrate who granted the protection order, the husband satisfied his worship that there had been no desertion, and the protection order was discharged. The plaintiff in the first suit thereupon, under the 52nd section of the Chancery Practice Amendment Act

(15 & 16 Vict. c. 86), made the husband a defendant by supplemental order in that suit; but, upon the application of the husband, the order was discharged, by one of the Vice Chancellors. On appeal, by the plaintiff in the first suit,—Held, reversing his Honour's decision, that the supplemental order was proper. *Rudge v. Weedon*, 28 Law J. Rep. (n.s.) Chanc. 788; 4 De Gex & J. 216.

(EE) ISSUE AND CASE SENT TO LAW.

The Chancery Amendment Act, 1858, having expressly left it to the Court to say, whether the trial of a question of fact shall take place before a jury at common law, before a jury in Chancery, or before the Court without a jury, this Court will not at present, unless both parties concur in the application, or there is some special reason of delay, expense or otherwise, direct the trial to be before itself, the confidence of either suitor in the method established by long habit being a circumstance which ought to turn the scale, especially on the first experiment of a different system being required to be made. *Peters v. Rule*, 28 Law J. Rep. (n.s.) Chanc. 246.

Semble—the legislature did not contemplate the trial of issues before this Court as a general rule. *Ibid*.

A will of real and personal estate was executed after the Wills Act (7 Will. 4. & 1 Vict. c. 26), and was established as to the personalty before the Judicial Committee of the Privy Council in proceedings in which the heir-at-law (but not as such) was a party:—Held, that he was still entitled to an issue *devisavit vel non*. *Stacey v. Spratley*, 27 Law J. Rep. (n.s.) Chanc. 725; 2 De Gex & J. 94.

After the trial of an issue *devisavit vel non*, if the verdict given satisfies the conscience of the Court that the capacity of the testator was competent to enable him to execute a will, a new trial will not be granted, at the request of the heir-at-law, though there were discrepancies in the evidence which were not satisfactorily explained. *Swinfen v. Swinfen*, 28 Law J. Rep. (n.s.) Chanc. 849; 27 Beav. 148.

A doubtful question of Scotch law having arisen at the hearing, the Court, under the provisions of the statute 22 & 23 Vict. c. 63, directed that a case should be sent to a Scotch Court to ascertain the law applicable to the question as administered in Scotland. *Lord v. Colvin*, 29 Law J. Rep. (n.s.) Chanc. 297; 1 D. & Sm. 24.

Semble—per *L.J. Turner*, that the Court ought not before the hearing to direct an issue to be tried by a jury in this Court, under the statute 21 & 22 Vict. c. 27, unless by consent of counsel on both sides. *Morrison v. Barrow*, 1 De Gex, F. & J. 633.

The circumstance that the plaintiff in an issue was dead when the issue was tried being unknown at the trial, held not to afford ground for a new trial. *Bird v. Kerr*, 4 Kay & J. 270.

(FF) REFERENCES.

The rule of the Court is, that in order to obtain an inquiry as to wilful default the plaintiff must allege a case for such an inquiry, must pray for it, and must prove at least one act of wilful default; and although it may not be necessary in order to obtain a preliminary inquiry, upon which an inquiry as to wilful default may be afterwards founded, that the plaintiff should conclusively establish such an

act, yet there must be such a case made out with respect to some specific item alleged in the bill as raises a doubt in the mind of the Court.—The dictum of *Knight Bruce, L.J.* in *Coope v. Carter* explained. *Sleight v. Lawson*, 26 Law J. Rep. (n.s.) Chanc. 553; 3 Kay & J. 292.

Where a creditor, after the Master had reported there were no debts, presented a petition charging fraud, and asking leave to go in and prove against the real estate—there being no receiver and no fund in court—the petition was dismissed, but without prejudice to his filing a bill. *Seale v. Buller*, 2 Giff. 312.

Lord Curzon had been a provisional committeeman in this company, which was one of the inchoate railway companies. He had as such committeeman attended one meeting, and no more; and in the state of the decisions then existing on the liability of provisional committeemen, as between them and the other shareholders, it was understood to be the law that no liability as a contributory existed unless the party was legally liable to some creditor of the association, and it had been accordingly determined by the then Master, in 1852, that Lord Curzon was only liable as a contributory in respect of the acts of the committee on the day on which he attended it, and he was put on the list of contributories as a contributory limited to that day. But it appeared by the notes of the Master's judgment that he had expressly reserved liberty to the official manager to open the question further if he should see grounds for claiming to extend Lord Curzon's liability. From that time to the present nothing had been done in respect of Lord Curzon's liability. In the mean time other persons as liable as Lord Curzon, who had not been put upon the list as general contributories, were, it was alleged, freed at law, under the Statute of Limitations, from any legal liability they might have had to creditors. In this state of things an application had been made to the Master on the authority of *Spottiswoode's case* in particular, and on the tender of further evidence for leave to review the decision of 1852 upon the recent decisions and upon such further evidence. It appeared that the evidence had not been looked at by the Master, but he decided, upon the citation and argument of the case and the allegation of further evidence, that there was enough to justify an order to review. On appeal, the Court confirmed this decision. *Re the London, Birmingham and Bucks Rail. Co., Ex parte Viscount Curzon*, 3 Drew. 508.

Course of proceeding under the 15 & 16 Vict. c. 80, where the parties neglect to proceed in a reference directed by the decree. *Parkinson v. Lucas*, 28 Beav. 627.

Parties neglected for ten years to prosecute a reference, and the Master reported that he was unable to dispose of the cause. On an application to the Court the matter was transferred into chambers, and it was ordered that the reference should be prosecuted with effect within a month, the Court intimating that in default the cause would be disposed of summarily. *Ibid*.

(GG) EXCEPTIONS.

(a) Answers.

One interrogatory contained six questions. The defendant answered five, but the answer to the sixth

question was insufficient. The plaintiff excepted to the answer, the exception including not only the unanswered sixth question, but all the other questions, which, it was admitted, had been answered:—Held, that the exception was wrong in form. *Higginson v. Blockley*, 25 Law J. Rep. (N.S.) Chanc. 74.

Exceptions having been taken to an answer, and a further answer put in, the plaintiffs set down the old exceptions. The defendants submitting to put in a further answer, and requiring further time, must apply for that purpose to the Court, and not to the Judge in chambers. *The Manchester, Sheffield and Lincolnshire Rail. Co. v. the Worksop Board of Health*, 25 Law J. Rep. (N.S.) Chanc. 25; 2 Kay & J. 25.

Unless a defendant plead to the discovery he is bound to answer fully. *Reade v. Woodroffe*, 24 Beav. 421.

When substantial information is given by the answer the Court discourages exceptions for insufficiency, and will not require minute and vexatious discovery. *Ibid.*

The bill required discovery and accounts from July 1850 of dealings between the plaintiffs and the defendants. A defendant by his answer stated that they had terminated by consent in February 1851, and he refused to set out the subsequent matters:—Held, that he was bound to do so. *Ibid.*

(b) Setting down.

A notice to set down the old exceptions after a second answer did not specify which:—Held, that it was irregular, and the plaintiff was ordered to pay the costs of the defendant's appearing to object; but liberty was given to him to amend the notice, and set down the exceptions again. *Thomas v. Rawlings*, 28 Beav. 346.

(HH) IN CHAMBERS.

The practice on proceedings in chambers is that if one side only desires to be heard by counsel, the Judge hears the arguments in chambers; if both desire to be so represented, the matter is adjourned to be heard in court. *Rumbold v. Forteach*, 3 Kay & J. 44.

If a party be dissatisfied with the accounts brought in and vouched in the Judge's chambers he may examine the accounting party *videlicet*, but he should give notice of the points as to which he is to be examined. The accounting party may in such case be required to produce the documents at his examination, notwithstanding an existing order for production elsewhere. *Wormsley v. Sturt*, 22 Beav. 398.

(II) SALES AND PURCHASES UNDER DIRECTION OF THE COURT.

(a) Conduct of the Sale.

Ordinarily the conduct of a sale directed by the Court is committed to the plaintiff; but when it appears for the benefit of the parties, it will be given to defendant. This right does not, however, depend on the extent of the interest of the parties in the property. *Knott v. Cottee* (No. 4), 27 Beav. 33.

When a sale is directed every party to the suit having the title-deeds is bound to facilitate the sale. *Ibid.*

(b) Opening Biddings.

Biddings will not be opened; except under very special circumstances, after the expiration of eight days from the filing of the certificate of sale. The offer of an advanced bidding is not sufficient to induce the Court to open biddings. *Ware v. Watson*, 25 Law J. Rep. (N.S.) Chanc. 199; 7 De Gex, M. & G. 739.

The eight days within which, under the 51st Order of October 16, 1852, made pursuant to the 34th section of the 15 & 16 Vict. c. 80. (the Masters in Chancery Abolition Act), an application must be made to vary the chief clerk's certificate are to be calculated inclusive of vacations. *Ibid.*

The chief clerk's certificate, signed and approved by the Judge, becomes, after the eight days, equivalent to a report absolutely confirmed under the old practice. *Ibid.*

Where a sale was ordered by the Court, and was advertised to be made by sealed tender, and was to be subject to conditions of sale, and also to the contract being sanctioned by the Judge; and one of the conditions stated that the certificate of sale would, in due course, be signed and filed, and become binding, without further notice or expense to the purchaser, one of the Vice Chancellors, upon an increased offer, after a purchaser had been certified as the highest bidder, opened the sale and declared the new bidder the purchaser. Upon appeal the Lords Justices considered the contract a conditional one, and such as warranted the order made, and dismissed the appeal. *Osborne v. Foreman*, 25 Law J. Rep. (N.S.) Chanc. 340; 8 De Gex, M. & G. 122.

A sale of an estate upon sealed tenders must be treated as a sale by auction, and the biddings may be opened, on application to the chief clerk, approved by the Judge, has been filed. *Barlow v. Osborne*, 27 Law J. Rep. (N.S.) Chanc. 308; 6 H.L. Cas. 556.

The practice of opening biddings not in itself approved of. *Ibid.*

The word "party" in the 49th Order of October 16, 1852, must be taken to mean "person." *Ibid.*

A person who was present and had bid at a sale having, within eight days of the sale, offered an advance of 200*l.* on 2,600*l.*, allowed to open the biddings on payment of the costs of the highest bidder. *In re Jones's Settled Estates*, 29 Law J. Rep. (N.S.) Chanc. 139; 1 Giff. 284.

(KK) PAYMENT INTO COURT.

In order to justify an order for payment into Court of a trust fund it is sufficient that the trustee's answer contains an admission of such a *prima facie* title in the plaintiff as to afford a reasonable expectation of the plaintiff succeeding at the hearing in making out his title. Therefore, where by the answer of a trustee of a composition deed it was admitted that the fund had been for five years in his hands, that some creditors had acceded within the time limited by the deed, but that the plaintiff had neither acceded nor refused to accede, an order was made for payment of the fund into court. *Whitmore v. Turquand*, 1 Jo. & H. 296.

(LL) PAYMENT OUT OF COURT.

The rule that the Court will not take the consent of a married woman to the payment out of Court of an unascertained sum, applies even where it is clear that the sum must be one of two amounts, and she is willing to consent to the payment of the larger. *Moss v. Dunlop*, 29 Law J. Rep. (N.S.) Chanc. 39.

Although the Court will not order payment to a defaulting receiver of his share in the estate under administration until he has made good his default, yet the same principle does not apply as against his assignees to the case of a share devolving on such defaulting receiver in his character of next-of-kin of a person originally entitled to a share in the same estate, notwithstanding that such share may have been paid into court with the assent of the personal representative of the person so originally entitled to the share, but in the absence and without the assent of the assignees of such defaulting receiver. *Brandon v. Brandon*, 1 Dr. & Sm. 16.

Upon a petition by an assignee for the payment out of court of a fund standing to the credit of an assignor, the Court requires the assignor to be served, unless there has been an *absolute* assignment of the *precise* fund, even where the total funds assigned exceed the fund in court. *Briant v. Dennett*, 4 Drew. 550.

Upon a petition for payment out of court of a share in a fund standing to a general account in which infants are interested,—Held, that a guardian *ad litem* of the infants must be appointed, on whom the petition must be served. *In re Trusts of A. Ward's Will*, 2 Giff. 122.

Prospective order for payment by the Accountant General to the tenant for life of the income of funds hereafter to be paid into court to the same account. *In re Chamberlain*, 22 Beav. 286.

Accountant General ordered to pay the income of a fund in court to the vicar of S for the time being. *In re Pearce*, 24 Beav. 491.

Money in court stood limited to a widow for life, and afterwards as she should by deed or will appoint. The Court directed payment to her without requiring an appointment. *Cambridge v. Rous* (No. 2), 25 Beav. 574.

A fund in court belonged in reversion to a married woman. After her death, the husband in 1821 sold and assigned it. The tenant for life died, and it having been found impossible to obtain from him an affidavit of no settlement, the Court in 1858 ordered payment to the assignee without one, on proof of there having been no children. *Clarke v. Woodward*, 25 Beav. 455.

(MM) RECEIVER.

Special order made by the Lord Chancellor that, instead of the further fee payable under the Order of the 23rd of October 1852 for the certificate on passing a receiver's accounts, such fee should be paid as the Judge to whose court the cause was attached should think reasonable. *Neave v. Douglas*, 26 Law J. Rep. (N.S.) Chanc. 756.

In the case of a receiver who was managing a business under the direction of the Court, a special order was made that, instead of the further fee payable under the Order of the 30th of January 1857, in respect of his gross receipts, the fee should be

payable in respect of the net profits; and a sum previously paid in respect of gross receipts was directed to be allowed in the payment of subsequent fees. *Buckmaster v. Buckmaster*, 28 Law J. Rep. (N.S.) Chanc. 564.

In a suit on behalf of a number of grantees of rentcharges on the same property, who had powers of distress and entry, a receiver was appointed to protect the property pending the litigation, it being untenanted, and it being impossible to obtain tenants for want of protection against the powers of the several grantees of the rentcharge. *White v. Smale*, 22 Beav. 72.

A suit for a receiver pending a litigation for probate in the Ecclesiastical Court is never brought to a hearing, and therefore cannot be dismissed for want of prosecution; but after the litigation is ended in the Ecclesiastical Court, this Court will, upon motion, dispose of the costs of the suit. *Barton v. Rock*, 22 Beav. 81.

Where a suit is instituted merely for the protection of the assets pending a litigation for probate in the Ecclesiastical Court, the practice of the Court is, upon grant of probate, to discharge the receiver, stay all proceedings in the suit, and dispose of the costs. *Barton v. Rock*, 22 Beav. 376.

In such a suit, for which there was not a reasonable foundation, the Court ordered the plaintiff to pay all the costs, though a receiver had been appointed. *Ibid.*

Ex parte motion before appearance for a receiver refused. *Caillard v. Caillard*, 25 Beav. 512.

A party interested may apply at once to prevent a receiver applying the monies in his hands in a manner contrary to the direction of the Court, and need not wait until he passes his account. *De Winton v. the Mayor of Brecon* (No. 2), 28 Beav. 200.

(NN) INFANTS' SUITS.

[*Dunn v. Dunn*, 7 Law J. Dig. 600; 7 De Gex, M. & G. 25.]

(OO) GUARDIAN AD LITEM.

Service of a copy of the bill and notice of an application to appoint a guardian *ad litem* to an infant defendant upon the principal of the college of which the infant was an undergraduate member, held sufficient, the plaintiff being unable to discover the residence of the infant's parent. *Christie v. Cameron*, 25 Law J. Rep. (N.S.) Chanc. 488.

Petitions having been presented under the Leases and Sales of Settled Estates Act and under the *Harte Estates Act* respecting money in court to which an infant remainderman was entitled, the Court directed that a guardian *ad litem* should be appointed to represent the infant remainderman, and also that the trustees of the will, under which the property was settled, should have their costs of appearing upon the petition. *In re the Leases and Sales of Settled Estates Act*; *In re the Harte Estates Act*, 29 Law J. Rep. (N.S.) Chanc. 530; 1 Dr. & Sm. 46.

A guardian *ad litem* must be appointed to infants who are served with petitions intitled "in matter," and not in causes. *Re Barrington*, 27 Beav. 272.

An order of course for the appointment of such a guardian *ad litem* may be obtained as of course. *Ibid.*

(PP) NEXT FRIEND.

The next friend of a married woman plaintiff must be a person who is capable of giving security for costs. *Hind v. Whitmore*, 25 Law J. Rep. (n.s.) Chanc. 394; 2 Kay & J. 458.

Facts amounting to suspicion of insolvency of a next friend for a married woman will not, in opposition to his own oath as to his solvency, disqualify him from acting as next friend. *Elliott v. Ince*, 26 Law J. Rep. (n.s.) Chanc. 821; 7 De Gex, M. & G. 475.

A co-defendant with a married woman may act as her next friend on an appeal by her. *Ibid*.

The next friend of a married woman having become insolvent, the proceedings were stayed. *D'Oechener v. Scott*, 24 Beav. 239.

(QQ) PAUPER.

A petition of appeal may be presented *in forma pauperis* and set down for hearing when the ordinary affidavit is produced, without the usual deposit. *Bradberry v. Brooke*, 25 Law J. Rep. (n.s.) Chanc. 576.

A suit was instituted against several defendants, all of whom having died, a bill of revivor and supplement was filed against the administrator of the last surviving defendant, and he obtained the common order to sue *in forma pauperis*. It appeared that this defendant was tenant at will of a cottage worth 10*l.* per annum; was also in receipt of an annuity of 20*l.* per annum, and claimed to be entitled to further property, but which he alleged was not available for paying the costs of this suit:—Held, upon the above grounds, that the common order to sue *in forma pauperis* must be discharged, with costs. *The Burry Port Co. v. Bowser*, 26 Law J. Rep. (n.s.) Chanc. 819.

An order for an infant to sue *in forma pauperis* by his next friend was obtained *ex parte*, on an affidavit by the infant in the common form, as to his own poverty:—Held, such an affidavit was clearly insufficient, and that the order had rightly been discharged, with costs. *Lindsay v. Tyrrell*, 2 De Gex & J. 7.

Whether such an order might not properly be made, if special grounds were shewn—*quære*. *Ibid*.

An order giving liberty to an infant suing by a next friend, to proceed *in forma pauperis*, discharged, with costs, as irregular. *Lindsay v. Tyrrell*, 24 Beav. 124.

(RR) CREDITORS' SUITS.

Under the decree in a creditors' suit for the administration of the estate of J H, deceased, his real estates were sold. It appeared by the conditions of sale that a part of the property was subject to a mortgage for 1,000*l.* to R T. The conveyances to the purchasers were executed by R T at the instigation of J T (who acted as his solicitor and also as solicitor for the purchasers), in consideration of the purchase-money being paid into court. J T was also a specialty creditor of the testator, and proved a claim for a bond debt of 1,000*l.*, with interest and costs. This debt was paid in full, and the residue of the assets, amounting to about 600*l.*, distributed among the simple contract creditors, without any provision being made for the payment of the mortgage debt. The mortgage deed remained in the

possession of the mortgagee, who died shortly after the execution of the conveyances. Upon a bill filed by the executrix of R T against the surviving partner and personal representatives of J T, against G & G, the solicitors who had the conduct of the suit, the simple contract creditors and the purchasers of the real estate in mortgage,—Held, that the simple contract creditors were liable to refund the whole of what had been received by them; secondly, that G & G were liable to make good all such sums as had been received by the simple contract creditors, and by reason of insolvency or otherwise had become irrecoverable from them; thirdly, that the representatives of J T were liable to refund the difference between the sums received by the simple contract creditors and the amount of the mortgage debt and interest; fourthly, that the costs of the suit must be paid by G & G. *Todd v. Studholme*, 26 Law J. Rep. (n.s.) Chanc. 271; 3 Kay & J. 324.

Bill dismissed without costs against such of the purchasers as had neglected to demand delivery of the title-deeds, on the plaintiff giving them up, and with costs against a purchaser who had taken a covenant for production from the purchaser of a larger lot. *Ibid*.

In a creditors' suit, leave was given to the plaintiff to try an issue as to the sanity of the debtor at a particular time. The plaintiff subsequently declined to try the issue, and upon the application of other creditors they were permitted to be substituted for him, upon giving security for the costs of the trial. *Elliott v. Ince*, 27 Law J. Rep. (n.s.) Chanc. 51.

If two creditors' suits are instituted for the administration of the estate of a deceased debtor, and one is stayed by order of Court, provision will not be imperatively made for payment of the costs of the suit stayed in the suit to be prosecuted, but they will be left to depend upon the result of the assets after debts are satisfied. *Cankam v. Neale*, 23 Law J. Rep. (n.s.) Chanc. 69; 26 Beav. 266.

If two suits are instituted for one purpose, and one is stayed, no order will be made which will give the plaintiff in the suit stayed a priority for his costs, especially if the application is made in the one suit only. *Ibid*.

The Court, by consent, made an immediate decree in a cause not in the paper for the administration of the real and personal estate of an intestate, at the suit of a creditor, after a summons in chambers for the administration of the personal estate had been taken out by another creditor, which was returnable before the first day on which the cause could be heard as a short cause. *Furze v. Henkel*, 2 De Gex & J. 125.

On an application being made to stay a creditors' suit, because of a decree obtained in an administration suit subsequently instituted by two of the executors against the third, as there was no evidence of the amount of assets received by the executors, and as it appeared that the creditor's case in the first suit depended on vouchers and documents in the hands of the executors, the Court ordered the motion to stand over until the executors had put in their answer in that suit. *Macrae v. Smith; Pantom v. Smith*, 2 Kay & J. 411.

Semble—that a creditor, whose suit in equity is stayed, as well as a creditor who is restrained from

prosecuting an action at law, is entitled to have a discovery of assets possessed by the executors, and payment of the amount into court. *Ibid.*

After decree in a creditors' suit, the plaintiff died, leaving no personal representative. The Court refused to allow the suit to proceed upon the motion of the accounting parties, but offered to do so if a creditor applied. *Johnson v. Hammersley*, 24 Beav. 498.

Interests of defendants, *inter se*, arising out of the rights of the plaintiffs, protected by the doctrine of *lis pendens*. *Tyler v. Thomas*, 25 Beav. 47.

In a suit instituted by creditors for the administration of the testator's estate, the deficiency of the personal estate for payment of the debts was payable out of two real estates, devised separately to the defendants, A and B. In 1846 the debts were ordered to be paid out of A's estate alone, without prejudice to his right of contribution against B's estate. In 1852 the suit was registered as a *lis pendens*, and two months afterwards B mortgaged his estate to C, who had no notice of A's rights:—Held, that there was a *lis pendens* as regarded A's rights, and that C's mortgage must be postponed to A's claims. *Ibid.*

(SS) SPECIAL CASE.

Although one of the Vice Chancellors has made an order upon a special case, yet, when it is appealed from, if the Court shall consider that it is in such a form as that upon the facts stated the rights of the parties will not be bound, or that the facts are not fully and truly stated, it will refuse to make a declaration upon it, and will discharge the order of the Court below, without prejudice. *Bulkeley v. Hope*, 25 Law J. Rep. (n.s.) Chanc. 240; 8 De Gex, M. & G. 86.

The Court has no jurisdiction to order the costs of all parties to a special case to be paid, unless there is a fund in court. The proper course is, to insert in the special case a question out of what estate or fund the costs should be paid. *Blinston v. Warburton*, 2 Kay & J. 400.

This Court has no power, either under Sir George Turner's Act (13 & 14 Vict. c. 35.) or under the Chancery Amendment Act (15 & 16 Vict. c. 86), to make a declaration in the lifetime of the tenant for life, with regard to the interests of parties entitled in reversion; unless it shall be necessary to do so for the administration of an estate, or in order to grant the plaintiff the relief to which he is entitled. *Gosling v. Gosling*, Johns. 265.

(TT) SUBSTITUTED SERVICE.

To a vendor's bill to enforce a lien upon the purchased estates in respect of unpaid purchase-money, by means of a sale of those estates, certain judgment-creditors of the insolvent purchasers were made parties in respect of their interests in those estates as such creditors. Two of these judgment-creditors being out of the jurisdiction, substituted service of a printed copy of the bill upon their respective attorneys in the actions in which the judgments had been recovered was ordered to be good service on them respectively, such attorneys being still the attorneys named on the records of the judgments, but declining respectively, for want of instructions, to accept service of the bill for their respective clients.

The Governors of the Gray-coat Hospital v. the Westminster Improvement Commissioners, 27 Law J. Rep. (n.s.) Chanc. 250.

Where a decree for payment of money had been made against a defendant, who was one of Her Majesty's consuls living abroad, substituted service upon his solicitor was ordered, without the Court requiring evidence to shew that the defendant could not be found, or that the plaintiff had used due diligence to find him. *Griffiths v. Cowper*, 29 Law J. Rep. (n.s.) Chanc. 607; 2 Giff. 230.

Where a defendant was permanently resident in Australia, the Court ordered substituted service of a *subpoena* to pay costs on his solicitor. *Walrond v. Parker*, 29 Law J. Rep. (n.s.) Chanc. 624; 1 Giff. 315.

Where a defendant was out of the jurisdiction, and had not appeared, but had himself subsequently filed a bill in respect of the same property, the Court gave leave to the plaintiff in this suit to effect substituted service on the solicitor who acted for the defendant as plaintiff in the other suit. *Hookins v. Bennett*, 1 Giff. 215.

The defendant's solicitor died, and the plaintiff (being unable to find the defendant) could not proceed in the accounts directed by the decree. The Court ordered substituted service of a *subpoena* to name a new solicitor, and the defendant having failed to appoint one, the Court directed the accounts to be taken in his absence. *Dean v. Lethbridge*, 26 Beav. 397.

The 4 & 5 Will. 4. c. 82. s. 2. is superseded by the 31st General Order of 1845, and therefore, unless the defendant has been within the jurisdiction within two years before the bill filed, the Court cannot, by way of substitution for the ordinary service of process, direct notice in the *Gazette*. *Thurlow v. Treedy*, 27 Beav. 624.

(UU) REHEARING.

A cause having been heard and re-heard before a Vice Chancellor may be re-heard by the Court of appeal. *Maybery v. Brooking*, 25 Law J. Rep. (n.s.) Chanc. 87; 7 De Gex, M. & G. 678.

A was indebted to a firm of C & D, copartners, in a promissory note for 100*l.*, which had been given to C alone. Other advances had been made by the firm to or on account of A, and the latter transferred bank shares to C, as a trustee for himself and partner. After the promissory note was given A became bankrupt and obtained his certificate, but no proof was made on the note or other debts against his estate. The firm had received monies on account of A, and made advances to him, and kept a debtor and creditor account with him, which was carried on without any notice of the bankruptcy. A died, leaving his wife his residuary legatee and executrix. C, after the bankruptcy, made his will, bequeathing to the widow of A the debt or sum which she or the estate of her late husband was then indebted to him, and gave her in addition 100*l.* She filed a bill against D, the surviving partner of C, who was one of C's executors, and his co-executors, praying a transfer of the debt to her and a delivery up of the bank shares:—Held, overruling two decisions of one of the Vice Chancellors, that the plaintiff was entitled to a decree; and that there being no debt exactly answering the description in the will, the

debt due to the testator and his partner, as to the testator's interest therein, passed by the bequest. It being admitted by the executors of C that the accounts of the firm could be so adjusted as to leave the debt of A to the firm as solely part of the estate of D, the accounts were ordered so to be taken. *Ibid.*

The Court will not allow an appeal from an order of a Vice Chancellor as to the choice of a receiver. *Ley v. Ley*, 25 Law J. Rep. (n.s.) Chanc. 600.

By a decree, dated in 1825, an obvious error was made in declaring who were the parties entitled to a fund in court. The error was not discovered for many years, and the delay in applying for a rehearing to rectify the mistake being accounted for,—Held, that the cause might be re-heard, notwithstanding the lapse of time. *Brandon v. Brandon*, 25 Law J. Rep. (n.s.) Chanc. 896; 7 De Gex, M. & G. 365.

The purchaser of a chose in action (whether with or without notice) cannot be in a better position than the person from whom he purchased. *Ibid.*

Orders for leave to re-hear a cause should not be applied for *ex parte*. *Ibid.*

In 1813 a decree was made, under which the Master, by his report in 1815, approved of a settlement directed to be executed by the trustees of the will of S in favour of the testator's two daughters and their issue. The settlement so approved was erroneous in certain particulars, and especially in including the ultimate reversion in the estates directed to be settled which was not disposed of by the will, and had descended upon the testator's two daughters in fee, as his co-heiresses. The report was confirmed, and other orders subsequently made, and other property was afterwards purchased and conveyed to the uses of the settlement. The prior limitations having failed, the parties claiming the reversion against the settlement filed petitions for leave to re-hear the erroneous orders. The respondents claiming under the settlement relied upon the lapse of time, and subsequent conduct of the parties, as shewing confirmation or acquiescence:—Held, that the petitions ought to stand over, until the petitioners had, by independent proceedings, established that they would be entitled to relief, if no orders were standing in the way, and liberty was given to file a bill within a limited time. *Horne v. Barton, Head v. Crossfield, Head v. Bartley*, 26 Law J. Rep. (n.s.) Chanc. 225.

A petition of rehearing cannot be presented now, except within five years; but if the circumstances of the case are such as to lead the Court to think that it would be "just and expedient" to permit it, then the Court is at liberty to dispense with that rule. *Ibid.*

The effect of a petition of rehearing is, that the decree or order complained of is to be upheld, reversed or altered, according to the circumstances, as they stood at the time when the decree or order was pronounced. Circumstances which have subsequently occurred cannot be taken into account. Where, therefore, those circumstances raise important questions, the Court cannot give leave to present a petition of rehearing, until it has had the opportunity of seeing what weight is due to those circumstances. *Ibid.*

(WW) PROHIBITION

This Court discourages applications in term for a

prohibition, even though the proceeding has originated here in vacation. *Re Michael Foster*, 24 Beav. 428.

(XX) FOREIGN JUDGMENTS.

A foreign judgment may be examined in the English Courts if their assistance is required to enforce it. *Reimers v. Druce*, 26 Law J. Rep. (n.s.) Chanc. 196; 23 Beav. 145.

Reasons appended to a foreign judgment supply the means of examining the correctness of the judgment. *Ibid.*

A foreigner resident abroad will not be assisted, after a lapse of thirteen years, to enforce a foreign judgment in England against the executors of a foreigner who had died domiciled here when the party against whom the foreign judgment was obtained survived it four years without any proceedings having been taken to enforce it in England, and when his estate since his death had been administered in England. *Ibid.*

(YY) PETITION OF RIGHT.

In the place of the usual commission issued on a petition of right, the Court, with the assent of the Attorney General, issued a formal commission, the return to which was to be made on the oath of the petitioner. *Ex parte Carl Robert von Frantzisius*, 26 Law J. Rep. (n.s.) Chanc. 797.

Where, upon an application to confirm an inquiry upon a petition of right, the Crown required time to make answer thereto, the Court declined, upon extending the time, to preclude the Attorney General from demurring. *Ex parte Carl Robert von Frantzisius*, 27 Law J. Rep. (n.s.) Chanc. 868; 2 De Gex & J. 126.

Leave given to a petitioner who had presented a petition of right to file a bill against the Attorney General, notwithstanding the issuing of a commission under the petition of right. *In re Roll*, 4 De Gex & J. 44.

(ZZ) OUTLAWRY.

Plaintiff moved to enlarge the time for closing evidence. Between the date of the notice of motion and the time of moving, proceedings in outlawry which had been taken against the plaintiff were completed:—Held, that the outlawry might be urged as an answer to the plaintiff's motion without having been pleaded. *Knowles v. Rhydedefed Colliery Co.*, Johns. 514.

A bill may be dismissed for want of prosecution, while the plaintiff is an outlaw. *Knowles v. Rhydedefed Colliery Co.*, Johns. 630.

(AAA) APPEAL.

The Court will not in general hear appeals directly from chambers, where the parties have not had an opportunity of being heard by counsel. *Stronghill v. Gulliver, Re Gulliver*, 7 De Gex & J. 118.

The plaintiff obtained an interlocutory order restraining the defendant from suing out execution or taking any proceedings on a judgment at law until further order. The plaintiff's bill was afterwards dismissed at the hearing, upon which the defendant issued an *elegit*, and placed it in the hands of the sheriff. The plaintiff appealed from the order of dismissal and moved before the Court of Appeal

to restrain the defendant, who resided out of the jurisdiction, from enforcing his *elegit* pending the appeal. The Court made an order that the sheriff should not proceed on the *elegit* until further order, and named an early day for hearing the appeal, reserving the costs of the application. *Earl of Shrewsbury v. Trappes*, 2 De Gex, F. & J. 172.

Semble—the application did not come within Consolidated Orders VI. 12, but was properly made to the Court of Appeal in the first instance. *Ibid*.

Per Lord Justice Knight Bruce, there is no inflexible rule that a person applying to stay proceedings under a decree pending an appeal must pay the costs of the application. *Ibid*.

An appeal directly from chambers heard where the Judge had made the order in person, and declined to adjourn the matter into court to be argued by counsel. *Ridgway v. Newstead*, 4 De Gex & J. 15.

(BBB) INDORSEMENT OF DECREE.

In an application under the 3rd Order of the 7th of August 1852 for leave to enrol a decree after the expiration of six months, it rests with the party resisting the application to shew cause why the decree should not be enrolled. *Kay v. Smith*, 26 Law J. Rep. (N.S.) Chanc. 136; 7 De Gex, M. & G. 383.

If the conduct of the party enrolling a decree has been such as reasonably to mislead the other party into the belief that he would not enrol, even though there may be no *mala fides*, the Court will vacate the enrolment. *Backhouse v. Wylde*, 26 Law J. Rep. (N.S.) Chanc. 812.

In a suit against several defendants one died, and before revivor against his executor another defendant obtained, on the 8th of May, an order to dismiss for want of prosecution, and enrolled it on the 30th of June. The Court refused to vacate the enrolment on the ground of the abatement of the suit at the date of the order, or on the ground of the haste with which the enrolment had been made. *Williams v. Page*, 26 Law J. Rep. (N.S.) Chanc. 813; 1 De Gex & J. 561.

Although the Court is disposed to take a lenient view of circumstances, which may have prevented an appeal from being prosecuted within five years, yet after that time it is desirable that the Orders as to enrolment, &c. should be strictly adhered to. *Wellesley v. Wellesley*, 28 Law J. Rep. (N.S.) Chanc. 1; 3 De Gex & J. 164: affirmed *nom. Beavan v. Mornington*, 30 Law J. Rep. (N.S.) Chanc. 663; 8 H.L. Cas. 525.

A decree was made in 1849, and an order on further directions in March 1853. In 1854 the plaintiff enrolled the former order. In 1858 a decree was made in another suit, which was considered favourable to a defendant in this suit; and he applied to enrol the order of March 1853, as the five years had so recently expired, and he had been for some years resident out of the kingdom; but the Court refused the application. *Ibid*.

On the 20th of July 1852, a decree was made giving an infant defendant costs out of the estate, upon an undertaking not to appeal. On the 9th of May 1857 the infant attained twenty-one, and in May 1859 applied for leave to enrol the decree, with a view to appeal to the House of Lords:—Held, that

the application was too late, the defendant having allowed two years to elapse from his attaining twenty-one before applying. *Mongpenry v. Dering*, 28 Law J. Rep. (N.S.) Chanc. 503; 4 De Gex & J. 175.

A defendant entered a *caveat* against enrolment of a decree on the 22nd of December. On the 2nd of March he obtained an order to set down the appeal, and served the order on the 23rd of April. On the 29th of March notice was given that the docket for enrolment would be presented for the Lord Chancellor's signature, unless the appeal were lodged, and an order for setting down the same served within twenty-eight days. The appeal was set down on the 29th of April, after the expiration of the twenty-eight days, and the enrolment was signed on the following day:—Held, that although to prosecute the *caveat* with effect, according to the 4th Order of August 1852, the appeal ought to have been set down and notice of it served within the twenty-eight days, yet, as the defendant appeared to have been misled, the enrolment was vacated on the ground of indulgence. *Pearce v. Lindsay*, 28 Law J. Rep. (N.S.) Chanc. 513; 4 De Gex & J. 211.

After a decree had been enrolled, declaring A B entitled to a particular fund as next-of-kin to a testator, a stranger to the suit presented a petition to be allowed to come in and prove his claim to be entitled to the fund instead of A B:—Held, that even if the petitioner could shew such a case as would insure his succeeding, the Court had no power to disturb the decree, and the petitioner could only establish his rights by filing a bill for that purpose. *Bauer v. Milford*, 29 Law J. Rep. (N.S.) Chanc. 268.

Order made *ex parte* under 21 & 22 Vict. ss. 12, 13, for the enrolment of an order of the Court of Session in Scotland directing payment by contributories of a sum of money, or in default attachment. *In re the Western Bank of Scotland*, 1 De Gex, F. & J. 1.

On the 14th of June, the docket of a decree at the Rolls dismissing the plaintiff's bill was deposited with the Clerk of Records and Writs for enrolment, and on the same day forwarded to the office of the secretary of the Master of the Rolls, who signed it on that day. On the 15th of June, a *caveat* was lodged at the office of the secretary of the Master of the Rolls, where both the docket and the *caveat* remained till the 19th, when the docket signed by the Master of the Rolls was returned to the Clerk of Records and Writs, who procured the Lord Chancellor's signature to be adhibited thereto on the 20th of June:—Held, that the *caveat* came too late to prevent the enrolment. *Picketts v. Martin*, 2 De Gex, F. & J. 163.

An enrolment of a decree ought not to be vacated except on strong grounds of surprise or in a case approaching deception or *mala fides*. Where, therefore, some communications had passed between the solicitors with reference to an appeal, and on application of the unsuccessful party to vacate the enrolment, his solicitor made an affidavit but did not state that he had been misled, the application was refused. *Wildman v. Lade*, 4 De Gex & J. 401.

Upon motion to enrol a decree after the expiration of six calendar months from the time the same shall have been made, if the adverse party appear and signify a *bona fide* intention to appeal to the Lord

Chancellor, he is entitled to present a petition for that purpose at any time within the twenty-eight days mentioned in the Third Order of the 7th of August 1852, notwithstanding notice of the motion has been given to all the parties. But his petition must be presented and answered within twenty-eight days after service of the order to enrol. Form of order under such circumstances. *Davison v. Robinson*, 4 Kay & J. 754.

(CCC) RECTIFYING PROCEEDINGS.

A suit was instituted by a client against his solicitor for an account, and by a decree it was referred to the Taxing Master to tax the solicitor's bill of costs; and it was referred to the Master in Ordinary to take an account of all dealings and transactions between the client and solicitor. The plaintiff afterwards moved to have the whole account taken by the Taxing Master, which motion was allowed by one of the Vice Chancellors; but, upon appeal,—Held, first, that the order was such a variation of the decree as could not, without consent, be made upon motion; and, secondly, that such a reference, being of matters not connected with questions on bills of costs, could not, under the 9th Order of the 26th of October 1842, be referred to the Taxing Master. *King v. Savery*, 25 Law J. Rep. (N.S.) Chanc. 564; 8 De Gex, M. & G. 311.

The costs of an interlocutory application and order were reserved, but by inadvertence on the final decree ordering the defendant to pay all the costs of the suit, no provision was made for these costs. The defendant enrolled the decree; but, upon the plaintiff's petition, the defendant was ordered to pay these reserved costs. *Viney v. Chaplin*, 28 Law J. Rep. (N.S.) Chanc. 164; 3 De Gex & J. 282.

Decree made on motion allowed to be varied on motion, and without a petition of appeal. *Hughes v. Jones*, 26 Beav. 24.

(DDD) ABATEMENT.

In a suit for administration a sole defendant died, leaving a sole plaintiff his executor. Several persons beneficially interested had attended in chambers to prosecute claims in the suit:—Held, that the suit might be revived against them. *Pedder v. Pedder*, 29 Law J. Rep. (N.S.) Chanc. 64.

(EEE) REPRESENTATION OF DECEASED DEFENDANT.

Bill to recover a sum of money in respect of which one defendant was treated as primarily liable, and the other two defendants as secondarily liable only. The defendant alleged to be primarily liable, after having, by his answer, admitted his liability to answer the plaintiff's demand, died, leaving assets altogether inadequate to meet such demand, and having, by his will, appointed two persons to act as his executors, both of whom declined to prove the will. The plaintiff then moved, under 15 & 16 Vict. c. 86. s. 44, that the Court would direct the suit to be proceeded with in the absence of any person representing the estate of the deceased defendant, or appoint some person to represent such estate for all the purposes of the suit. The Court held, that the deceased defendant was "a deceased person interested in the matters in question" within the meaning of the act, and under the circumstances, appointed the persons named in

his will to represent his estate for the purposes of the suit. *Ashmall v. Wood*, 25 Law J. Rep. (N.S.) Chanc. 28.

The executor of A was made a party, and was before the Court at the original hearing; but having no interest, he took no part in the discussion, and had since died; and at the hearing on further directions, his estate was not represented:—Held, that the case fell within section 44. of 15 & 16 Vict. c. 86. *Bessant v. Noble*, 26 Law J. Rep. (N.S.) Chanc. 236.

Order made under the 44th section of the 15 & 16 Vict. c. 86. in a creditors' suit for the appointment of a person to represent the deceased debtor under an annuity deed where there was no such representative, upon a motion supported by an affidavit that after payment of incumbrances out of the proceeds of the sale, no surplus would be left, and upon notice being given to the debtor's next-of-kin who were entitled to take out administration. *Davies v. Boulcott*, 1 Dr. & Sm. 28.

Where the entire adverse interest is unrepresented by any party to the suit, the Court will not appoint a person to represent that interest under 15 & 16 Vict. c. 86. s. 44. *Gibson v. Wills*, 21 Beav. 620.

The question was between the children who survived and those who pre-deceased their parents. There had been two of the latter, but neither of their estates was represented in the suit. It was asked under the 15 & 16 Vict. c. 86. s. 44. that the surviving husband of one might represent the interests of the absent parties. The application was refused. *Ibid*.

A person cannot be appointed to represent an estate under the 15 & 16 Vict. c. 86. s. 44. without his consent. *Prince of Wales, &c. Assoc. Co. v. Palmer*, 25 Beav. 605.

The Court cannot under the 15 & 16 Vict. c. 86. s. 44, appoint a person to represent the estate of a deceased person who is not willing to act. *Hill v. Bonner*, 26 Beav. 372.

A bill was filed against the Scotch executors of a domiciled Scotchman to set aside a sale to their testator of shares in a Scotch company and to make them account for the dividends received by the testator thereon:—Held, on demurrer that the suit could not proceed in the absence of a legal personal representative constituted in England. Held, also, that the objection could not be removed by appointing a person to represent the estate under the 15 & 16 Vict. c. 86. s. 44. *Maclean v. Dawson*, 27 Beav. 21.

(FFF) ATTACHMENT.

Attachment for want of answer ordered upon evidence consisting of a memorandum of service of the interrogatories upon the defendant's solicitor in the handwriting of the clerk by whom the service had been effected, and an affidavit by another clerk of the plaintiff's solicitor of the verbal admission of such service by the defendant's solicitor. *Sidbottom v. Adkins*, 27 Law J. Rep. (N.S.) Chanc. 152.

A writ of attachment was issued out of this court to enforce an order made for the payment of 1,228l. 7s. 1d. The sheriff arrested the prisoner, but subsequently allowed him to go at large, without bail, upon his promise to surrender when called on. This he neglected to do, and, without having been recaptured, he committed suicide. Upon an application against

the sheriff,—Held, that an escape had been permitted; that this Court had jurisdiction to ascertain the amount of damages sustained; that the 5 & 6 Vict. c. 98, must be considered as controlling the practice of this Court; and that the sheriff's liability was the actual loss, and not the full sum for which the attachment issued. *Moore v. Moore, in re Mosley*, 27 Law J. Rep. (N.S.) Chanc. 885; 25 Beav. 8.

The sheriff having taken bail upon an attachment in a case not bailable, the Court directed a messenger to go. *Cowdroy v. Cross*, 24 Beav. 445.

An attachment issued against defendants in the County Palatine for not making an affidavit of documents. The sheriff after capture let the defendants out on bail, they having filed the affidavit. The sheriff being afterwards ordered to return the writ made default; and on a motion that he should return the writ or stand committed, Held, that it was not competent for the sheriff to object to the first order, on the ground that it ought to have been directed to the Chancellor of the County Palatine of Lancaster, and not to the sheriff; and, secondly, that the Court would not on this occasion allow him to enter into the merits to shew that the plaintiffs had not been prejudiced by the irregularity, but that a return must be made. *Sugden v. Hull*, 28 Beav. 268.

(GGG) SEQUESTRATION.

An attachment was issued by mistake into a county in which the defendant (who was abroad) had not resided, and a return of *non est inventus* made. The Court ordered a sequestration. *Hodgson v. Hodgson*, 28 Beav. 604.

PRESUMPTION.

Where a person has not been heard of for seven years, there is no presumption of law that he died at any particular period during that time; and it is for the party alleging that he was not alive four years after he was last heard of to prove that fact. *Lambe v. Orton*, 29 Law J. Rep. (N.S.) Chanc. 286.

The Court, acting on the improbability of a lady in her 58th year having future issue, distributed the fund. *Edwards v. Tuck*, 23 Beav. 268.

PRINCIPAL AND AGENT.

- (A) OF THE AGENCY IN GENERAL.
- (B) RIGHTS AND LIABILITIES OF THE PRINCIPAL.
 - (a) *In general.*
 - (b) *On Contracts of the Agent.*
- (C) RIGHTS AND LIABILITIES OF THE AGENT.
 - (a) *As regards his Principal in general.*
 - (b) *Right to Commission.*
 - (c) *As regards third Persons.*
- (D) POWERS AND AUTHORITY OF THE AGENT.

(A) OF THE AGENCY IN GENERAL.

In an action for the price of goods sold, the fact that the party who took the order from the defendant called himself a "commission agent," and exhibited the plaintiff's prospectus (there being no evidence that the plaintiff sent an invoice to the defendant, or

that the defendant sent any order to the plaintiff), will not be any evidence of a liability to the plaintiff. And if the party who took the order agreed that he would allow the defendant a certain discount off the prices specified, this will tend to shew that the contract was with him as principal. *Burton v. Furniss*, 27 Law J. Rep. (N.S.) Exch. 139.

A wife is the general agent of her husband with reference to such matters as are usually under the control of the wife. Therefore, where the wife of a labourer incurred a debt for provisions for the use of the family, the husband was held liable, though he had supplied his wife with money to keep the house. *Ruddock v. Marsh*, 1 Hurl. & N. 601.

Spanish bonds, passing by delivery, were left by the defendant with his stockbroker, to obtain money for him on them, by deposit. The stockbroker borrowed money from the plaintiff, also a member of the Stock Exchange, and deposited a part of the bonds; this was done without disclosing, as is the custom, the name of the principal. On others of the bonds the stockbroker, without the knowledge of his principal, obtained a further sum of money, which he applied to his own use. The defendant afterwards gave notice that he should settle his account, and on the settling day he sent a cheque to his stockbroker for the principal and interest then remaining due, and the stockbroker applied this money to redeem the bonds deposited to secure the money he had applied to his own use, and a part of the bonds deposited to secure the loan obtained for the defendant; and on delivering the redeemed bonds to the defendant, the stockbroker informed him that his assets were not sufficient to redeem the other bonds, and that he had postponed the further settlement to the following settling day. The stockbroker, on that day, informed the defendant that his assets were still insufficient. It was then arranged, between the stockbroker and the defendant, that the stockbroker should give his cheque to the plaintiff, for the sum due, and that the defendant on receiving the bonds, should give him his cheque for a sum sufficient to enable the stockbroker to meet the cheque he was to give to the plaintiff. The bonds were obtained by the stockbroker on his crossed cheque, and delivered to the defendant, but he refused to give his cheque for the sum required, and the stockbroker's crossed cheque, in passing through the clearing-house was dishonoured. In a suit instituted for a re-delivery of the bonds, Held, that the plaintiff was not deficient in caution when he took the crossed cheque, and that he was not bound to inquire whether it would be honoured before delivering the bonds. Held, also, that the defendant had induced his stockbroker and agent to give the crossed cheque by his promise to supply assets to meet it, and that the bonds would not otherwise have been obtained by his agent, and therefore that the defendant must either pay the amount due to the plaintiff with interest, or give up the bonds to him. *Mocatto v. Bell*, 27 Law J. Rep. (N.S.) Chanc. 237; 24 Beav. 585.

In general dealings and transactions between two firms, if one purchases securities for the other, those securities in the hands of the firm which purchased will be a security for what may be due from the firm on whose behalf the purchase was made upon a general balance of account, notwithstanding all claims which arose in respect of the securities pur-

chased have been satisfied, and the Court will not restrain the firm that purchased from selling the securities to reimburse themselves any sums which may be due to them. *Bock v. Gorrisen*, 29 Law J. Rep. (N.S.) Chanc. 678.

Semble—a contract for a *del credere* agency is not a promise to answer for the debt of another within the 4th section of the Statute of Frauds, on the authority of *Couturier v. Hastie*, 8 Exch. Rep. 40, and observations on that case. *Wickham v. Wickham*, 2 Kay & J. 478.

(B) RIGHTS AND LIABILITIES OF THE PRINCIPAL.

(a) *In General.*

If a company does not discover, and has not the means of discovering, the correctness of entries in a succession of accounts rendered by their agent, they are not after the decease of the agent precluded by lapse of time, or by certain shareholders omitting, against opposition, to press for explanations previously asked, from shewing that such entries are not only erroneous but fraudulent. *Stainton v. the Carron Co.*, 27 Law J. Rep. (N.S.) Chanc. 89; 24 Beav. 346.

Where the accounts of an agent acting for a company have been improperly kept or mystified, and not duly rendered and explained when asked for, the Court will direct them to be taken through a period of twenty-five years, though accounts sent in have been acted on, and though shareholders who asked for further information and explanations on such accounts did not persevere to obtain them. Manner in which the Court will direct the accounts to be taken. *Ibid.*

(b) *On Contracts of the Agent.*

T & M, brokers employed by H, sold on his account to D, M & Co., who were also brokers, ten tuns of linseed oil. On the 14th of August 1855, the following sold note was sent by T & M to H:—"Sold to Dale, Morgan & Co., for account of Mr. Charles Humfrey, ten tuns of linseed oil, of merchantable quality, at, &c. (stating the terms). Thomas & Moore, brokers. Quarter per cent. brokerage to D, M & Co., and a half to us." On the same day the following bought note was sent by D, M & Co. to T & M:—"Sold this day for Messrs. Thomas & Moore, to our principals, ten tuns of linseed oil, of merchantable quality, at, &c. (stating the same terms). Dale, Morgan & Co. brokers. Quarter per cent. to D, M & Co." D, M & Co. afterwards declined to accept the oil; and on the 28th of February 1856 they informed H of the name of the principal for whom they had purchased. H afterwards brought an action against D, M & Co. for the price of the oil, and at the trial parol evidence was admitted of a usage of trade in the city of London, by which a broker making such a contract was held personally liable as purchaser, if he did not at the time of the contract disclose the name of his principal:—Held, first, that there was clear evidence of a contract of bargain and sale between the plaintiff as seller and the undisclosed principal of the defendants. Secondly, that the evidence of usage of the trade, whether treated as explaining the language of the written contract, or adding to it a tacitly implied incident, was properly

admissible, and rendered the defendants themselves liable under the contract. *Humfrey v. Dale*, 26 Law J. Rep. (N.S.) Q.B. 187; 7 E. & B. 266.

H, who was a commission agent, ordered of the plaintiff shirtings in August and September 1857, which were entered in the plaintiff's books to H as the purchaser, and the goods and invoices were sent to him, debiting him with the price. By the course of dealing the price became due in cash, minus discount, on the last Friday in October 1857. H had been employed for several years by the defendant (who was a merchant in England and Canada) to buy goods for him, and the course of dealing between them was for the defendant to give H acceptances from time to time at four months, in order to put him in funds to meet the current account. The shirtings were bought by H, pursuant to orders from the defendant, and being sold by the plaintiff "in the grey" H got them finished, and invoiced them from himself to the defendant, charging the cost price of the goods and of finishing, and a commission to himself of 2½ per cent.; and the goods when finished were sent by H to be shipped on the defendant's account to Canada. The defendant suspended payment on the 13th of October; but he had sent to H between that day and August acceptances more than sufficient to cover the price of the shirtings and all other orders, and H had discounted the bills, which had thus got into the hands of third persons, but he did not pay the plaintiff on the last Friday in October, or at any other time. On the 16th of October H sent the defendant his account current, including the invoice for the shirtings and for other goods, and he credited himself with the price of the goods, and debited himself with the amount of the bills, the balance being in the defendant's favour. At the time of the purchase the plaintiff knew that H was a commission agent, but knew nothing of the defendant, nor that the shirtings were for him. In November 1857 the plaintiff was informed by H that the defendant was the principal in the purchase; but he took no proceedings whatever in the matter till December 1858, when he commenced an action against the defendant. After the plaintiff had been informed that the defendant was the principal, the defendant arranged to take up, among others, the bills which had been given to H, by giving promissory notes for the amount; and when these notes became due (before September 1858) a fresh arrangement was entered into with the creditors, at 12s. 6d. in the pound, for which the defendant gave fresh acceptances, which were still running at the time of action brought. H was a party to both renewals. At the trial the defendant contended that he was not a principal in the purchase from the plaintiff by H; the jury found that the purchase was made by H, as agent for the defendant:—Held, that, assuming on this finding the plaintiff to have had the right in November 1857 (when he first knew that the defendant was the principal) to elect between the defendant and H, he must be taken from his conduct actually to have elected to make H his debtor; or that, having made no election, he had, by lying by for nine months, allowed the defendant to change his position to his prejudice; and that in either view he could not recover against the defendant. *Smethurst v. Mitchell*, 28 Law J. Rep. (N.S.) Q.B. 241; 1 E. & B. 622.

Quere—whether, H not having authority to

pledge the defendant's credit, the plaintiff had a right of election in November 1857. *Ibid.*

Quere, also, whether the plaintiff, knowing H to be only an agent, ought not, in order to be able to charge the principal, to have made inquiries for the principal's name when the day for payment arrived. *Ibid.*

Where a broker, under the authority of an agent who was employed verbally by a firm to purchase and sell goods, entered into contracts at the request of the agent, and credited them in his books to the firm, and settled accounts with the agent on behalf of the firm, such contracts and settlements of account were held under the circumstances to bind the firm, though they insisted that their agent had, with the knowledge of the broker, exceeded his authority, and that the broker did not comply with their directions, or act on their behalf. *Pole v. Leask; Leask v. Pole*, 29 Law J. Rep. (N.S.) Chanc. 888; 28 Beav. 562.

(C) RIGHTS AND LIABILITIES OF THE AGENT.

(a) As regards his Principal in general.

Where a foreign principal orders goods of a broker here, who buys them in his own name, though the vendor knows he is acting as agent, and the broker pays the vendor the purchase-money, which he afterwards receives from his principal, and it turns out that the goods were not in existence at the time of the contract, the principal cannot recover back the money paid from his agent, the broker, but must proceed against the vendor for it. *Risbourg v. Bruckner*, 27 Law J. Rep. (N.S.) C.P. 90; 3 Com. B. Rep. N.S. 812.

Quere—Whether the action by the principal against the vendor ought not to be brought in the name of the broker. *Ibid.*

Though a person, not a licensed broker in the City of London within the statute 6 Ann. c. 16, cannot support a claim against his employer for commission for making the contract for the purchase of scrip certificates in a public company, yet he may recover the money he has paid to complete the purchase, though he has paid it without any other request than that implied from the direction to purchase the scrip, and the usage of the trade that the broker who purchases such scrip pays the price—So held by the Court of Exchequer Chamber (*Crompton, J. diss.*). *Smith v. Lindo* (Ex. Ch.), 27 Law J. Rep. (N.S.) C.P. 385; 5 Com. B. Rep. N.S. 587; affirming the decision below, 27 Law J. Rep. (N.S.) C.P. 196; 4 Com. B. Rep. N.S. 395.

The plaintiffs, stockbrokers and members of the Stock Exchange, were, on the 28th of August, directed by the defendant, for whom they had made similar purchases before, to purchase for him, upon the Stock Exchange, shares in a chartered joint-stock bank. The plaintiffs accordingly, on the same day, contracted with R, a jobber on the Stock Exchange, for the purchase of the shares for the 15th of September, the settling day. By the deed of settlement, recited in the charter of the bank, shareholders were empowered to sell and transfer their shares with the consent of the directors; and it was provided that, before making such transfer, notice should be given by the transferor or the transferee to the directors of the name of the person to whom the transfer was

proposed to be made. The bank stopped payment on the 3rd of September; and on the 8th the defendant refused to have the shares transferred to his name, and on the 11th gave the plaintiffs notice not to pay for them. On the 15th application was made to the bank, on behalf of the proposed transferors, to prepare transfers of their shares to the defendant, which was refused; but blank printed forms, previously issued by the bank, were obtained from brokers, and duly executed by the owners of the shares to the defendant, and stamped, and, together with certificates of the shares, were, on the same day, presented by R to the plaintiffs; and they, according to the practice of the Stock Exchange, were thereupon bound to pay R for them. The plaintiffs had no notice of the refusal of the bank to grant the transfers, and it was no part of their duty to complete the transfers, or to see to their registration.—Held, that the defendant must be presumed to have given the plaintiffs authority to purchase and pay for the shares according to the custom of the Stock Exchange, and that they were entitled to recover from him the price of the shares which they had paid R, notwithstanding the stoppage of the bank and the refusal of the directors to consent to the transfers. *Taylor v. Stray*, 26 Law J. Rep. (N.S.) C.P. 185; 2 Com. B. Rep. N.S. 175; affirmed in error, 26 Law J. Rep. (N.S.) C.P. 287; 2 Com. B. Rep. N.S. 175.

An advice-note of the purchase was sent by the plaintiffs to the defendant as follows: "Bought for (the defendant), for the 15th of September, twenty Royal British Bank shares, at 32, of Russell"—Held, that the words, "of Russell," merely denoted the person of whom the shares were bought, and not the owner of the shares. *Ibid.*

The defendants, merchants at B, who had before acted as brokers for the plaintiffs at L, proposed to them to purchase a quantity of iron belonging to a person at B, for whom they were also acting as brokers. In the proposal they specified the quality of the iron. The plaintiffs asked for an offer of cost and freight for R. The defendants replied, stating the price, but also stating their inability to make an offer as to freight, but expressing a conviction that they should shortly be able to find a ship. Before the plaintiffs closed with the offer, the defendants wrote proposing a ship for the conveyance of the iron. The plaintiffs accepted the purchase, but objected to the ship, and the defendants, as the agents for both parties, entered into and accepted the contract of sale, and transmitted the same to the plaintiffs. They engaged a vessel and shipped the iron, which, on arriving at its destination, turned out to be of a very inferior description, and the plaintiffs sustained a serious loss in consequence. The defendants received commission from the seller and also from the captain of the ship.—Held, in an action against the defendants, that they were not liable in respect of the loss sustained by the plaintiffs, for that, in the absence of any usage or agreement that they should inspect the iron and see to its quality, they were not bound to do so. *Zuichenbart v. Alexander*, 29 Law J. Rep. (N.S.) Q.B. 236.

A solicitor acting for an embryo banking company agreed with R for the purchase from C of a large building and adjoining premises suitable for the com-

pany; R, through the solicitor, induced the company to purchase the building at a large increased price, which was divided between R and the solicitor. The company took possession, and adapted the building to the purposes of a bank, and obtained a trade reputation. They subsequently discovered the circumstances under which the sale of the building had been made to them; and, upon a bill by the company stating that they could not relinquish the building, and that the adjoining premises would greatly facilitate their business,—Held, that the purchase by the solicitor was made as agent and for the benefit of the company; that the company was entitled to the profits made by the solicitor; and that the solicitor was a trustee for the company of the interest taken by him in the premises adjoining the building. *The Bank of London v. Tyrrell*, 28 Law J. Rep. (N.S.) Chanc. 921; 27 Beav. 273.

(b) *Right to Commission.*

A manufacturer employed a commission-agent to obtain orders for him on the terms of paying commission "on all goods bought" by persons whose accounts were opened through the agent:—Held, that where under such contract an order for goods which the manufacturer had accepted had been obtained for him through the agent, the latter was entitled to his commission, although the manufacturer had been afterwards unable to execute the order, and had, therefore, derived no benefit from it. *Lockwood v. Levick*, 29 Law J. Rep. (N.S.) C.P. 340; 8 Com. B. Rep. N.S. 603.

The defendant being possessed of a leasehold house, and likewise of certain building-land also held on lease, the former of which was subject to an annual rent of 75 guineas, and the latter to a rent of 50*l.*, and also to a covenant to lay out a certain sum in building, employed the plaintiff, an estate-agent, to dispose of the whole for him, upon the terms of commission mentioned in a printed paper, as follows: "For the sale of property by private contract,—on the first 100*l.*, 5*l.* per cent. (and in no case less than 5*l.*); from 100*l.* to 5,000*l.*, 2½*l.* per cent.; from 5,000*l.* to 10,000*l.*, 1½*l.* per cent.; on the sum exceeding 10,000*l.*, 1*l.* per cent. For letting, or disposal of the leases of, estates or houses,—unfurnished, 5*l.* per cent. on one year's rent, and 5*l.* per cent. on the premium or sum obtained for fixtures, furniture, &c.; on lease, 5*l.* per cent. on the first year's rent, and 2½*l.* per cent. on the second year's rent, and 5*l.* per cent. on premium or sum obtained for fixtures, &c.,—furnished, 5*l.* per cent. on the entire rental (not exceeding twelve months), but in no case (whether furnished or unfurnished) less than 1 guinea. On letting building-land,—one year's standing ground-rent. For large estates, one half-year's ground-rent." The plaintiff having disposed of the premises to one M for 1,300*l.*, the two leases were assigned to M subject to the covenants for payment of the rents, &c.:—Held, by *Erle, C.J.*, *Williams, J.* and *Willes, J.*, that the plaintiff was only entitled to a commission on the 1,300*l.* under the first branch of the printed scale, viz., 5*l.* per cent. on the first 100*l.*, and 2½*l.* per cent. upon the remainder. Held, by *Byles, J.*, that he was also entitled to a commission on the amount of the yearly rent, under the second branch of the sale. *Biggs v. Gordon*, 8 Com. B. Rep. N.S. 638.

(c) *As regards third Persons.*

[*Lennard v. Robinson*, 5 E. & B. 125; 6 Law J. Dig. 610.]

Whether an agent resident in England who contracts for a foreign principal resident abroad is personally liable on the contract, is in all cases a question of fact and not of law, to be determined by reference to the contract and the surrounding circumstances. *Green v. Kopke*, 25 Law J. Rep. (N.S.) C.P. 297; 18 Com. B. Rep. 549.

K, the London agent of R, a foreigner resident abroad, contracted expressly "as agent and on behalf of R," by bought and sold notes, to sell to the plaintiff tar, to be shipped from a foreign port:—Held, that K was not liable on the contract. *Ibid.*

Quære—whether evidence was admissible to shew that by the usage of the Baltic trade an agent contracting under such circumstances is personally liable. *Ibid.*

A party who makes a contract as agent thereby warrants that he has authority as agent to make the contract; and if he has no such authority, he and his executors are liable in an action for the damages necessarily occasioned by a breach of his warranty, although he acted *bona fide* under a mistaken belief that he had authority as agent to make the contract. In such an action,—Held, by *Lord Campbell, C.J.* and *Crompton, J.* (*Wiglesman, J. dubitante*), that the costs of an unsuccessful Chancery suit against the alleged principal for specific performance of the contract, instituted in reliance upon the agent's representation of authority, and in the absence of any notice to the contrary from the agent, may be recovered as part of the damages, although no notice of the intention to institute the suit was given to the agent. *Collen v. Wright*, 26 Law J. Rep. (N.S.) Q.B. 147; 7 E. & B. 301.

The defendant, as agent of R, entered into a contract with the plaintiff for the purchase of a ship at a certain price. R, not having given the defendant authority, repudiated the contract, and the plaintiff sold the ship at a lower price. Both the contract price and the price on re-sale were the fair market value of the ship:—Held, that the plaintiff, in an action against the defendant for a breach of his contract that he had authority as agent of R, could recover as damages the difference between the two prices. *Simons v. Patchett*, 26 Law J. Rep. (N.S.) Q.B. 195; 7 E. & B. 568.

By an agreement stated to be between the defendants, shipowners, of Liverpool, and the plaintiff, of London, on behalf of the Geelong and Melbourne Railway Company, it was agreed that a ship of the defendants should load certain goods and proceed to Geelong, in the colony of Victoria, and there deliver the goods alongside the pier of the company; the rates of freight determined by the parties to the agreement, one-third to be paid in London, and the remainder by the company at Geelong; the goods to be taken on board at Liverpool at the ship's expense. The plaintiff signed the agreement in his own name:—Held, that he was entitled to sue, and liable to be sued, personally, on the contract. *Cooke v. Wilson*, 26 Law J. Rep. (N.S.) C.P. 15; 1 Com. B. Rep. N.S. 153.

The declaration set out the agreement, and averred that the goods were in the care of the defendants for

the purpose of being taken on board, and by their neglect some of the goods were injured, whilst the same were so being taken on board:—Held, that the declaration shewed a duty on the part of the defendants to take the goods safely on board, and that they were liable to the plaintiff. *Ibid.*

The Court will take judicial notice that the colony of Victoria is abroad. *Ibid.*

A person who *bond fide* but without authority pretends to act as agent for another, and makes a contract on his behalf with a third party, impliedly warrants to such third party that he has authority to make the contract. *Collen v. Wright*, (Ex. Ch.), 27 Law J. Rep. (N.S.) Q.B. 215; 8 E. & B. 647.

Where a suit in Chancery was brought by such third party against the supposed principal to enforce a contract made by the alleged agent, and the latter after notice said he would be responsible if the suit failed for want of authority to contract, never withdrew the assertion that he was authorized to make the contract, and the bill was dismissed on the ground of such want of authority, it was held, that the third party might in an action against the agent on the implied warranty of authority recover as damages his costs of the Chancery suit. *Ibid.*

Declaration for money had and received. Plea—that the defendants, at the request of the plaintiffs, dealt with F as principal in the transaction in respect of which the money was received by the defendants; that the plaintiffs, at the time of making the request, further authorized the defendants to receive any money resulting from the said transaction on account of and as the money of F; that the money pleaded to being the money resulting from the said transaction was afterwards, in pursuance of the said request and authority, received by the defendants in respect of the said transaction, and as the money of F. Averment, that upon faith of the said request and authority the defendants afterwards gave credit to F in respect of divers other transactions, and allowed F to incur debts to them which are still due; and that before and at the time the money was so received by the defendants as the money of F, F was and still is indebted in respect of the divers debts hereinbefore mentioned in an amount equal to the plaintiffs' claim, which amount the defendants are willing to set off:—Held, on demurrer, a bad plea. *Ferland v. Bischoffsheim*, 27 Law J. Rep. (N.S.) C.P. 302; 4 Com. B. Rep. N.S. 710.

(D) POWER AND AUTHORITY OF THE AGENT.

If a creditor employs an agent to receive money of a debtor, and the agent, instead of receiving money, writes off a debt due from himself to the debtor, the latter is not thereby discharged. Therefore, where C, who was employed by the plaintiff to receive payment of a debt from the defendant, accepted as payment a cheque of his own, which the defendant had previously cashed for his accommodation,—Held, that as the plaintiff had not ratified C's act, the defendant was not discharged. *Underwood v. Nicholls*, 25 Law J. Rep. (N.S.) C.P. 79; 17 Com. B. Rep. 239.

The defendant owned a jeweller's shop at Lewes, living himself in London and visiting the shop monthly. The shop was managed by a shopman, H, from whom the plaintiff had for some years received orders at Lewes, in the defendant's name, for goods,

which were sent to the shop and afterwards paid for by the defendant. H absconded, and came to London, and ordered jewellery there of the plaintiff in the defendant's name, which he carried away with him:—Held, that the previous course of dealing justified the plaintiff in assuming that H had general authority to order goods for the shop on the defendant's credit, and that the defendant was therefore liable for the goods obtained by H in London. *Summers v. Solomon*, 26 Law J. Rep. (N.S.) Q.B. 301; 7 E. & B. 879.

A, the defendant, resident at Liverpool, and the agent of a foreign merchant, was instructed by his principal to effect a policy on a cargo, and thinking that he could effect it on better terms in London than at Liverpool, wrote to L there, instructing him to get the policy. L obtained a policy in his own name through his broker N. An average loss occurred, and the money which became due upon the policy was paid to N, who claimed to retain it upon a lien for premiums on other policies unpaid by L. The merchant then sued the defendant for negligence:—Held, that it was a material question whether L shewed his letter of instructions to N, as in that case, assuming that the defendant had committed a breach of duty, he would still not be liable for the whole amount due on the policy, though he might be for nominal damages. *Quære*—whether the defendant did violate his duty by employing L. *Cahill v. Dawson*, 26 Law J. Rep. (N.S.) C.P. 258; 3 Com. B. Rep. N.S. 106.

In an action for goods sold, a letter from the defendants' broker announcing to his principals a purchase on their account, on certain terms stated, was held to be evidence of a precedent authority to purchase, not merely on precisely the terms stated, but upon terms not unusual nor unreasonable, and in substance the same: and held, also, that the sellers' right to resort to the undisclosed principals on a contract made by the broker in his own name, was not affected by their delaying to do so until parties to whom the broker had re-sold had become insolvent; the defendants, the original purchasers, not having paid the brokers in the mean time, nor otherwise altered their position. *Campbell v. Hicks*, 28 Law J. Rep. (N.S.) Exch. 70.

A, upon going abroad in 1841, gave to B in this country a power of attorney, empowering B to act in and conduct and manage all his affairs in the United Kingdom of Great Britain and Ireland during his absence, and to receive and recover debts, to settle accounts, to recover money due on security, to compound debts, to enter and repair his messuages and hereditaments, to receive his rents, and to sell and exchange his real estate, "and for all or any of the purposes aforesaid, generally to do all and every or any other acts, deeds, matters or things whatsoever in or about the estates, property and affairs of him, the said A, as amply and effectually as A could do or have done": A thereby ratifying and confirming, and agreeing to ratify and confirm whatsoever B should do or cause to be done. In 1848 B wrote to A, who was in want of money, suggesting that he should raise money upon a policy belonging to A in his (B's) possession, instead of selling it. In 1849, B, in the name of A, but unknown to him, borrowed a sum of money of C upon the security of the above policy, which was at the same time deposited with

C. In 1850 A wrote to B directing money to be raised upon the same policy. Other letters were also written by A to B, urging B to borrow money upon the security of the policy. B misappropriated the money received by him from C in 1849. Upon a bill by A, alleging that he did not authorize the loan by C, and that he had not received any portion of the money thereby raised, and praying for a declaration that he was not liable for its repayment,—Held, first, that although upon the construction of the power of attorney *per se*, B might not have been authorized to borrow money on A's behalf, yet, that upon the construction of the power, coupled with the correspondence, B was authorized to do so; and, secondly, that the advance by C to B was a sufficient payment to A: and, upon appeal, this decision was affirmed. *Perry v. Holl*, 29 Law J. Rep. (n.s.) Chanc. 677; 2 Giff. 188; 2 De Gex, F. & J. 38.

A power of attorney, followed by general words, is not to be extended beyond what is necessary for doing the particular act for which the power is given. *Ibid*.

A steward has no general authority to enter into contracts for granting leases of farms for a term of years; and, therefore, where a steward and land agent whose powers were specially limited had in the name of the owner entered into a written agreement with a farmer to grant him a lease for twelve years, but without communicating to him the fact that his power was specially limited, it was held that the agreement did not bind the owner. *Collen v. Gardner*, 21 Beav. 540.

Where a general authority is given to an agent, this implies a right to do all subordinate acts incident to and necessary for the execution of that authority; and if notice be not given that the authority is specially limited, the principal is barred. *Ibid*.

Though an agent cannot delegate his authority, yet there are many acts which he must necessarily do through the agency of other persons, and which are valid when so done. A proposal for a life policy was accepted, on behalf of a London assurance company by their agent in Australia, who acted in the transaction through the medium of a sub-agent, and the premium was paid. It was held binding on the company though the agent had no authority to appoint a sub-agent, and although there were some informalities, but of form only. *Rositer v. the Trafalgar Life Assur. Assoc.*, 27 Beav. 377.

The ordinary import of language of a letter giving full authority to deal with the property of another ought not to be cut down or restricted by merely ambiguous or uncertain expressions in other parts of the document. Where, therefore, a foreign merchant wrote to his English correspondent directing the latter to consider any consignment from him as the property of his son, who was residing in England, so that the son might place and dispose of his father's money as if it was the son's own property, and stating that as the son informed the father of everything the consignor would not continue writing, but that whatever the son said for him was to be the same as if he had said it himself, and must guide the consignee,—Held, first, that the son was thus constituted not merely an agent, but with full powers to act for his father, but that the consignee was justified in setting off with the son's concurrence a debt due to the father against one due from the son. Secondly,

that although on one or two occasions the consignee had required a written authority from the son before so acting, neither the circumstance nor the terms of the letters rendered any writing necessary, but that a verbal direction or subsequent adoption by the son was sufficient. Thirdly, that the incumbrance of the consignee's firm having been changed by the death of a member of it subsequently to the date of the letters, made no difference in these respects, the letters having imposed a duty on the consignee's house which continued so long as the relation between the plaintiff and it, however it might be composed. *Pariente v. Lubbock*, 8 De Gex, M. & G. 5.

PRINCIPAL AND SURETY.

[A surety who discharges the liability entitled to assignment of securities held by the creditors by 19 & 20 Vict. c. 97. s. 5.]

[See BILLS OF EXCHANGE AND PROMISSORY NOTES
(A) (c).—BOND.]

- (A) RIGHTS OF SURETYSHIP.
- (B) INDEMNITY OF SURETY BY HIS PRINCIPAL.
- (C) DISCHARGE OF SURETY.
 - (a) *By Payment.*
 - (b) *By Change in Duties or Tenure of Office.*
 - (c) *By giving Time to the Debtor.*
 - (d) *By Compromise with the Debtor.*
 - (e) *In other Cases.*
- (D) CONTRIBUTION.

(A) RIGHTS OF SURETYSHIP.

The plaintiffs lent money to A B on the security of A B's furniture and of the joint and several promissory note of A B and the defendant as his surety, which note the plaintiffs took on the terms of the defendant being such surety:—Held, that though the character of the defendant as surety did not appear on the face of the instrument, yet the defendant might give evidence of his being such surety, and set the same up, together with a loss occasioned by the plaintiffs' misconduct in realizing the value of the furniture, as an equitable defence to an action on the note. *The Mutual Loan Fund Assoc. v. Sudlow*, 28 Law J. Rep. (n.s.) C.P. 108; 5 Com. B. Rep. N.S. 449.

Messrs. Reid & Co., brewers, lent a sum of money to their tenant, and took as security two promissory notes, in one of which the plaintiff joined as surety. At the time the plaintiff became surety he was aware that the brewers were to take a further security for their debt upon the furniture and a pension of their tenant. The rent of the tenant fell into arrear, the brewers distrained, but they afterwards took the furniture mortgaged at a valuation in satisfaction of their rent; they then sued the surety for the sum secured on the promissory note and interest. Upon a bill by the surety,—Held, (affirming a decree of the Master of the Rolls), that the brewers could not appropriate the mortgaged property to the payment of any debt but that for which it was a security, and an account was directed and a set-off of one-half of what had been received by the brewers for the furniture and pension against their claim upon the surety.

Pearl v. Deacon, 26 Law J. Rep. (N.S.) Chanc. 761; 1 De Gex & J. 461; 24 Beav. 136.

J H T was sued at law on a promissory note, in which he had joined as surety for J B, and he pleaded an equitable plea. Issue was joined, and the action was tried on the 29th of May, and a verdict found against J H T. On the 6th of June, before judgment was signed, J H T filed a bill in the Court of Chancery to restrain further proceedings in the action, the same equitable grounds being taken as in the defence to the action. On the 12th of June he moved for an injunction, which was refused. On the 15th the plaintiff in the action signed judgment, and thereupon J H T gave notice of appeal from the decision refusing the injunction:—Held, that he was too late, and that by his equitable plea he had elected to defend himself at law, and his appeal must be dismissed, with costs. *Terrell v. Higgs*, 26 Law J. Rep. (N.S.) Chanc. 887; 1 De Gex & J. 388.

B B was entitled as heir-at-law to shares in the estate of S B, under administration in this court. He also became entitled, by purchase, from parties interested, to other shares. He was appointed receiver of the rents, and gave the usual security. B B became a defaulter, and his sureties were compelled to pay the full amount of their recognizances, which was not sufficient to satisfy the deficiency. One of the Vice Chancellors decided that, inasmuch as the parties to the suit other than B B were entitled to say that B B should take nothing until they were paid in full their shares, and as the money paid in by the sureties was applicable to make good those shares as far as it would go, the sureties had an equity to be re-couped all they had paid out of the shares of B B after these shares had made good all that remained due to the other parties after exhausting the money paid in by the sureties. B B had executed a mortgage to the sureties of all his shares as heir-at-law, but "not the shares he had purchased." He became bankrupt, and his assignees sold these shares, and the Vice Chancellor decided that the purchaser from the assignees could not stand in a better position than the assignees, who took only subject to the same equity as B B:—Held, on appeal, that the decision was correct, the mortgage making no difference in the rights of the sureties. *Brandon v. Brandon*, 28 Law J. Rep. (N.S.) Chanc. 147; 3 De Gex & J. 524.

The plaintiff accepted a bill for the accommodation of R. R afterwards compounded with his creditors, who executed a release in which the holder of the bill concurred, under a secret understanding between him, the plaintiff, and R that his rights against the plaintiff should not be prejudiced. R died, appointing the plaintiff his executor. The plaintiff at the request of R's widow renounced probate and allowed the widow to take out administration, in consideration of which Mrs. R and her brother gave him a memorandum, undertaking to indemnify him against all his liabilities as surety for R on several instruments and under the accommodation bill, but not beyond the amount of the assets. The holder of the bill pressed the plaintiff for payment, the plaintiff paid him and filed his bill against Mrs. R and her brother for indemnity out of the assets:—Held, that, however the case might have stood apart from the memorandum, Mrs. R had thereby

estopped herself from treating the plaintiff's payment to the bill-holder as voluntary and not made in satisfaction of a legal liability, and that she had, therefore, no defence to the suit; and that although the demand against her brother might be of a legal and not of an equitable nature, yet as he was surety in respect of a demand which as against his principal was the proper subject of a suit in equity, he was properly made a party to the suit. *Atkins v. Revell*, 1 De Gex, F. & J. 360.

Notice to a creditor when his debt is contracted that the relation of principal and surety exists between his co-debtors is sufficient to affect him with the consequences of that relation to the creditor, without any further acceptance of it on his part. But it is not a consequence of that relation that the creditor, without any inquiry on the part of the surety, should acquaint him with every circumstance affecting the credit of the debtor, or of any matter unconnected with the transaction in which he is about to engage which may render it hazardous, the principles applicable to insurances not applying to such a case. *Wythers v. Labouchere*, 3 De Gex & J. 695.

A customer, being desirous of obtaining an advance from his bankers on the credit of a surety, employs solicitors for that purpose who are also the ordinary solicitors of the bankers, but are not employed by them in the transaction in question. The solicitors, however, give information to the bankers as to the sufficiency of the surety, and debit them with the costs of preparing the instrument of suretyship:—Held, that they could not be regarded as having acted for the bankers from the beginning, so as to affect the bankers with notice of any concealment or misrepresentation on the part of the customer towards the surety. *Ibid*.

Repayment of a sum given by bankers to a customer for the purpose of constituting a parliamentary qualification on an understanding that it was to be returned,—Held, not a payment on his general account so as to discharge a surety. *Ibid*.

A creditor holding a mortgage for a guaranteed debt, is bound to hold it for the benefit of the society to enable him on paying the debt to take the security in its original condition unimpaired. *Pledge v. Bass*, Johns. 663.

Therefore, where a creditor held a mortgage for a debt for which the plaintiff was surety, and after the bankruptcy of the principal debtor without notice to the surety released the assignees and the bankrupt's estate in consideration of the conveyance to him of the equity of redemption,—Held, that the surety was discharged, and that it was not enough for the creditor to allow in account the dividends released and to give a new charge on the mortgaged premises. *Ibid*.

In order to entitle a surety to relief on the ground of misrepresentation or concealment at the time of the contract he must make out a case amounting to fraud. *Ibid*.

The rights of a surety with respect to securities extend to securities taken after the contract of suretyship. *Ibid*.

A surety for a mortgagor, who pays part of the mortgage, is entitled as against the mortgagor to a charge on the estate. *Gedger v. Watson*, 25 Beav. 310.

A surety who covenants for payment of the mort-

gage-money is not a necessary party to a foreclosure suit, if he has paid nothing. *Ibid.*

(B) INDEMNITY OF SURETY BY HIS PRINCIPAL.

D M being appointed treasurer to a corporation in 1841, A, B, and C became his sureties to the extent of 2,000*l.* D M opened a banking account, in which he was described as treasurer; but this designation was added without his authority, and was afterwards struck out. It was understood between D M and the corporation that he should always have a considerable balance in his hands, of which he might make interest for his own profit. In August 1848 D M drew out 2,300*l.* from his banking account, and placed the same in another bank in the name of his son, a minor. In the same month, D M obtained his son's indorsement of a receipt, and withdrew the 2,300*l.* from his name and placed it in that of his daughter, who was of age. On the 29th of September 1848, A received notice of D M being a defaulter in his accounts with the corporation. A called upon D M and required an explanation and indemnity. D M then gave to A the deposit receipt for 2,300*l.*, upon which, it being signed by the daughter, A received that sum from the bank. In a suit by the corporation against D M and his sureties, it was held, that there was sufficient evidence to shew that the 2,300*l.* was part of the corporation monies, and that A ought to have made further inquiry, and therefore that the sum must be restored to the corporation. *The Mayor and Corporation of Berwick v. Murray*, 26 Law J. Rep. (N.S.) Chanc. 201; 7 De Gex, M. & G. 497.

B died during the progress of the suit, and after a sum of money had been paid into court, and the legal liability of the sureties had been settled; and it was held, that the representatives of B must be brought before the Court in the suit. *Ibid.*

(C) DISCHARGE OF SURETY.

(a) By Payment.

The defendant became surety to the guardians of a poor-law union by a bond, conditioned that the treasurer should discharge the duties of his office by receiving all monies tendered to be paid to the board of guardians, by paying out of the monies in his hands of the guardians all orders drawn on him on their behalf, and that he should pay over all balances and monies belonging to the union. The treasurer, who was a corn-dealer, was in the habit of receiving from the overseers of the parishes of the union, who were farmers, payment of the poor-rates collected by them in the following manner: they sent corn to him for sale, and he, after debiting himself with the amount so received, debited them in his trade account with the amount of the poor-rate, and credited them in his accounts with the guardians for the like amount as paid to him. He settled with them from time to time, paying or receiving the balance. His accounts were audited half-yearly, and the credit in corn was allowed by the auditors as payment in money. At the last audit, the auditors found 239*l.* 1*s.* 7*d.* due from him to the guardians:—Held, that the surety was liable to make good this balance, since, as between the overseers and the treasurer the transactions respecting the corn amounted to payment in money. *The Guardians of the Poor*

of the Belford Union v. Pattison (Ex. Ch.), 26 Law J. Rep. (N.S.) Exch. 115; *nom. Pattison v. the Guardians of the Poor of the Belford Union*, 1 Hurl. & N. 523.

The treasurer of a poor-law board entered, along with sureties, into a bond, with a condition that he should honestly, diligently and faithfully perform the duties of his office, one of which was to pay orders for money which should be drawn upon him by the guardians. He was a banker issuing his own notes. On Friday he paid orders drawn upon him by the guardians, partly in cash and partly in his own notes; and again on Monday forenoon paid similar orders in a similar way, and also gave, in exchange for their order in favour of persons in London, a common banker's draft upon London, afterwards dishonoured. The bank stopped payment on Monday afternoon:—Held, that the sureties were discharged, because, as to the notes given on Friday, the guardians, having kept them during Saturday, conclusively elected to treat the orders as paid; as to all the notes the guardians, who were entitled to receive cash, thought fit to receive the notes; and as to the banker's draft upon London, the guardians received it for their own convenience. *The Guardians of the Poor of the Lichfield Union v. Greene*, 26 Law J. Rep. (N.S.) Exch. 140; 1 Hurl. & N. 884.

The defendants signed a note jointly and severally with one C B, the elder, as security for his account with the plaintiffs as his bankers. They were aware that C B, the elder, a maltster, paid in to his account sums received by him from his son, who was in business as a miller, and paid his son such sums as he required; but the cheques were drawn and the accounts kept in the name of the father, and it did not appear that he and his son were partners. Afterwards, a balance being due from the father, the father, in the son's presence, agreed with the plaintiffs that in future the cheques should be drawn and the accounts kept in the name of "C B & Son"; and this was done, but nothing was said to the son as to the transfer to the new account of the old balance due to the plaintiffs from C B, the elder, and no balance was struck on the plaintiffs' books; it was simply carried on to the new accounts, with the account of the credit on the other side, and the pass-book was unaltered. Afterwards, a larger amount than the amount of the old balance was paid in generally to the new account, but C B & Son then failed, there being then a balance against them exceeding the amount of the note. In an action against the sureties, the Judge having left it to the jury whether the arrangement really was made as appeared in the books, and they having found for the plaintiffs, the Court refused to set aside the verdict as against the weight of evidence, and held that there was no evidence for the jury that the old account was transferred to the father and son, so that the defendant was not discharged. *Alaway v. Harris; the Same v. Roberts*, 29 Law J. Rep. (N.S.) Exch. 214.

(b) By Change in Duties or Tenure of Office.

The condition of a bond recited that G had been appointed bailiff of a county court under the 9 & 10 Vict. c. 95, and stipulated for the proper execution by G of all warrants, &c. issued out of the said court

to the high bailiff, and making true returns thereof according to the rules regulating the practice of the said Court, and for his due performance of the office of bailiff, and for his not taking any fees except those specified in that act. After this bond, and before any breach occurred, statutes were passed increasing the jurisdiction of the county court in point of amount, giving it jurisdiction in matters of insolvency and over absconding debtors, and enabling any one of the bailiffs authorized by the Judge to sell goods seized in execution without the intervention of a sworn broker:—Held, that by these statutes the duties and liabilities of the office were essentially changed, and the risk of the sureties increased; and that consequently they were discharged, notwithstanding that the breach of duty relied upon arose entirely out of the original duties of the office. *Pybus v. Gibb*, 26 Law J. Rep. (N.S.) Q.B. 41; 6 E. & B. 902.

The 5 & 6 Will. 4. c. 76. s. 58. requires the treasurer of a borough to be appointed by the council in every year. By the 6 & 7 Vict. c. 89. s. 6. the council of every borough are, on the 9th of November 1845, to appoint a treasurer, who is thenceforth to hold his office during the pleasure of the council. The condition of a bond, dated the 8th of October 1839, after reciting that P had been appointed treasurer of the borough of D, under the 5 & 6 Will. 4. c. 76, was, that P should at all times account for and apply all monies, &c. in his hands as treasurer (whether by virtue of his present or any subsequent appointment to the said office), according to the direction and intent of the said statute, and in every other respect act in conformance with the same "and all other laws and regulations now or hereafter to be in force touching the said office of treasurer, or the person or persons performing or liable to perform the duties thereof":—Held, that under this bond the sureties were liable for a breach of duty by P as treasurer, under an appointment during pleasure, by virtue of the 6 & 7 Vict. c. 89. *The Mayor, Aldermen and Burgesses of Clifton Dartmouth Hardness v. Silly*, 26 Law J. Rep. (N.S.) Q.B. 90; 7 E. & B. 97.

The defendant gave a bond as surety for the due performance by W, as collector of poor-rates for the parish of P. The bond recited that, by an order of the Poor-Law Commissioners it was ordered, that the plaintiffs should appoint one or more fit and proper persons to be the collector or collectors of the poor-rates of such of the several parishes as the guardians should deem to require a collector, and that every person so appointed should find security for the performance of the duties of the said office. The bond was conditioned, amongst other things, for the payment over of all sums collected by W to the overseers, &c. The plaintiffs having determined to carry the said order into effect, advertised for "two persons to be collectors of the poor-rates of the parish of P, to one of whom would be assigned a collection of such rates from the owners of small tenements." W applied, offering himself as a candidate for one of them. He was elected for the purpose of collecting the rates from the owners of small tenements. The defendant then executed the bond above mentioned, as a security for the due performance by W of the duties of his office. Subsequently W applied to the plaintiffs to transfer him to the L district of the

parish as collector of the poor-rates in that district, a vacancy having occurred by the resignation of K, who had previously been the collector. The application of W was acceded to, and he entered upon his duties. In consequence of his neglecting to pay over certain monies which he had collected, an action was brought by the plaintiffs against the defendant as his surety:—Held, that the appointment was a general one, as collector of poor-rates for the parish, and that the transfer from the duty of collecting the rates from the owners of small tenements to the duty of collecting poor-rates generally from the ratepayers in the L district was not such a change as would relieve his surety from liability, and therefore that the defendant was liable upon the bond given by him. *The Guardians of the Portsea Island Union v. Whillier*, 29 Law J. Rep. (N.S.) Q.B. 150.

A bond executed before the passing of statute 6 & 7 Vict. c. 89, by the sureties of P, treasurer of a borough, was subject to a condition by which, after reciting that P had been elected treasurer under stat. 5 & 6 Will. 4. c. 76, it was provided that the bond should be void if P should account for monies that might come to his hands as treasurer "(whether by virtue of his present or any subsequent appointment to the said office), according to the directions and true intent and meaning of the said statute, and in every other respect act in strict conformance with the same, and all other laws and regulations now or hereafter to be in force touching the said office of treasurer, or the person or persons performing or liable to perform the duties thereof":—Held, that the sureties were liable for misconduct of P after the tenure of the office had been altered by statute 6 & 7 Vict. c. 89. from an annual office to an office held during pleasure. *Mayor of Dartmouth v. Silly*, 7 E. & B. 97.

(c) *By giving Time to the Debtor.*

Indorsees of bills of exchange, as a security for a floating balance due on the accounts between them and the drawer, had notice that the acceptor was a surety for the drawer. They afterwards entered into an agreement with the latter that the existing debt should be liquidated by the drawer building for them certain ships, and should in the mean time be secured by a policy of assurance:—Held, first, that time was thus given to the principal debtor, and that the surety was released in equity, if not at law also. Secondly, that a creditor who holds a floating guarantee from a surety cannot, without the surety's consent, give time to the principal debtor as to a portion of the debt, without reserving the creditor's rights against the surety, and yet hold the surety liable for that portion. Thirdly, that whether the acceptor could or could not use, by way of defence to an action by the holders of the bills, the giving of time by them to the drawer, he was not bound to do so, but might (at the risk of costs) defend the action on other grounds, and also institute a suit for equitable relief and an injunction to restrain the proceedings at law; though if the matter had been pleaded at law, and the Court of law had adjudicated on the plea, the case might have been different. *Davies v. Stambank*, 6 De Gex, M. & G. 679.

A letter written by the agent of a bond creditor

to the principal obligor, giving him eighteen months further time to pay the bond debt, upon condition of his paying off at once the arrear of interest, and keeping down the interest to accrue in future,—Held to be a mere promise without consideration, and not binding; and therefore held, that the co-obligor, who had joined in the bond as surety only, was not thereby discharged. *Tucker v. Laing*, 2 Kay & J. 745.

It is not every alteration of his position by the act of the creditor that discharges the surety. To have this effect, the alteration must be such as interferes for a time with his remedies against the principal debtor. *Ibid.*

Where the creditor knew that the surety was negotiating a loan for the principal debtor, for the purpose of paying off therewith the debt for which the surety was liable, and thus getting rid of such liability, and the creditor promised the debtor to give him further time, and this induced the surety to desist from his attempt to raise the money,—Held, that the surety's liability to the creditor was not discharged. *Ibid.*

A creditor upon giving time to his principal debtor may reserve his rights against his surety, and this without communicating the arrangement to the surety. *Webb v. Hewitt*, 3 Kay & J. 438.

But when the creditor gives a release to the debtor, he cannot reserve any right against the surety, because the debt is gone at law. *Ibid.*

An agreement between a bond debtor and his creditor that the latter shall take all the debtor's property, and shall pay all his other debtors five shillings in the pound, though not a discharge of the bond at law, by way of accord and satisfaction, because not under seal, still operates in equity as a satisfaction of the debt, and it is not possible in equity upon such a transaction as that to reserve any right against the surety, and any attempt to do so would be void as being inconsistent with the agreement. *Ibid.*

(d) *By Compromise with the Debtor.*

A creditor obtained a judgment against the principal creditors, and sued out execution against them; they presented a petition of insolvency, and were discharged by the creditor upon terms by which they abandoned the business in which their liabilities were contracted:—Held, that this would not discharge a party who, as surety for the debts, had been previously sued, and had entered into agreements for liquidating the demands against him arising out of the liabilities of the firm. *Reade v. Lowndes*, 26 Law J. Rep. (N.S.) Chanc. 798; 23 Beav. 361.

(e) *In other Cases.*

One of two intended co-sureties executed a deed of covenant for the repayment of monies to be advanced to the principal debtor, on the understanding that the money would not be advanced until the deed was executed by the other surety. The deed was never executed by the other surety, and no notice of his failure to execute was given by the creditor to the executing surety, until after the principal debtor had made default and become insolvent:—Held (affirming the decision of one of the Vice Chancellors), that the executing surety was entitled to be discharged in equity from every part of the debt, and (varying so

much of the decree as ordered the deed to be delivered up to be cancelled,) to have an injunction to restrain all proceedings under it. *Evans v. Bremridge*, 25 Law J. Rep. (N.S.) Chanc. 834; 8 De Gex, M. & G. 100, 102; 2 Kay & J. 174.

An innocent party to a fraud committed by another will not be allowed to derive any benefit from that fraud, unless there has been a consideration moving from himself. Therefore, where a surety innocently joined with his principal in persuading the creditor to accept a transfer of a pretended mortgage, which turned out to have no existence, and to release the surety from his liability,—Held, that such a release was inoperative. *Scholefield v. Templer*, 28 Law J. Rep. (N.S.) Chanc. 452; Johns. 155; 4 De Gex & J. 429.

The friends of a surety advanced money to satisfy his private debts, stipulating, however, as a condition of such advance, that he should be released from his liability as surety. The surety having been released under the circumstances above mentioned,—Held, that the creditor was not entitled to set aside the release without repaying to the friends the money advanced by them. *Ibid.*

(D) CONTRIBUTION.

To an action by the plaintiff to recover contribution from the defendant, his co-surety, the defendant pleaded that without his privity or consent the plaintiff had agreed to discharge the principal. Replication, on equitable grounds, that the agreement, by which it was alleged the principal was discharged, was worded by mistake so as to include the present claim, contrary to the intention of the parties, and that the plaintiff did not otherwise discharge the principal, and that the true agreement was in all respects performed:—Held, on demurrer, a good replication. *Vorley v. Barrett*, 26 Law J. Rep. (N.S.) C.P. 1; 1 Com. B. Rep. N.S. 225.

Semble, per *Willes, J.*, that where the previous pleading is on legal grounds, an answer pleaded on equitable grounds may be supported on either legal or equitable grounds; but that it can be supported only on equitable grounds where the previous pleading is on equitable grounds. *Ibid.*

PRISONER.

[The Laws relating to Prisons in Ireland further amended by 19 & 20 Vict. c. 68.—Franchise Prisons abolished by 21 Vict. c. 22.—The Act for Regulating the Queen's Prison amended by 23 & 24 Vict. c. 60.—The Management of the General Prison at Perth, and for the Administration of Local Prisons in Scotland, provided for by 23 & 24 Vict. c. 105.—Better Provision for the Relief of Prisoners in Contempt of the High Court of Chancery and Pauper Defendants made, and the more efficient Despatch of Business in the said Court enacted by 23 & 24 Vict. c. 149.]

(A) COMMITMENT.

(B) REMOVAL TO QUEEN'S BENCH PRISON.

(C) DISCHARGE FROM EXECUTION.

(D) LIABILITY OF BOROUGH FOR EXPENSES OF PRISONERS IN COUNTY GAOL.

(A) COMMITMENT.

A commitment under the Vagrant Act, 5 Geo. 4. c. 83, s. 4, stated that "T. C., on &c., in this city (London), then being a reputed thief, frequenting the public streets and places of and in the said city, then and there was found in Railway Place, being a public thoroughfare, and one of the places of public resort of and in the said city, with intent feloniously to steal," &c.:—Held, sufficient. *Ex parte Thomas Cross*, 1 Com. B. Rep. N.S. 573.

(B) REMOVAL TO QUEEN'S BENCH PRISON.

A debtor arrested in the county who has applied to the Insolvent Debtors Court there for his discharge, may still be removed by writ of *habeas corpus* into the Queen's Prison. *Gurney v. Hallen*, 25 Law J. Rep. (N.S.) Exch. 277; 1 Hurl. & N. 142.

(C) DISCHARGE FROM EXECUTION.

A defendant taken in execution on a judgment in ejectment, since the Common Law Procedure Act, 1852, is entitled, under the 48 Geo. 3. c. 123, s. 1, to be discharged after twelve months' imprisonment, by reason of the 207th section of the former act. *Humphreys v. Franks*, 27 Law J. Rep. (N.S.) C.P. 114; 3 Com. B. Rep. N.S. 765.

Where an application for the discharge of a prisoner, under the 48 Geo. 3. c. 123, on the ground that he has been detained in execution for a year for a sum under 20*l.*, is made before the expiration of the ten days' notice mentioned in the 129th rule of Hilary, 1853, a rule nisi only can be granted. *Doye v. Key*, 3 Com. B. Rep. N.S. 764.

(D) LIABILITY OF BOROUGH FOR EXPENSES OF PRISONERS IN COUNTY GAOL.

An additional gaol for the county of Essex was built under a local act, which, by section 28, gave power to the Justices acting in and for the boroughs, &c., within the county, having distinct jurisdiction, to commit offenders charged with or convicted of offences committed within such boroughs to the said county gaol, and, by section 29, provided for the payment by the said boroughs to the treasurers of the county, of a certain sum for the expense of the feeding and clothing of the borough prisoners confined in the county gaol under the commitments before mentioned. These sections were inserted in the act after a conference between a deputation on the part of some of the boroughs affected by the act, including the borough of Colchester, and the county Justices. Since the passing of the act, offenders within the borough of Colchester had been committed to the said gaol, and the expense of maintaining such offenders paid for the said borough in the manner provided for by the above sections, there being no other arrangement existing between the borough and the county. Before the passing of the General Prison Act, 5 & 6 Vict. c. 98, a separate Court of Quarter Sessions was granted to the said borough, and under this act the county claimed to be paid 400*l.*, being the actual expense attending the borough prisoners, and 100*l.* for interest and instalments of money borrowed for repairs, alterations, additions and improvements to the said gaol, in the manner provided by section 18. of such general act:—Held, that there was no special contract subsisting between the borough

and the county relative to the borough prisoners, within the meaning of section 18 of the 5 & 6 Vict. c. 98, which repealed sections 28 and 29 of the local act, and therefore that the county was entitled to recover from the borough the whole of the amount claimed. *Bramston v. the Mayor of Colchester*, 25 Law J. Rep. (N.S.) M.C. 73; 6 E. & B. 246.

The council of a borough having a grant of a separate Court of Quarter Sessions, and having no gaol, entered into a contract with the county, that all prisoners who should be committed, or removed to, or confined in, the gaol of the county from the borough, should be supported and maintained therein during the agreement at 7*s.* a head:—Held, that the agreement while in force exempted the borough from contribution to the county in respect of those things contracted for, but no further; that the words "support and maintenance" used in the contract included the expenses of keeping up the prison, and the borough was not liable to contribute in respect of those; but that it was liable to contribute in respect of the expenses of the conveyance of prisoners upon summary convictions in respect of offences committed in the borough (but none other), and of prosecutions at assizes and sessions of borough offenders, and of lock-up houses for the county. *Regina v. Gravesend*, 5 E. & B. 459.

PRIVY COUNCIL.

[The Authentication of certain Orders of the Privy Council in the Absence of the Clerk of the Council in Ordinary provided for by 22 & 23 Vict. c. 1.]

Practice, on Appeal.

A bill of indictment for libel was found at the assizes held for the County of Cornwall, in the Island of Jamaica. The prosecution was a private one. The indictment was afterwards removed by *certiorari* to the Supreme Court of the Island, and tried on the civil side of that Court, when a verdict of guilty was found. Upon motion for arrest of judgment, the Supreme Court suspended judgment, pending an application to the Queen in Council upon certain grounds raised: upon a petition for leave to appeal, their Lordships dismissed the petition, declining to interfere or give any opinion on the merits of the case. *Quære*—whether, upon a record so framed, in the absence of a final judgment, an appeal will lie. *In re Leuen*, 10 Moore's P.C. 31.

Observations upon the report of *Goupy v. Harden* (7 Taunt. 159). Under certain circumstances special leave to appeal allowed, although the subject-matter of the appeal was under the appealable value stipulated by the Order in Council, dated the 18th of December 1834. *Castrique v. Buttigieg*, 10 Moore's P.C. 94.

After a delay of eight years from the date of the judgments of the Court below, the Judicial Committee refused to grant leave to appeal *in forma pauperis*, no sufficient explanation being given to account for the petitioner's laches. *In re Sarchet*, 10 Moore's P.C. 533.

The judgment of the Court below being reversed on a point not argued below, the suit was dismissed

without costs of the appeal. *The James*, 1 Swab. Ad. Ca. 62.

Under peculiar circumstances, though the judgment be reversed, no costs either in the court below or in the Court of Appeal were allowed. *The Dumfries*, 1 Swab. Ad. Ca. 127.

Where in a cause of salvage, appealed on the ground of an insufficient award, and the Court reluctantly affirmed the judgment, no costs were allowed. *The Clarisse*, 1 Swab. Ad. Ca. 134.

Indisposition of the Court of Appeal to interfere with a judgment of the Court below, especially in salvage cases, unless the judgment appealed from is clearly erroneous. *The Clarisse*, 1 Swab. Ad. Ca. 134.

Where both parties appeal from a sentence of the Court below, pronouncing both to blame, and the sentence is affirmed, no costs of the appeal given. *The North American*, 1 Swab. Ad. Ca. 358.

Wherein a cause of collision the appellant was found in the Court below solely to blame and condemned in the whole damage, and the Court of Appeal found both parties to blame, and divided the damage, costs of appeal given. *The Fyenoord*, 1 Swab. Ad. Ca. 374.

Upon disobedience to a monition to pay costs, sequestration granted under 7 & 8 Vict. c. 65. s. 12. *The Australia*, 1 Swab. Ad. Ca. 480.

PRODUCTION AND INSPECTION OF DOCUMENTS.

[*Wright v. Money*, 11 Exch. Rep. 209; 7 Law J. Dig. 618.]

- (A) IN GENERAL.
- (B) UNDER THE COMMON LAW PROCEDURE ACT.
- (D) PRACTICE.

(A) IN GENERAL.

The Court refused to make an order permitting the plaintiff to inspect a document in the possession of the defendant, in an action which it appeared was not to be brought *bona fide* for any real cause of action existing against the defendant, but for the purpose of obtaining inspection of the document in question, with the view of assisting the plaintiff in another action brought by him against a third party. *Temperley v. Willett*, 25 Law J. Rep. (N.S.) Q.B. 259; 6 E. & B. 380.

An independent sovereign prince was possessed of two promissory notes of the East India Company. In the course of a war between this sovereign and the company the notes were taken as spoils of war. The prince filed a bill against the company for the recovery of the notes, and upon the coming in of the answer moved for the production of documents. The Master of the Rolls decided that when a government is properly made a defendant to a suit in which its acts can be impeached, it cannot refuse to produce relevant documents on the ground that they are political communications between itself and its agents, or between its agents with one another; but, upon appeal, Held, that the plaintiff was not entitled to production, they being political communications, relating to matters of government and state affairs, which had passed between the company and

their agents. *The Rajah of Coorg v. the East India Co.*, 25 Law J. Rep. (N.S.) Chanc. 345.

The refusal to compel such production is grounded on the reason that such production would be prejudicial to the public interests, and therefore against public policy; and, also, that such matters are from their nature exempt from municipal jurisdiction. *Ibid.*

Pursuant to the provisions of the deed of settlement of a joint-stock company, established and registered under the 7 & 8 Vict. c. 110, and 19 & 20 Vict. c. 47, a book was kept of minutes of the proceedings of the general meetings of the shareholders, and also a book of minutes of the proceedings of the directors. By a clause in the deed, "The books wherein the proceedings of the company are recorded shall be kept at the offices of the company, and shall be open to the inspection of the shareholders every day," between certain hours:—Held, on motion by a shareholder of the company for a mandamus to give him inspection, that he was not entitled, under this clause, or otherwise, to inspection of the book of minutes of the proceedings of the directors. *The Queen v. the Mariquita and New Granada Mining Co.*, 28 Law J. Rep. (N.S.) Q.B. 67; 1 E. & B. 239.

To an action, upon an agreement made between a testator and the plaintiff, to recover from the executors arrears of an annuity, the defendants pleaded that it was agreed between the plaintiff and the testator that the agreement should be, and the same was rescinded. The plaintiff, upon an affidavit stating that he had written some letter to the testator relating to the annuity, the words of which he could not remember, and also his belief that the defendants intended to rely on that letter as constituting the agreement alleged in the plea, but denying that any such agreement was ever made, applied to the Court, in the exercise of their equitable jurisdiction at common law, for leave to inspect the letter:—Held, that it was not shewn that the defendants were in possession of any ascertained document which they held as trustees for the plaintiff so as to entitle him to an inspection of it. *Shadwell v. Shadwell*, 28 Law J. Rep. (N.S.) C.P. 315; 6 Com. B. Rep. N.S. 679.

The declaration stated an agreement between the plaintiff and the defendant that the plaintiff should lease to the defendant a farm, and that the defendant should forthwith, after making the agreement, pay to the plaintiff the amount of certain tillage on the farm at a valuation; and the breach averred was the non-payment of the valuation. The defendant, upon an affidavit stating that during the treaty for the farm he had written letters to the plaintiff, which were in the plaintiff's possession, but of which the defendant had no copies, and that he believed it was upon such letters that the plaintiff relied to establish the agreement, and that he had a just ground to defend the action, and that it was necessary for the purpose of his pleading that he should inspect the letters, obtained an order from a Judge at chambers to inspect them:—Held, on cause shewn against a rule to rescind the order, that the defendant was entitled to inspection at common law. *Shadwell v. Shadwell* commented on, and distinguished. *Quere*—whether the defendant was entitled to inspection under the 14 & 15 Vict. c. 99.

s. 6. *Price v. Harrison*, 29 Law J. Rep. (N.S.) C.P. 335; 8 Com. B. Rep. N.S. 617.

Except under special circumstances, the Court will not, where by the indorsement on the writ of summons it appears that the action is to recover principal and interest on a mortgage-deed, order the plaintiff before declaration to allow the defendant inspection of the deed; for *non constat* that the plaintiff may declare upon the deed, and it may turn out that the application is premature. The fact that the defendant executed the deed under the advice of the plaintiff's attorney, without any copy of it, and is ignorant of its effect or contents, is not sufficient to justify the application at so early a stage in the cause. *Jones v. Hargreaves*, 29 Law J. Rep. (N.S.) Exch. 368.

A shareholder in a joint-stock company is not entitled to an inspection of their books for the purpose of proving a plea of justification in an action against him for libel imputing insolvency to the company. *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 Hurl. & N. 146.

In action against executors upon an agreement under which the plaintiff claimed certain arrears of an annuity alleged to be due to him from the testator, the defendants pleaded, that, after the making of the agreement, and before the accruing of the causes of action, it was agreed between the testator and the plaintiff that the agreement should be, and the same accordingly was, waived and rescinded, and that the testator should be, and he accordingly was, exonerated from all further performance thereof. The Court refused to grant the plaintiff a rule to inspect a supposed letter upon which the plea was founded, upon a mere affidavit stating that the plaintiff had written some letter to the testator relating to the annuity, the words of which he could not remember, and also his belief that the defendants intended to rely on that letter as constituting the agreement alleged in the plea, but denying that any such agreement was ever made,—the inspection being sought, not in order to support the plaintiff's own case, but in order to see whether and by what means a defence could be made out against him. *Shadwell v. Shadwell*, 6 Com. B. Rep. N.S. 679.

The right of the heir-at-law and that of the heir-in-tail to production of documents upon bill for discovery in aid of an action of ejectment, distinguished. The principle upon which, in such a suit, the heir-in-tail is entitled to inspect deeds of settlement creating estates tail, has no application to a suit by the heir-at-law. But in a suit of this nature the heir-at-law is entitled to production of all such parts of deeds and writings admitted by the defendants as relate to or tend to shew his pedigree. Form of an order for this purpose. *Rumbold v. Fortescue*, 3 Kay & J. 748.

Documents belonging to the East India Company relating to its political duties, held to be protected from production. *Wadeer v. the East India Co.*, 8 De Gex, M. & G. 182.

Semble—that documents not within the rules protecting them from production by reason of their own contents, will not be protected by their connexion or association with protected documents. *Ibid*.

(B) UNDER THE COMMON LAW PROCEDURE ACT.

The Court will not grant a discovery of documents

under the 50th section of the Common Law Procedure Act, 1854, (17 & 18 Vict. c. 125), except upon an affidavit of the party to the suit; and it is not enough that the affidavit is made by the attorney of such party, the party himself being abroad. *Herschfield v. Clark*, 25 Law J. Rep. (N.S.) Exch. 113; 11 Exch. Rep. 712.

Where a demandant in dower asked, under the Common Law Procedure Act, 1854, sect. 50, for inspection of a deed conveying land to her deceased husband, which was in the possession of the tenant (a subsequent purchaser), and the tenant refused, on the ground that he had purchased for value without notice of the dower,—Held, that inasmuch as, according to the weight of authority, a bill of discovery could not have been maintained in a Court of equity in such a case, the demandant was not entitled to the inspection. *Gosna v. Parrott*, 26 Law J. Rep. (N.S.) C.P. 279; 3 Com. B. Rep. (N.S.) 47.

In an action by an administrator for arrears of wages due to the intestate and for money lent to the defendant, it appeared from the affidavit of the plaintiff in support of a rule for the production and inspection of documents under section 50. of the Common Law Procedure Act, 1854, that after action brought the defendant delivered an account debiting himself with a balance of 122*l.* and had taken out a summons to stay proceedings on payment of that sum, but on which no order was made. The plaintiff deposed that he thought it probable the defendant was indebted to the intestate in a larger sum than 122*l.*, and that the plaintiff had reason to suspect and believe that the defendant, who was the keeper of a lunatic asylum, during the period of the intestate's services, kept books of accounts containing all the accounts relating to the servants of the asylum; and that for the above reasons and for other reasons the deponent had good cause to suspect and believe, and did suspect and believe, that such books were in the defendant's possession, and contained entries relating to the action, shewing that he was indebted to the intestate in divers sums for wages and principal and interest. The defendant, in answer, swore that he had only one book of account, and his attorney deposed that he had produced to the plaintiff's attorney a statement of account (which appeared to be the same as that referred to in the plaintiff's affidavit), and which he believed and told the plaintiff's attorney contained a true abstract of all monies mentioned in the said book as due to the intestate:—Held, that as the only book which appeared to be in the defendant's possession was one an extract from which had been already produced, and the inspection of which was apparently not the object of the rule, the plaintiff was not entitled to the order. Held, by *Bramwell, B.*, that the plaintiff's affidavit was defective in not sufficiently shewing the existence of any book or document. *Bray v. Finch*, 26 Law J. Rep. (N.S.) Exch. 91; 1 Hurl. & N. 463.

The provision for discovery of documents (under sect. 50. of the Common Law Procedure Act of 1854) "on the application of either party, upon an affidavit by such party of his belief that any document to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession of the opposite party," cannot be taken advantage of merely upon an affidavit of belief that some documents (as letters, or entries, &c.) are in

the possession of the opposite party, which relate to the subject-matter of the suit, and of which it is material that the applicant should have a discovery; but the affidavit must so describe the documents that the Court may see that they are documents "to the production of which he is entitled for discovery or otherwise"; and it must state or shew reasonable grounds for belief that such documents are in the possession or power of the opposite party. *Thompson v. Robson*, 26 Law J. Rep. (N.S.) Exch. 367; 2 Hurl. & N. 412.

Whether the documents will be deemed of such a character as that the applicant is "entitled to their production," must depend upon the nature of the case as disclosed in the pleadings and the affidavit; but, *semble*, that discovery will not be granted of documents neither necessary for purposes of pleading nor properly admissible, *per se*, as evidence. And in an action on a stipulation in a charter-party that the ship should be clean and fit to carry passengers, discovery of letters from the defendants, the owners, to the ship's husband, and from the master, during the voyage, to the defendants, and instructions given by the defendants as to the ship, &c., was refused to the plaintiff, upon an affidavit merely stating the plaintiff's belief that some such documents existed. *Ibid*.

In an action for libel, where there is a plea of justification, imputing to the plaintiff dishonesty while in the employ of the defendant, the plaintiff will be allowed inspection (under the Common Law Procedure Act, 1854, section 50.) of statements of accounts furnished by himself of monies received in the course of such employ, and of letters from himself to the defendant relating thereto, and of entries in the defendant's books of monies received from him, so far as they may be material to disprove charges contained in the plea; or, if the plea is general, so far as they may relate to charges specified in particulars; and the defendant will be compelled to deliver such particulars. *Collins v. Yates*, 27 Law J. Rep. (N.S.) Exch. 150.

To an action to recover the price of gas supplied by the plaintiffs to the defendants, the defence was that the gas supplied was not in quantity or quality according to the contract, and, in order to ascertain these facts, the defendants had made experiments and written the results down on a paper, which, it was sworn, was in their possession, and would shew that the plaintiffs had fulfilled their contract. In answer to an application made by the plaintiffs to a Judge at chambers upon these facts, for an order to inspect and take a copy of this paper, it was sworn on behalf of the defendants, that the evidence related exclusively to the defendant's case. The Judge having made an order,—Held, on cause shewn against a rule to rescind it, that it was no objection to the inspection of a document in the possession of the defendants that it related to their case, if it was shewn, as the Court thought it was shewn upon the affidavits here, that it also sustained the case of the plaintiffs. *The London Gaslight Company v. the Vestry of the Parish of Chelsea*, 28 Law J. Rep. (N.S.) C.P. 275; 6 Com. B. Rep. (N.S.) 411.

In an action for not accepting goods consigned to and by the plaintiffs' firm in India, a Judge having made an order, under the Common Law Procedure Act, 1854, s. 50, that the plaintiffs should answer on

affidavit as to documents in their possession or power relating to the subject of the suit, at the same time allowing pleas, including one of fraud; and the plaintiffs having accordingly so answered, acknowledging that they had in their possession or power, with the bills of lading, &c., letters to and from their broker in this country, by whom the contract with the defendants had been effected, and to and from the native merchant in India, who consigned the goods to the plaintiff's firm, (some having been written after the contract), and a Judge having ordered production of these documents to the defendants, the Court declined to disturb the order. *Coleman v. Truman*, 28 Law J. Rep. (N.S.) Exch. 5; 3 Hurl. & N. 871.

The plaintiffs, in an action for diminishing certain water, were held entitled to an order to inspect a deed referred to in the defendants' plea, under which the defendants justified doing the act complained of, although the plaintiffs were no parties to such deed, and the same related exclusively to the defendants' title. *The Penarth Harbour, Dock and Railway Co. v. the Cardiff Waterworks Co.*, 29 Law J. Rep. (N.S.) C.P. 230; 7 Com. B. Rep. (N.S.) 816.

It is no objection to an order, under the 14 & 15 Vict. c. 99. s. 6, for the inspection of a document in the possession of a defendant, that its production will disclose his case, provided that it be satisfactorily shewn that it also supports the plaintiff's case. *The London Gaslight Co. v. the Chelsea Vestry*, 5 Com. B. Rep. 411.

(D) PRACTICE.

Documents referred to in affidavits, and exhibited, must be handed in with the affidavits, and remain in court until the matter in respect of which the affidavits are sworn has been disposed of. *Attenborough v. Clarke*, 2 Hurl. & N. 588.

There is no general rule that the costs of inspection of documents must be borne by the party seeking it, and that the costs of obtaining an order for the inspection are costs in the cause; but the Court will in its discretion order both the application and inspection to be, in any event, the costs in the cause of the party called upon to grant the inspection. *Stilwell v. Ruck*, 4 Hurl. & N. 468.

PROHIBITION.

[To Court of Criminal Judicature, see CORONER; *The Queen v. Herford*, *ante*, p. 179.]

A writ of prohibition will not be granted after judgment, unless it is perfectly clear that there has been an excess of jurisdiction. *Ricardo v. the Maidenhead Local Board of Health* (Ex. Ch.), 27 Law J. Rep. (N.S.) M.C. 73.

The Court will not grant a prohibition to the Lord Mayor's Court of London to restrain proceedings on an attachment of goods and chattels merely on the ground that the attachment had the effect of preventing the due registration by the garnishee (the purser and secretary of the mine) of the transfer of shares sold to the applicant by the debtor. *Tredinnick v. Oliver, ex parte Bill*, 29 Law J. Rep. (N.S.) Exch. 466; 5 Hurl. & N. 780.

PUBLIC BODIES.

A committee, who were elected annually from among the Justices of a county, were authorized by the 17th section of the 8 & 9 Vict. c. 126. to make certain contracts; and by section 16. they might be sued in the name of their clerk:—Held, that an action was maintainable against the committee for the time being in the name of their clerk, upon a contract entered into by a former committee within the scope of their authority. *Kendall v. King*, 25 Law J. Rep. (N.S.) C.P. 132; 17 Com. B. Rep. 483.

Semble—that the plaintiffs' remedy to enforce their judgment would be by bill in equity or mandamus. *Ibid.*

Commissioners, who were elected annually under a local act, and were authorized to carry out its provisions for the internal management of a town, were empowered to appoint a clerk and other necessary officers, and to pay them reasonable salaries out of the monies to be raised by rates and tolls; they were to sue and be sued in the name of their clerk, who was to be reimbursed all costs and expenses out of the same fund, and not to be personally liable for them; power was given to them to enter into certain specified contracts; no power was expressly given to them to retain an attorney, but the nature of their powers would render legal assistance necessary. The plaintiff was appointed clerk by one set of Commissioners, no salary being mentioned, and was reappointed the next year by the succeeding Commissioners at a fixed salary; and he also did business within the scope of the act for the same Commissioners, on their retainer:—Held, that the plaintiff could maintain an action of contract against the Commissioners for the time being, in the name of their clerk, for the services thus rendered to former Commissioners. *Hall v. Taylor*, 27 Law J. Rep. (N.S.) Q.B. 311; E. B. & E. 107.

The 3 & 4 Will. 4. c. cxiii., an act for better preserving the harbour of Maryport, and for lighting and otherwise improving the township of Maryport, section 7, appoints trustees to carry the act into execution. By section 21, they may elect a harbour-master, who, by section 47, may direct any person, having the command of any vessel entering into or being within the harbour, to anchor and place the same in such situation within the harbour as he shall direct. After the passing of the act some coals were shot into a berth in the harbour which rendered it dangerous. The trustees at a board-meeting having had notice of the state of the berth, gave directions to their clerk to have the coals removed, and the coals were accordingly partly, but not sufficiently, removed at their expense. After this the harbour-master, without the knowledge of the trustees, directed the plaintiff to place his vessel in the berth. He did so, and the vessel while lying there sustained damage in consequence of the berth being unsafe. The harbour-master knew that the berth had been unsafe and what had been done to it, but neither he nor the trustees knew that the berth continued unsafe when he directed the plaintiff to place his vessel in it:—Held, by the Court of Exchequer Chamber, that there was no evidence to warrant a verdict against the trustees. *Metcalf v. Hetherington*, 5 Hurl. & N. 719.

PUBLIC HEALTH.

[The General Board of Health continued by 19 & 20 Vict. c. 85; by 20 & 21 Vict. c. 38.—See 21 & 22 Vict. c. 97, vesting in the Privy Council certain Powers for the Protection of the Public Health.—The Public Health Act, 1848, amended, and further Provision made for the Local Government of Towns and populous Districts, by 21 & 22 Vict. c. 98.—The Public Health Act, 1858, amended and made perpetual by 22 & 23 Vict. c. 3.—Further Provision for the Expenses of Local Boards of Health and Improvement Commissioners acting as Burial Boards made by 23 & 24 Vict. c. 64.]

- (A) APPLICATION OF THE PUBLIC HEALTH ACT OF 1848.
- (B) CONSTRUCTION OF THE ACT.
- (C) CONSTITUTION OF LOCAL BOARD.
- (D) POWERS OF GENERAL AND LOCAL BOARD.
- (E) BY-LAWS.
- (F) CONTRACTS NOT UNDER SEAL.
- (G) RATES.
- (H) COMPENSATION.
- (I) ACTION BY LOCAL BOARD.

(A) APPLICATION OF THE PUBLIC HEALTH ACT, 1848.

Upon the petition of the requisite number of inhabitants of a parish, consisting of a township and three hamlets, the General Board of Health sent an inspector to inquire into and report, under the 11 & 12 Vict. c. 68. s. 9, as to the application of the act to the parish. The inspector inquired as to the parish, and recommended the application of the act to the township, and public notice to that effect was appended to the report. The General Board reported that the act should be applied to the parish within its existing boundaries; and, by an Order in Council thereon, the act was ordered to be applied to and put in force within the entire parish:—Held, that the order was valid. *Barber v. Jessop*, 26 Law J. Rep. (N.S.) Exch. 136; 1 Hurl. & N. 578.

Before the application of the act, separate highway-rates had been made for the township and for each hamlet; but the local board made a general highway-rate, as well as a general district rate:—Held, that the highway-rate was illegal, and that the statute 17 & 18 Vict. c. 69. did not apply to an action brought to try the validity of the rate, in which the verdict was found before the passing of the act, subject to a special case stated and decided after the act. *Ibid.*

(B) CONSTRUCTION OF THE ACT.

The Public Health Act, 11 & 12 Vict. c. 63. s. 63, which empowers the local board to require "any present or future street, not being a highway," to be properly paved, &c. by "the owners or occupiers of premises fronting, adjoining or abutting upon" such street, and upon their refusal empowers the board to execute the works and charge the expenses upon them, does not give the board power to make new streets, nor does it apply to streets repairable, or partly repairable, by the parish, but only to streets in no part repairable by the parish. *The Local Board of Health of Kingston-upon-Hull*

v. *Jones*, 26 Law J. Rep. (N.S.) Exch. 33; 1 Hurl. & N. 489.

The proviso in section 85. of the Public Health Act, 1848, requiring local boards, before contracting for the execution of any works under the act, to obtain an estimate and report from their surveyor as to future repairs, does not apply to a contract for work done to streets not being highways under section 69. But such estimate and report must be obtained where, under the provisions of the act, the local board are required to execute the particular work and afterwards repair. *Cunningham v. the Local Board of Health of the Borough of Wolverhampton*, 26 Law J. Rep. (N.S.) M.C. 33; 7 E. & B. 107.

(C) CONSTITUTION OF LOCAL BOARD.

Three members of a local board of health consisting of nine members ceased to be members under section 18. of the Public Health Act, 1848 (11 & 12 Vict. c. 63), by reason of absence. On the 4th of January the board met and declared that the said three members should be the one-third in number of the members of the board who should go out of office, as required by section 13. of the said act, on the 3rd of March, the day named in the Order in Council applying the said act to the district. At the annual election held on that day, three persons were duly elected, the other six members remaining in office:—Held, in an action of replevin, that the election on the 31st of March was good, and that a general district rate made by the board after such election was valid. *Howitt v. Mansfield*, 25 Law J. Rep. (N.S.) Q.B. 411; 6 E. & B. 786.

(D) POWERS OF GENERAL AND LOCAL BOARDS.

By an act, 9 Geo. 4. c. xxxvii., for paving, lighting, &c. the town of North Shields, certain Commissioners thereby appointed were, by section 25, required to make and repair the streets, lanes, &c. within certain limits defined by the said act; and by section 27. it was provided, that so much and such part of the turnpike-roads passing into or through the said town, on both sides whereof houses were or should be built, as lay within the limits of the act, should cease to be part of such turnpike-roads, and that the trustees of such turnpike-roads should not contribute towards the repairs thereof. The North Shields road (part of which was within the limits defined by the said act) was made a turnpike-road by an act passed in the 22 Geo. 2, amended by subsequent acts. By the 1 & 2 Will. 4. c. lxxii. the said turnpike acts were repealed; and section 18. enacted that no part of the money to be received by virtue of the repealed acts or this act should be laid out in paving, repairing or cleansing any street, road or highway, within any town through which the said road and branches might pass, and which street, road or highway had or should have houses or other buildings abutting or ranging along both sides thereof; nor should it be lawful for the turnpike trustees to collect any toll in any such street, road or highway. Under section 10. of the Public Health Act, 1848, a provisional order of the General Board of Health was made, which, after reciting that the Commissioners, under the 9 Geo. 4. c. xxxvii. had transferred the powers vested in them to the mayor, aldermen and burgesses of the borough of T, directed,

amongst other things, that every part of the Public Health Act, 1848, except section 50. and a part of section 88, should be in force within the said corporate borough, and that the said borough should form one district for the purposes of the said act, and that certain sections of the said recited act should be repealed, and certain sections of the Towns Police Clauses Act, 1847, and of the Towns Improvement Clauses Act, 1847, should be incorporated with so much of the 9 Geo. 4. c. xxxvii. as remained unrepealed, and of the Public Health Act as applied to the said borough under the said order, and any act of parliament confirming the same. Sections 25. and 27. of the 9 Geo. 4. c. xxxvii. were not amongst the sections directed to be repealed by the said order. Section 50. was one of the sections of the Towns Improvement Clauses Act directed to be applied to the said corporate district, and it enacted, "that the trustees of any turnpike-road shall not collect any toll on any road within the limits of the special act, or lay out any money thereon." By a subsequent act, 14 & 15 Vict. c. 10, the provisional order, so far as the same was authorized by the Public Health Act, was declared to be as binding and of the like force and effect as if the provisions of it had been expressly enacted in the act. Under the act 1 & 2 Will. 4. c. lxxii. several toll-gates were maintained by the trustees, all of them being within the boundaries of the said corporate district of T, but without the limits defined by the 9 Geo. 4. c. xxxvii. Two of the said gates stood in the main street of a village, at a point where houses abutted on both sides of the road. Another of the gates stood between the collector's toll-house, abutting on the road, and an inclosure in front of an asylum, and a range of buildings forming a suburb of North Shields formerly adjoined the toll-house; but since 1846 the toll-house was disconnected from the range of buildings by the construction of a railway. There was no continuous range of buildings abutting on the opposite side of the road. The places at which two others of the gates stood were without buildings ranging along or abutting upon either side of the road. The local board, acting under the Public Health Act, had caused the gates to be removed, the turnpike trustees refusing to allow the carts of the local board to pass without payment of toll:—Held, in an action of trespass (*Lord Campbell, C.J.* differing), that prohibiting the receipt of tolls by the trustees within the limits of the corporate district of T could not be considered as a regulation or restriction necessary for the purpose of applying the Public Health Act, 1848, to the district; and therefore that the provisional order incorporating the 50th section of the Towns Improvement Act, 1847, under which the defendant acted, was not authorized under the powers given to the General Board of Health by the 10th section of the Public Health Act, 1848; and therefore that the local board was not justified in causing the gates to be removed. *Clayton v. Fenwick*, 25 Law J. Rep. (N.S.) Q.B. 226; 6 E. & B. 114.

And, per *Erie, J.*, that the local situation of the gates was not such as to bring them within the prohibition contained either in the 27th section of the 9 Geo. 4. c. xxxvii. or the 18th section of the 1 & 2 Will. 4. c. lxxii. *Ibid.*

A local board of health has no power, under the

Public Health Act, 11 & 12 Vict. c. 63, to enter upon land without the consent of the owner for the purpose of making reservoirs and deposit-beds for retaining the sewage; and the Court granted an injunction to restrain such a proceeding. *Sutton v. the Mayor and Aldermen of Norwich*, 27 Law J. Rep. (N.S.) Chanc. 739.

A local board of health, under cover of legislative powers, cannot make a sewer which will have the effect of polluting the water of a canal:—Held, therefore, that the board must be restrained from permitting sewage communications to be made between the adjoining houses and the main sewer so long as it should discharge itself into the canal. *The Manchester, Sheffield and Lincolnshire Rail. Co. v. the Workop Board of Health*, 26 Law J. Rep. (N.S.) Chanc. 345; 23 Beav. 198.

Power given to a canal company, by their act of incorporation, to supply the canal with water from all brooks, streams and watercourses within 1,000 yards of the canal, does not so far comprise rain and other surface water which, being collected on the road, ran along an open gutter into the canal, as to preclude a local board of health from allowing it to fall through gratings into a sewer which they had made under the road for the drainage of the district. *Ibid.*

The powers of local boards, under the Public Health Act, 11 & 12 Vict. c. 63, for the construction of sewers, are confined to their own district; and the Local Government Act, 21 & 22 Vict. c. 98, extends the exercise of those powers beyond the district only where it may be necessary for the purpose of outfall or distribution of sewage, and not for the purpose of making new sewers. *Hayward v. Lowndes*, 28 Law J. Rep. (N.S.) Chanc. 400; 4 Drew. 454.

(E) BY-LAWS.

By a local improvement act, incorporating "The Public Health Act, 1848," which, by Order in Council, had been previously applied to the district, the local board were empowered from time to time to make by-laws for the purpose (*inter alia*) of regulating the conduct of the drivers of hackney carriages and animals plying within the district, and for fixing the stands of such hackney carriages and animals. The local board made a by-law that the places in the district where painted boards should from time to time be placed by the local board of health to distinguish them as stands, should be the stands for such number of carriages, &c. as should be mentioned on such boards, and prohibiting drivers from placing their vehicles, &c., or plying for hire elsewhere than on such stands, under a penalty of 40s.:—Held, that the by-law was valid, and within the powers of the local act, and that it was not necessary to make a by-law for fixing the position of the stands. *Bennett v. the Blackpool Local Board of Health*, *Kennyon v. the same*, 28 Law J. Rep. (N.S.) M.C. 203; *nom. The Blackpool Local Board of Health v. Bennett*, 4 Hurl. & N. 127.

The Public Health Act, 1848, was applied by the Order in Council to the township of L. and the Local Improvement Act adopted the same limits. L. was on one side bounded by the sea. The provisions of the local act shewed that it was intended that the Justices should have jurisdiction over the shore:—Held, that the sea-shore between high and low water-

mark was within the district, and, consequently, that the above by-law was applicable to stands on the sea-shore. *Ibid.*

On appeal against the determination of Justices, under the 20 & 21 Vict. c. 43, the party in support of the information or complaint is entitled to begin. *Ibid.*

(F) CONTRACTS NOT UNDER SEAL.

The Public Health Act, 1848, 11 & 12 Vict. c. 63, which establishes local boards, and gives them power to make contracts binding on the district rates, requires in the case of non-corporate districts, that the board shall cause a seal to be made for the use of such board in the execution of the act; and the 85th section requires that all contracts above 10l. shall be in a certain form, in writing; and in the case of a non-corporate district, sealed with the seal of the board and signed by five or more members thereof,—Held, that the 85th section is not merely directory, but creates a condition, and therefore that a contract not under seal is void. *Frend v. Dennett*, 17 Law J. Rep. (N.S.) C.P. 314; 4 Com. B. Rep. N.S. 576.

(G) RATES.

[See ante (A).]

The power given by section 89. of the Public Health Act, 11 & 12 Vict. c. 63, to local boards of health, "from time to time to divide their district or any street therein into one or more parts, for all or any or either of the purposes of the act, and make a separate assessment upon any such part for or in respect of all or any of the purposes for which the same is formed," is a discretionary power. *Dorling v. the Local Board of Health of Epsom*, 24 Law J. Rep. (N.S.) M.C. 162; 5 E. & B. 471.

The occupier of premises within a district under the management of a local board of health, is liable to be assessed to a special district rate, made under the 86th section of the act, for defraying the expenses of permanent works and laid on the entire district, although the premises rated receive no direct or immediate improvement from the works in respect of which the rate is made. It is sufficient that the part of the district within which the premises are situated is benefited by the works executed. *Ibid.*

The Public Health Act, 1848, (11 & 12 Vict. c. 63.) s. 108, enacts, that all rates made or collected under it shall be published in the same manner as poor-rates:—Held, that non-publication did not make a rate void; and that on a summons to enforce the rate, which had not been published, but had not been appealed against, the Justices were right in disregarding the non-publication; and that their warrant was a protection to the officer distraining under it. *Le Feuvre v. Müller*, 26 Law J. Rep. (N.S.) M.C. 175; 8 E. & B. 321.

The district of the Local Board of Health of the city of Ely comprised two parishes, a part of each of the said parishes being an ancient hamlet. The parishes and the hamlets had, before the Public Health Act, 1848, respectively maintained their own highways, separate surveyors being appointed for each. The greater portion of the district consisted of land used almost entirely as arable, meadow or pasture land. The local board, acting as sur-

veyors of highways under the Public Health Act, 1848, had made four separate highway rates for each of the said parishes and hamlets, in one of which the appellant was rated as the occupier of a farm-house and lands upon the full rateable value, and thereupon appealed against the said rate:—Held, that the district of the Local Board of Health was one entire district for all the purposes of the Public Health Act, 1848; and that for defraying the expenses of repairing and maintaining the highways the local board must make a general district rate under the said Public Health Act, and could not make a separate highway rate in each of the parishes and hamlets forming the district; and that the rate appealed against was therefore bad. *Moseley v. the Local Board of Health of the City of Ely*, 26 Law J. Rep. (N.S.) M.C. 23; 6 E. & B. 518.

By section 88. of 11 & 12 Vict. c. 63. (Public Health Act, 1848), special and general district rates shall be made and levied upon the occupiers of all such kinds of property as are assessable to any rate for the relief of the poor; provided "that if within any district or part of a district any kind of property shall, before the passing of this act, have been exempted from rating by any local act, in respect of all or any of the purposes for which general or special district rates may be made under this act, the same kind of property shall, in respect of the same purposes, and to the same extent within the parts to which the exemption applies, be exempt from assessment to any general or special district rates under this act. By section 105. of the 5 Geo. 4. c. xxii., a local act, for paving, &c. the borough of Plymouth, Commissioners were empowered to direct rates to be made upon the tenant or occupier of all houses, &c. in the said borough, and upon the several gardens, &c. thereto adjoining or belonging; and upon all gardens, tenements and hereditaments adjoining to or upon any of the streets, &c. made or to be made within the populous or town part of the said borough, or situate so contiguous to some street within the said populous or town part of the borough that there should be no greater distance than 100 feet from some street within the populous or town part, &c. to the nearest of such houses or buildings, or the gardens, &c. thereunto adjoining and belonging, nor from such last-mentioned houses or buildings, gardens, &c., to such as shall be next succeeding, and so on from one rateable house, &c. to the next or nearest in the said borough. By a general district rate made by the local board of health, L was rated as the occupier of a field and market-garden. The field was within the borough and district, but was not adjoining to or upon any street, &c. within the populous or town part of the borough, nor within the limits defined by the local act. The market-garden was within the borough and district, but was not a garden adjoining or belonging to any house, &c., or situate or adjoining to or upon any street, &c., nor within the limits defined by the local act. No rate had ever been paid in respect of the property under the local act:—Held, (*dissentiente Erie, J.*) that L was liable to be so rated, as the proviso in section 88. of the 11 & 12 Vict. c. 63. only applies to property exempted in respect of its kind, and not in respect of its locality. *Luscombe v. the Local Board of Health for the Borough of Plymouth*; *Shortland v. the Local Board of Health for the*

Borough of Plymouth; *Pontey v. the Local Board of Health for the Borough of Plymouth*, 27 Law J. Rep. (N.S.) M.C. 299; E. B. & E. 691.

In the same rate S was rated as the occupier of a house and garden attached thereto within the borough, and within the district, but not within the populous or town part, nor within 100 feet of any property rateable under the local act, except the line of the S D Railway Company:—Held, (*dissentiente Erie, J.*) that S was liable to be so rated. *Ibid.*

In the same rate P was rated as the occupier of a pasture field within the populous part of the borough, and adjoining to and upon a street within the populous or town part, &c. and within the district. He was also rated as the occupier of a market-garden within the district and within the populous or town part of the borough, and adjoining to and upon a street within the populous or town part of the borough, but not adjoining or belonging to any house or building:—Held, that he was liable to be so rated. *Ibid.*

The 103rd section of the Public Health Act, 1848, provides, that if any person assessed to a rate under that act fail to pay the same when due, a Justice may summon the defaulter to shew cause why the rate should not be paid: and if no sufficient cause be shewn, the Justice may cause the same to be levied by distress. By section 135, any person who shall think himself aggrieved by any such rate, or by any order, conviction, judgment or determination of or by any matter or thing done by any Justice in any case in which the penalty imposed or the sum adjudged shall exceed 20s., may appeal to the Court of Quarter Sessions held next after the making of the rate. The act having been put in force within the borough of M, the local board made three several district rates, and assessed R in sums amounting to 4l. 5s. 6d. in respect of premises occupied by him. R refused to pay the rates, on the ground that the greater portion of the premises occupied was not within the borough. He was thereupon summoned before two Justices, who made an order, whereby, after reciting the refusal to pay the rates, that the parties appeared before them, and having heard the matter of complaint, they adjudged that R pay the several rates, with costs, and that if the several sums be not forthwith paid, the same be levied by distress. R appealed against this order to the Court of Quarter Sessions, who quashed the order, with costs, to be paid by the local board, who thereupon appealed to this Court for a prohibition, on the ground that the appeal to the Sessions would not lie:—Held, that as the matter was not free from doubt, the Court ought not to grant a prohibition. *Ricardo v. the Maidenhead Local Board of Health*, 2 Hurl. & N. 257.

Semble—that the "sum adjudged" in the 135th section means the sum in respect of which the adjudication was made; and, therefore, that the order of the Justices was a matter or thing done by them in which the sum adjudged exceeded 20s. within the meaning of that section. *Ibid.*

(H) COMPENSATION.

A mandamus to a local board of health, constituted under the Public Health Act, 1848, recited that R, the prosecutor, had been injured by the exercise, by the defendants, of the powers of the act; that he had

demand compensation from the defendants, and that they had denied all liability, and enjoined the defendants to cause compensation to be made to R out of the general or special rate to be levied under the act. The return stated that the defendants had not denied all liability, and that they were ready to make compensation so soon as it had been duly ascertained under the act; that it had not yet been so ascertained, nor had R taken any steps towards having it ascertained, nor given the defendants notice of the amount of his claim, nor informed them whether it was above 20*l*, nor appointed, nor given notice of his intention to appoint, an arbitrator. This return was traversed generally, and on the trial it was found that the defendants had denied all liability, but that the prosecutor had never claimed any specific sum, and a verdict was entered for the prosecutor. On a motion to enter the verdict on the rest of the return for the defendants, and to enter judgment for them, —Held, that, under the 144th section of the act, the mandamus was good, and that the prosecutor was entitled to a verdict on the whole return, and to a peremptory mandamus, on the ground that where the liability to make compensation is denied, it is no bar to the prosecutor's right to a mandamus that he has not claimed a specific sum or taken steps to have the amount settled by arbitration under the act. *The Queen v. the Burntlem Local Board of Health* (Ex. Ch.), 29 Law J. Rep. (N.S.) Q.B. 242; affirming the decision below, 28 Law J. Rep. (N.S.) Q.B. 345.

(I) ACTION BY LOCAL BOARD.

A contract was entered into with the defendants by five persons named, who were members of a local board of health, for works to be done by the defendants. The five covenanted "for themselves, their heirs, executors and administrators," but the contract professed to be entered into by them "for and on behalf of the local board":—Held, that the clerk to the local board was the proper person to sue for a breach of this contract, by virtue of the 138th section of the Public Health Act, 1848, 11 & 12 Vict. c. 63. *Cobham v. Holcombe*, 8 Com. B. Rep. 815.

PUBLIC WORKS.

[The Advance of Money out of the Consolidated Fund for carrying on Public Works and Fisheries and for the Employment of the Poor, authorized for a further period by 19 & 20 Vict. c. 17.—The Application of Money for the Purposes of Loans for carrying on Public Works in Ireland, authorized for a further period by 19 & 20 Vict. c. 18.]

Works planned by public boards may be executed, though they tend to the injury of neighbouring landowners. Notice to landowners and a purchase of their rights is not necessary before commencing the works. Public boards of works constituted by general acts of parliament have neither the rights nor obligations of landowners. Where, therefore, in making a public sewer the defendants cut a high road contiguous to lands of the plaintiffs in such a manner that they withdrew the water of an ancient spring, and laid dry a rivulet and a series of ponds extending three quarters of a mile, upon a bill by the landowners claiming an immemorial right to the spring,

DIGEST, 1855—60.

—Held, that this Court would not restrain the defendants in the execution of the works, or compel them to make the sewer water-tight, or to do any act to restore the ancient flow of water; and that the plaintiffs were without any remedy in equity, and that their only relief lay in requiring compensation for the damage done. *Stainton v. Woolrych, Stainton v. the Metropolitan Board of Works and the Lewisham District Board of Works*, 28 Law J. Rep. (N.S.) Chanc. 300; 23 Beav. 225.

Public works ordered by act of parliament must be so executed as not to interfere with the private rights of individuals; and in deciding on the right of a single proprietor to an injunction to restrain such interference the circumstance that a vast population will suffer (e.g. by remaining undrained) unless his rights are invaded, is one which the Court cannot take into consideration. *Attorney General v. Council of Borough of Birmingham*, 4 Kay & J. 528.

The Council of the borough of Birmingham was bound by a local act of parliament incorporating the Towns Improvement Clauses Act (10 & 11 Vict. c. 34), effectually to drain the town:—Held, that they were not justified in carrying on their operations for this purpose so as to drive away fish and prevent cattle from drinking of the water of a river at a part seven miles below the town, and where it belonged to the plaintiff. *Ibid*.

Held, also, that assuming the inhabitants of Birmingham to have had before their act a right to drain their houses into the river, that circumstance would not authorize the council in discharging the sewage in such a manner as to subject the plaintiff to the inconvenience of which he now complained. *Ibid*.

Held, further, that although plaintiff had submitted to the injury for nearly four years, trusting to the assurance of the council that they were carrying out a scheme of sewage by which eventually the evil would be removed, he was not precluded on the ground of laches from now applying for an injunction, the rule in such cases being that the mere prospect of injury does not give a right to this relief. *Ibid*.

QUO WARRANTO.

[See VENUE.]

An information in the nature of a *quo warranto* will not issue with the view of removing a disqualified person from the Burgess-roll of a borough, unless it be shewn that the person has done something more than merely allow his name to be retained on the roll after notice of objection to his qualification. *In re Armstrong*, 25 Law J. Rep. (N.S.) Q.B. 238.

An information in the nature of a *quo warranto* will not be granted in the case of a clerk to borough Justices appointed under section 102. of 5 & 6 Will. 4. c. 76, as such a clerk is removable at the pleasure of the Justices. It is also an answer to an application for such an information, that the clerk was lawfully appointed, and that his office has never been vacated. *In re Fox*, 27 Law J. Rep. (N.S.) Q.B. 151; *nom. R. v. Fox*, 8 E. & B. 939.

Quære—whether the fact that such a clerk was in partnership as an attorney with the clerk of the

peace for the county, who was entitled to receive certain fees upon the prosecution of offenders committed by the borough Justices for trial at the Quarter Sessions for the county, constituted him a person "interested in the prosecution" within the meaning of section 102. *Ibid.*

RAILWAY.

[See COMPANY: LANDS CLAUSES CONSOLIDATION ACT.]

["The Railways Act (Ireland), 1851," continued by 19 & 20 Vict. c. 72.]

Section 53. of the Railways Clauses Consolidation Act, 8 Vict. c. 20, applies only to a temporary obstruction of and interference with roads caused by the carrying on of the necessary operations for constructing a particular line of railway. Where, therefore, a railway company, under a power contained in their special acts, became the proprietors by purchase of an existing tramroad, and, under a further power enabling them to do so, altered and adapted the tramroad so as to form a part of their new line of railway, the company was held not liable to an action under the 55th section of the 8 Vict. c. 20, for not substituting another road instead of the tramroad before the commencement of their operations. *Tanner v. the South Wales Rail. Co.*, 25 Law J. Rep. (N.S.) Q.B. 7; 5 E. & B. 618.

A colt accidentally got out of a field and strayed along a highway. The plaintiff, the owner, sent his servant after it, who turned it and drove it along the high road back again towards the field. The high road adjoined the premises of a railway company, the gate of which being left open by the carelessness of one of the company's servants, the colt went through the gate on to the line, and was killed by a train which passed.—Held, that the company were liable, as at the time the accident happened the owner was lawfully using the road by driving the colt along it; but that they would not have been liable had the colt been so killed while straying by itself. *The Midland Rail. Co. v. Daykin*, 25 Law J. Rep. (N.S.) C.P. 73; 17 Com. B. Rep. 126.

Section 46. of the Railways Clauses Consolidation Act (8 Vict. c. 20), which provides that a bridge made by a railway company for carrying a turnpike road or public highway over or under the railway, with the immediate approaches and all other necessary works connected therewith, shall be executed, and at all times thereafter maintained at the expense of the company, imposes on the company the obligation of perpetually maintaining in repair the roadway over the bridge, and over the ascents and descents, notwithstanding that by section 56, where a railway company interferes with, or raises a road, all that the company is required to do is to restore it to as good a condition as the same was in at the time when it was first interfered with by the company, or as near thereto as the circumstances permit. *The North Staffordshire Rail. Co. v. Dale*, 27 Law J. Rep. (N.S.) M.C. 147; 8 E. & B. 886.

A railway company, in 1848, purchased freehold land of the plaintiff, adjoining a turnpike-road, for the purpose of diverting the existing road and substituting a new one. In 1849, after having made the

new road, they took possession, with the full knowledge of the plaintiff, of a portion of the old road not occupied by but adjoining their railway, and which by the diversion had ceased to form part of the turnpike-road. At the time of the conveyance both the plaintiff and the defendants thought that the soil of the old road was vested in the turnpike trustees, and it was not included in the conveyance which referred to the map deposited by the defendants with the clerk of the peace, in which the road was described as a distinct property, reputed to belong to the trustees. By the local acts regulating the management of the road, it appeared that it had been from time to time widened, and power was given to the trustees to purchase land for that purpose; but it did not appear that the soil of this particular portion had ever been purchased by the trustees under their acts. In 1858 the plaintiff brought ejectment for this portion:—Held, first, that the presumption of the plaintiff's ownership of the road, as owner of the adjacent soil, was not rebutted by the local acts, so as to cast upon him the onus of shewing that the land forming this part of the road had not been purchased by the trustees. Secondly, that although ordinarily by a conveyance of lands adjacent on both sides of a turnpike-road the road would pass, though not referred to in the conveyance, the road under the circumstances of this case did not pass. Thirdly, that the effect of the General Turnpike Act, 3 Geo. 4. c. 126, coupled with the Railway Clauses Consolidation Act, was not to place the defendants in the position of trustees of the new road, and so to transfer to them the soil of the diverted road. *Quære*—whether the diversion of the road was under the powers conferred by the 16th or the 56th section of the latter act? Fourthly, that the non-interference of the plaintiff when the defendants took possession did not amount to such consent as precluded the plaintiff, under the Lands Clauses Consolidation Act, s. 124, from re-entering. Fifthly, that the effect of that section is not to prevent the plaintiff from bringing an action of ejectment to establish his title, but to authorize the Court to stay execution on the judgment. *The Marquis of Salisbury v. the Great Northern Rail. Co.*, 28 Law J. Rep. (N.S.) C.P. 40; 5 Com. B. Rep. N.S. 174.

The plaintiff, as lord of the manor, granted a piece of the waste adjoining the turnpike-road to P, to hold as part of the copyhold of the manor:—Held, assuming the plaintiff to have power so to grant, that the right to the soil of the road did not thereby vest in P. *Ibid.*

By section 168. of 5 & 6 Will. 4. c. cvii. every person who shall send, or cause to be sent, by the Great Western Railway any aquafortis, oil of vitriol, gunpowder or other goods of a dangerous quality, shall distinctly mark or state the nature of such goods on the outside of the package, or shall give notice of the nature of such goods, on pain of forfeiting 10l.:—Held, that guilty knowledge is necessary before this offence is committed; therefore where G and S received from N cases which contained oil of vitriol, and N had imposed upon them by stating that the contents were of an entirely different description, and G and S had no knowledge of what the contents really were, and sent them innocently by the railway, it was held that they were not liable to be convicted. *Scmble*—that G and S would be civilly liable to the railway company as being the senders of the

goods. *Seemle*, also, that N might have been proceeded against under the above section. *Hearne v. Gavton*, 28 Law J. Rep. (n.s.) M.C. 216.

The by-laws of a railway company, made pursuant to the Railways Clauses Consolidation Act, sections 108. and 109, are documents of a public nature, and proveable as such. The above act, section 110, provides that the substance of such by-laws shall be painted on boards, &c., and affixed on the front of every wharf or station belonging to the company, according to the nature or subject-matter of such by-laws respectively, and so as to give public notice thereof to the parties interested therein or affected thereby; and no penalty imposed by any such by-law shall be recoverable unless the same shall have been published, &c. as aforesaid. Section 111. enacts, for proof of the publication of any such by-laws it shall be sufficient to prove that a copy of such by-laws was affixed as by the act directed. Upon an information before Justices charging a passenger with an infraction of a by-law (prohibiting passengers from quitting a carriage while the train is in motion), it was proved that a copy of the by-laws was affixed in the manner directed by the act at the two stations respectively at which the passenger entered and quitted the carriage,—Held (*dissentiente Williams, J.*), sufficient proof of publication; and that it was not necessary to prove further that copies were affixed at every other station on the line. *Mottram v. the Eastern Counties Rail. Co.*, 29 Law J. Rep. (n.s.) M.C. 57.

A person who places a truck across a railway line, in such a manner that if a carriage or engine came along the line its passage would be obstructed thereby, and the safety of passengers in any such carriage endangered, is guilty of a misdemeanor, under the statute 3 & 4 Vict. c. 97. s. 13, though the railway has not been yet opened for passenger-traffic, and though no carriage or engine is, in fact, obstructed. *The Queen v. Bradford*, 29 Law J. Rep. (n.s.) M.C. 171; Bell's C.C. 268.

The plaintiff folded his sheep in a field adjoining a railway, using the quickest hedge forming the company's fence as on one side of the inclosure. Some of the sheep escaping through a small hole in the hedge, got upon the railway and were killed:—Held, that the company were liable, and that it was no misdirection to tell the jury that by section 68. of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), the company were bound to keep their fences sufficiently strong to prevent sheep and cattle from straying out of the adjoining lands,—the jury having found as a fact that the fence was insufficient. *Bessant v. the Great Western Rail. Co.*, 8 Com. B. Rep. N.S. 368.

A entered into an agreement with the projectors of a railway company, whose projected line was marked in the plans as intended to run through his property, to withdraw his opposition to their proposed bill, and they agreed that in case the company should in that or any subsequent session obtain an act of incorporation the company should pay to him 1,000*l.* for all lands required and 4,000*l.* for residential injury, and there were special provisions as to making a tunnel and a passenger station. A received the usual notices, and his lands were surveyed and marked out, but the projected company was afterwards amalgamated with another, and the amalgamated company

took a different line of route, and did not require the land of A:—Held, that this was not a contract which the company was bound under these circumstances to perform, as the provisions of it shewed that it was to be conditional on the actual taking of A's land, and A's land had not been taken. Held, that the withdrawal of A's opposition, in consequence of which the act had passed, was not the ground of an absolute contract, as other provisions of it shewed that the contract was conditional on the taking of A's land, which had not been taken; and therefore the company was not bound to perform the obligations of the contract. *Preston v. the Directors and Proprietors of the Liverpool, Manchester and Newcastle-upon-Tyne Junction Railway*, 25 Law J. Rep. (n.s.) Chanc. 421; 5 H.L. Cas. 605.

A railway company had compulsory powers to purchase soil for their works, and to purchase such of the lands delineated in the plans, and within the limits of deviation indicated in the plans and books of reference, and to enter upon, take and use such of the said lands as should be necessary for such purposes. They entered upon a small piece of land belonging to A B, situate within the limits of deviation, and made a contract with him for the purchase of the soil found thereon for the purpose of making an embankment, forming part of the railway works situate at some distance from the other lands of A B. After this the company determined on the purchase of this small piece of land in fee simple, and gave the required notices for the assessment of its value. It appeared that the company did not want this small piece of land for any other purpose than that of taking the soil for the embankment. On a bill filed by A B, one of the Vice Chancellors granted an injunction to restrain the company from taking the piece of land; and on appeal (the motion being turned into a motion for a decree),—Held, that the fee simple of the land was not necessary for the making and maintaining the railway within the meaning of the parliamentary powers of the company, but that the soil alone being wanted, which they might purchase elsewhere under their powers, the injunction must be made perpetual. *Everfield v. the Mid Sussex Rail. Co.*, 28 Law J. Rep. (n.s.) Chanc. 107; 3 De Gex & J. 286; 1 Giff. 153.

By virtue of an act of parliament, passed in 1847, a railway, from H to P, and the station at P, became vested in the S W and S C Railway Companies as joint tenants, the joint line and station being under the management, as to expenses, &c., of a joint committee, appointed by the two companies. The D P Railway was afterwards completed, joining the S C Railway at a point a short distance from H. That short distance of the S C Railway the D P Company became entitled to use. In 1858 the S W Company agreed with the D P Company to apply for an act to enable the S W Company to accept a lease of the D P Railway for 999 years, at 18,000*l.* per annum; the S W Company in the mean time, until the act was obtained, working the D P Railway and paying that company at the rate of 18,000*l.* per annum. Shortly afterwards another agreement was made between the S W and D P Companies, alleged to be under the 87th section of the Railways Clauses Consolidation Act, 1845, for the regulation of tolls, &c., but providing that, out of the joint fund therein mentioned, there should be

paid to the D P Company 18,000*l.* per annum, in priority to all charges. A third agreement was made in 1859, between the S W and D P Companies, which was stated to be a temporary arrangement respecting the user by the S W Company of the D P Railway until an agreement should be sanctioned by the Board of Trade, or an act obtained for a lease of the D P Railway to the S W Company. By this agreement the S W Company was to have the use of the D P Railway, and pay all expenses, &c., and should cause such an amount of traffic to pass over the D P Railway as should cause the payments under that agreement to the D P Company in respect of tolls to be after the rate of 18,000*l.* per annum at least. The S W Company attempted to use the joint station at P for the purposes of the traffic by them passed over the D P Railway. The S C Company objected to this, as the right of the S W Company to use the joint station was only in respect of traffic lawfully carried by them, and filed a bill for an injunction. Upon the motion for injunction being made, Wood, V.C. refused it. Upon the motion being renewed, by way of appeal, it was directed to stand over, in order that the cause might be brought on by motion for decree, the evidence on both sides being in the mean time to be completed: and upon the cause being thus brought on, it was held, that the agreements between the S W and D P Companies being illegal, the injunction to restrain the use by the S W Company of the joint station for traffic passed over the D P Railway must be granted. *The London, Brighton and South Coast Rail. Co. v. the London and South-Western Rail. Co.*, 28 Law J. Rep. (N.S.) Chanc. 521; 4 De Gex & J. 362.

Blackacre and Whiteacre being settled upon A for life, with remainder to B in tail, the South Devon Railway Company, under the powers of their act (7 & 8 Vict. c. lxxviii.), purchased Whiteacre, and paid the purchase-money into court. The entail in Blackacre was afterwards barred, but the deed barring such entail did not bar the entail in the produce of Whiteacre. Subsequently, the entail in such produce was barred:—Held, that the costs of the preparation and execution of the deed barring the entail in the produce of Whiteacre should be paid by the company. *Re South Devon Rail. Co.'s Act, re the Devises of Nicholas Brookings*, 29 Law J. Rep. (N.S.) Chanc. 151; 2 Giff. 31.

A mortgage or bond for securing money borrowed by a railway company, according to the form in Schedule C annexed to the Companies Clauses Consolidation Act, 1845, comprises the lands as well as the rails and chattels of the company, and is entitled to priority over a writ of *elegit* sued out against the company by a judgment creditor thereof. Where, therefore, a railway company borrowed money from various persons on mortgage, according to the form in Schedule C. annexed to the Companies Clauses Consolidation Act, 1845, the Court, at the instance of a mortgagee, who sued on behalf of himself and all other the mortgagees of the company, restrained the sheriff from delivering legal possession of the company's lands and rails to a creditor of the company, who was the contractor who had constructed the railway, and had obtained judgment against the company, and had sued out a writ of *elegit* thereon. *Legg v. Mathieson*, 29 Law J. Rep. (N.S.) Chanc. 385; 2 Giff. 71.

Upon an information, filed against a railway company, alleging certain facts to shew that the company had acted as coal-dealers in buying and selling coal to obtain profit, and praying for an injunction to restrain the company from acting as coal-dealers, the Court held, that the evidence was sufficient to prove such dealing by the company; that these transactions were illegal and calculated to effect an injury upon the public; and that an information by the Attorney General was the proper remedy, and was rightly filed in this case. Held, also, that the right of the Attorney General to sue a railway company for breach of their powers was not taken away by the provisions of the act 7 & 8 Vict. c. 85. Injunction granted, with costs. *Attorney General v. the Great Northern Rail. Co.*, 29 Law J. Rep. (N.S.) Chanc. 794; 1 Dr. & Sm. 154.

Where a railway act provided that the expenses of altering the gauge of a railway should be borne by several companies in equitable proportions, to be determined in case of difference by the Board of Trade,—Held, that the Board of Trade and Commissioners of Railways (who succeeded to the functions of the Board) were not in the position of private arbitrators, but had a discretion which the Court could not control, and that a bill to set aside their award, on the ground of undue delegation of authority, and the admission of *ex parte* statements, could not be sustained. *The Newry and Baniskillen Rail. Co. v. the Ulster Rail. Co.*, 8 De Gex, M. & G. 437.

It is not imperative on the Court to enforce by interlocutory injunction a statutory prohibition; and where a railway company were about to violate a clause in their act expressly prohibiting the opening of a main line until a junction line was opened, but which appeared to have been introduced merely for the purpose of obliging the company to complete speedily the junction line, the Court, on an undertaking being given to complete the junction line with all practicable diligence, suspended an interlocutory injunction granted by the Court below to restrain the opening of the main line. *The Cromford and High Peak Rail. Co. v. the Stockport, Disley, &c. Rail. Co.*, 1 De Gex & J. 326.

By a clause in a railway act (similar to the 17th section of the Railways Clauses Consolidation Act) owners or occupiers of land adjoining or near the railway might lay down or extend on their own lands, or on lands on the sides thereof belonging to the company, any collateral or continuous branch from such lands to communicate with the railway, for the purpose of bringing carriages upon or across the same; but all the openings and communications for that purpose were to be made at such times as might, so far as practicable, be most convenient to all the parties interested, and so as not to endanger the safety of persons travelling on the railway; and in case of difference as to the proper places for openings, they were to be determined by two Justices of the Peace; provided always, that the company should not be bound to make any such opening where they should have erected any building, station or yard, &c.:—Held, that the assent of a company to an opening being made at a station was not in the nature of a licence, and could not be revoked. *Bell v. Midland Rail. Co.*, 8 De Gex & J. 673.

A railway company agreed with a landowner, through whose estate the railway would pass, to

construct and maintain a siding connected with their railway at B, together with all necessary approaches thereto, for public use, for the reception and delivery of goods:—Held, that specific performance could be decreed of the agreement to construct the siding and approaches without decreeing the company to maintain them when made. *Lytton v. the Great Northern Rail. Co.*, 2 Kay & J. 394.

Held, also, that the agreement did not bind the company to erect sheds, or to keep one of their servants in attendance at the siding; but that it obliged them to construct a proper siding with approaches, and a wharf or raised platform for the loading and unloading of goods. *Ibid.*

Held, further, that "necessary approaches" meant also "proper approaches." *Ibid.*

Although it is competent to the directors of every railway company, on complying with the Wharfedale Order, to apply to parliament for an extended line, or for any other extension of their powers, they will be restrained from defraying the expenses of such application out of the assets of the company, and from issuing new shares, purporting to be shares in the company, except for the purposes and under the powers of existing acts. *Vance v. the East Lancashire Rail. Co.*, 3 Kay & J. 50.

By a railway company's act, after reciting that the company had issued certain "preference shares" on the terms of the owners thereof being entitled to "fixed preferential dividends thereon, payable out of the revenues of the company," at certain rates in the act mentioned, it was enacted, that the income of the company from time to time applicable to the payment of interest on monies borrowed and dividends on shares should be applied, first, in payment of the interest from time to time accruing on mortgages and bonds; next, in payment of the preferential dividends on the several classes of preferential shares in the order in the act specified; and, lastly, in payment rateably of dividends on original shares. The contracts upon which the preference shares had been issued and taken up (irregular in themselves, but rendered valid by the act) were to the effect that such preference shares should be entitled, some to a dividend, at a certain given rate per cent., for a given number of years, and at a lower given rate in perpetuity thereafter; others to a given rate per cent., without restriction as to time; and others at a given rate per cent. for a term certain, and thereafter until such time as they were redeemed by the company:—Held, that, coupling the enacting part of the act with the recitals in its preamble, and having regard to the contracts upon which the shares were issued, the holders of such preference shares were entitled, according to their priorities, *inter se*, to arrears of former dividends before any dividend could be paid to the holders of ordinary shares; for the word "dividend" is not, *ex vi termini*, restricted to profits accruing during any given period; and here the consequence of so restricting it would be to enable the holders of ordinary shares so to arrange the declaration of their dividends as to prevent the holders of preference shares from deriving any of the advantages for which they had stipulated. *Crawford v. the North-Eastern Rail. Co.*, 3 Kay & J. 723.

Where purchase-money had been paid into court by the Bristol and Exeter Railway Company, and invested in stock,—Held, on the construction of the

company's act, that the Court had no power to order the company to pay the costs of obtaining a transfer to the person absolutely entitled, notwithstanding they might have been ordered under the act to pay much larger costs had the petition prayed a re-investment in land. *In re Land's Trust*, 4 Kay & J. 81.

Compulsory powers to take land are given to railway companies, and must be exercised for the sole purpose of constructing the railway and works; therefore, where a railway company endeavoured, by means of their compulsory powers, to construct a road so as to accomplish a subsidiary object, they were restrained by the Court of Chancery at the instance of the landowner whose property would be affected, though the proposed works were within the scope of their act. *Dodd v. the Salisbury and Yeovil Rail. Co.*, 1 Giff. 158.

Semble—the saving of expense is a legitimate consideration in exercising the compulsory powers given to a railway company. *Ibid.*

A railway act authorizing the purchase-monies of lands taken by the railway to be applied in the discharge of land-tax or incumbrances affecting the same or other lands settled to the same uses, or laid out in the purchase of lands, tenements or hereditaments,—Held, not to authorize the application of the money in rebuilding a new farm-house and buildings in purchased lands. *Re Rudyard's Trusts*, 2 Giff. 394.

The defendants were, by act of parliament, authorized to make a short line uniting their main line with the plaintiff's line; but the 12th section prohibited the defendants opening their main line until the junction should be completed. In default of the defendants making the junction within a specified time, the plaintiffs were authorized to make it. The defendants proposed opening their main line before the completion of the junction:—Held, that the plaintiffs had a sufficient interest to entitle them to an injunction to prevent this proceeding, and that it was not necessary to resort to an information for that purpose; and an injunction was granted, although the delay in opening the main line might be prejudicial to the public. *The Cromford and High Peak Rail. Co. v. the Stockport, Disley and Whaley Bridge Rail. Co.*, 24 Beav. 74.

The 8 & 9 Vict. c. 42. (1845) enabled canal companies to become carriers on canals, to lease their canals and to take leases of others. Subsequently (1856) a railway company obtained an act enabling them to purchase the X canal, and to exercise all its "rights, powers and privileges":—Held, that after the purchase, the railway company had authority to take a lease of canal Y under the first act, this being a "right, power and privilege" possessed by canal X, and which passed in its sale to the railway company. A motion by a shareholder of the railway for an injunction to restrain the purchase of canal Y was refused. *Rogers v. the Oxford, Worcester and Wolverhampton Rail. Co.*, 25 Beav. 322.

A railway company gave notice to a tenant at will to take part of the lands, and they were allowed to take possession and complete their line. Afterwards a person who had subsequently to the notice purchased one-ninth of the land, filed a bill, merely praying an injunction to restrain the railway company from entering upon, continuing in possession

of, or otherwise interfering with the land. The bill was dismissed, with costs. *Carnochan v. the Norwich and Spalding Rail. Co.*, 26 Beav. 169.

Notices by railway companies to take land cannot be treated higher than contracts, and after great delay in proceeding on such notices they will be considered abandoned. *Hedges v. the Metropolitan Rail. Co.*, 28 Beav. 109.

Notice to take part of a property was given by a company ten days before the expiration of their compulsory powers. A counter notice was given by the landowner, requiring them to take the whole. The company did not follow up their notice, but fourteen months afterwards gave the landowner notice of an intended application to parliament to abandon their undertaking. This they did not obtain, and nineteen months after the first notice the company proceeded to obtain the lands compulsorily. The landowner filed a bill for an injunction, stating that the original notice was not *bond fide* given; that the company in their subsequent proceedings had treated the notice as abandoned, and that in the belief of such abandonment the plaintiff had forbore taking proceedings:—Held, that the plaintiff was entitled to relief; the company's demurrer to the bill was consequently overruled, and the injunction was on a subsequent motion granted. *Ibid.*

RAPE.

To constitute rape it is not necessary that the connexion with the woman should be had against her will: it is sufficient if it be without her consent. *The Queen v. Fletcher*, 28 Law J. Rep. (n.s.) M.C. 85; Bell's C.C. 63.

RATE.

[The Exemption of Stock in Trade from Rating continued by 19 & 20 Vict. c. 42.—The better Management of County Rates enacted by 21 & 22 Vict. c. 33.—The Annual Return of Rates, Taxes, Tolls and Dues levied for local Purposes in England, provided for by 23 & 24 Vict. c. 51.—The Act for authorizing the Application of Highway Rates to Turnpike Roads continued by 23 & 24 Vict. c. 67.]

(A) POOR RATE.

(a) *Validity of.*

(b) *Persons and Property Rateable.*

(1) *In general.*

(2) *Special Exemptions.*

(c) *Rateable Value and Principle of Assessment.*

(d) *Appeal against.*

(B) CHURCH RATE.

(C) COUNTY RATE.

(D) BOROUGH RATE.

(E) HIGHWAY RATE.

(F) LIGHTING, WATCHING AND PAVING RATE.

(G) SEWERS RATE.

(H) DISTRESS FOR RATES.

(I) EXEMPTION FROM.

(A) POOR RATE.

[See BOUNDARIES—BURIAL (A).]

(a) *Validity of.*

A rate, which does not by its heading or otherwise shew upon its face for what purpose and by what authority it is made, is void. The addition of the declaration at the end of the rate, required by the 6 & 7 Will. 4. c. 96, will not cure the defect. *Re Eastern Counties Rail. Co. and Overseers of Moulton*, 25 Law J. Rep. (n.s.) M.C. 49.

A poor-rate which describes the property in respect of which it is laid as "land, &c.," and omits the "name and situation of the property" and its "estimated extent," is not therefore void. *Ibid.*

A rate was made for the parish of K in February, and was afterwards, in the month of May, quashed on appeal; but the parish officers continued to collect the amount due from the ratepayers under it. Another rate was made in June, and in it P, the occupier of a house, was rated, and paid the rate, his house not having been assessed in the February rate, as it was then unoccupied. A third rate was made in October, one moiety of which was for the purpose of enabling the overseers to allow a deduction on account of the money which had been paid on the void February rate. P was called upon to pay the whole amount to which he was assessed upon the October rate, and claimed to be allowed an abatement of one-half. The parish officers proceeded against him by summons, but the Justices refused to grant a distress warrant:—Held, there having been no appeal against the rate, that the Justices were wrong, and that the parish officers were entitled to have a rule made absolute to levy the whole sum against P. *The Queen v. the Justices of Kingston-upon-Thames and Phillips*, 27 Law J. Rep. (n.s.) M.C. 199; E. B. & E. 256.

A rate at 1s. 6d. in the pound was made in February for the parish of K, and A was rated therein for a house and premises which he occupied, and paid the sum at which he was assessed. The rate was afterwards quashed. Another rate was made in June, at 1s. 6d. in the pound, the whole of which was wanted for current expenses, and therefore no deduction was allowed from that rate in respect of the money collected under the February rate. A third rate, at 3s. in the pound, was made in October, and in it W was rated for the house and premises for which A had been rated in the February rate, at the net rateable value of 65l., he, W, having come into possession on the 29th of September. This last rate was made for the purpose of giving credit to those who had paid the February rate, to the extent of 1s. 6d. in the pound; the other sum of 1s. 6d. in the pound being wanted for current expenses. W was called upon to pay the whole amount at which he was assessed, but he refused to pay more than 1s. 6d. in the pound upon his house and premises, claiming to have an allowance of the other 1s. 6d. as having been paid by A on account of the quashed February rate. An application was made to Justices to grant a distress warrant against him, but the warrant was refused by them. A rule nisi having been obtained, calling upon them to shew cause why they should not do so,—Held, by Lord Campbell, C.J. and Wightman, J., that the October

rate was not the next effective rate within 41 Geo. 3. c. 23. s. 1; that W had no right to claim the deduction; and therefore that the rule should be made absolute. Held, by *Erie, J.* and *Crompton, J.*, that W was entitled to claim the allowance of 1s. 6d. in the pound on the October rate, and therefore that the Court ought not to order the Justices to issue their warrant to levy upon him for that amount. *The Queen v. the Justices of Kingston-upon-Thames and Webb*, 27 Law J. Rep. (N.S.) M.C. 201.

Under the 6 & 7 Will. 4. c. 96. s. 8,—which enables parish officers to have a survey of the parish made for the purposes of the poor-rates, and “to make provision for paying the costs by a charge on the poor-rates,” and requires that “provision shall be made for paying off not less than one-fifth of the sum, with interest, in each succeeding year,”—the charge is on the rates generally, and not specific on the rates of the five years. The lender, therefore, of money upon a bond, pursuant to that section, is entitled to a mandamus to the parish officers to repay him after the five years have elapsed; but if he has delayed in coming to the Court, the delay must be explained. *The Queen v. the Churchwardens and Overseers of Hursbourne Tarrant*, 27 Law J. Rep. (N.S.) M.C. 214; E. B. & E. 246.

The occupier of a farm, of which a certain number of acres are in parish A and the residue in parish B, is properly rated to the poor-rate of parish A as the occupier of the number of acres in that parish, although the specific acres in either parish are not known. *The Queen v. Woods*, 27 Law J. Rep. (N.S.) M.C. 289; E. B. & E. 481.

Certain debts, accruing chiefly during the two previous years, from the guardians of a union to tradesmen, amounting to 23,000*l.*, and a debt, accruing during several years, from the guardians to the treasurer of the union by reason of their overdrawing their account, remained unpaid at Christmas 1856, through the frauds and embezzlements of the collector for nine parishes of the union and of the assistant clerk to the union. The collector was appointed for the nine parishes by the guardians of the union (which consisted of ninety-eight parishes), and his appointment was confirmed by the Poor-Law Board. He collected the whole of the rates for the nine parishes, and was ordered by the guardians to pay all that he collected to the treasurer of the union, to be placed by the clerk of the union to the credit of each of the nine parishes respectively. By collusion between the collector and the assistant clerk, these parishes were credited in the union ledger with large sums for rates collected by the collector, but which were never, in fact, paid over by him to the treasurer, but which were embezzled by the collector. The parochial accounts had been audited up to September 1856 upon false accounts concocted by the collector. In December 1856 the collector and assistant clerk absconded, having embezzled 22,407*l.* and 3,000*l.* respectively, at which time the embezzlements were first discovered. A call or order for contributions for the coming half-year, being the first call after the discovery, was made by the guardians on each of the parishes of the union in February 1857. In making the estimate for these orders, under article 81. of the Consolidated Order, 1847, the deficit resulting from the frauds and embezzlements was treated as “an extra-

ordinary charge” upon the union, and thus the several debts above mentioned were included as chargeable upon the funds of the whole union; and, assuming them to be so chargeable, the parish of S was charged in the order made upon it with its proper proportion. The parish of S was not one of the nine parishes, and had paid up its quota charged on it by previous orders:—Held, by the Court of Queen’s Bench, on a special case stated between the parish of S and the guardians of the union, that the debts so left outstanding were “extraordinary charges, to which the union was liable in the coming half-year,” and so were within the power conferred on the guardians by article 81. of the Consolidated Order, 1847; that the collector was the officer of the union, and not of the nine parishes, inasmuch as the orders of the guardians to him to pay over the money received by him direct to their treasurer negatived that his duty was regulated by article 6. of the Collection of Poor-rates Order, 1854, which directs the collector to pay over weekly to the overseers, their bankers, or otherwise under the direction of the overseers; and therefore that the parish of S was liable to pay the whole amount charged upon it, and that the order upon it was valid. But held, by the Court of Exchequer Chamber, reversing the judgment of the Queen’s Bench, that the contribution order was wholly invalid, as it was made in part to pay old debts; that the guardians had no power by law to make a retrospective order, nor overseers to make a retrospective poor-rate; and that these old debts could not be included under the head of extraordinary charges, as that term must be limited to such charges as were legally chargeable on the parishes. *Waddington v. the Guardians of the Poor of the City of London Union* (Ex. Ch.), 28 Law J. Rep. (N.S.) M.C. 113; E. B. & E. 370.

Article 81. of the Poor Law Commissioners’ Consolidated Order, 1847, directs that the clerk to the guardians of a union shall at stated times ascertain the costs to each parish in the union for the separate charges of such parish, as well as for the common charges incurred in the half of the last year, &c., and “shall also estimate the probable balance due to or from the parish at the end of the current half-year, and shall then prepare the orders on the several parishes for the sums which, upon such computation, it shall appear necessary for them to contribute to the expenses of the union for the coming half-year,” &c. Article 82. directs that “the guardians shall make orders on the overseers or other proper authorities of every parish of the union, from time to time, for the payment to the guardians of all such sums as may be required by them for the relief of the poor of the parish, and for the contribution of the parish to the common fund of the union, and for any other expenses chargeable by the guardians on the parish.” The guardians of a union made a contribution order on one of the parishes of that union, pursuant to article 82, but the clerk in preparing the order had not complied with the terms of the 81st article, inasmuch as in computing the sum for which such contribution order was made he omitted to estimate the probable balance due to the parish. If he had taken such balance into account, it was so largely in favour of the parish, that no sum whatever would have been needed to meet the cost of

the maintenance of its poor, and the other charges for which the order was made. There was in point of fact no balance or available fund whatever in the hands of the guardians, the balance having been lost by the defalcations of a collector for certain parishes of the union, not including the parish in question:—Held, that as the contribution order was made without taking into account the balance due to such parish, it was illegally made, and could not be enforced. *Hale v. the Guardians of the Poor of the City of London Union*, 29 Law J. Rep. (n.s.) M.C. 5.

Where the amount of a poor-rate comes to only the fraction of a farthing, the ratepayer is not bound to pay it. *Morton v. Brammer*, 29 Law J. Rep. (n.s.) M.C. 218.

(b) *Persons and Property Rateable.*

(1) *In general.*

Along the whole of the western shore of the harbour of Swansea and within the limits of the borough, all goods imported and exported are landed on and shipped from quays. The soil and freehold of the quays are vested in the corporation of Swansea, with the exception of two, the soil and freehold of which are vested in the Duke of Beaufort as lord of the manor and borough of Swansea, and some of the corporation quays are leased to private individuals. The tolls and dues were payable to the corporation in respect of the landing and shipping of goods, without any distinction being made between the Duke's quays and those leased to private individuals. The tolls and dues were, without distinction, sometimes described as town dues and quayage, and sometimes as quayage. The individual occupiers of the quays were severally assessed to the poor-rate in respect of their occupation, without taking into account the tolls and dues:—Held, that the corporation were not liable to be rated in respect of the tolls and dues. *Lewis v. the Churchwardens and Overseers of the Poor of the Town of Swansea*, 25 Law J. Rep. (n.s.) M.C. 33; 5 E. & B. 508.

The appellants were rated for "land occupied by the platform and other matters used as a pier for landing and embarking steamboat passengers." The pier consisted of two barges, kept in their places by iron chain cables, fastened to iron anchors, placed in the bed of the river Thames, and by an iron chain from one of the barges to a staple fixed in the stone-work of certain stairs used as a public shipping and landing place. The barge which was nearest to the stairs floated at high water, but at low water rested on blocks fixed in the bed of the river for that purpose; the other barge was always afloat. A moveable platform extended from the stairs to the first barge, and another moveable platform connected the two barges together. The whole had been used as a pier since 1843, and the stairs and the land over which the barges and platforms were placed were in the respondent parish:—Held, that there was a permanent and profitable occupation of the soil, and therefore that the appellants were rateable. *The Queen v. Forrest*, 27 Law J. Rep. (n.s.) M.C. 96.

If the officers of a parish claim a right to rate a person for occupying that part of the sea-shore which lies between high and low water marks, the onus lies upon them to shew by evidence that such part is within the parish, and in the absence of evidence it must be presumed that the land is extra-parochial,

and therefore not liable to be rated. *The Queen v. Musson*, 27 Law J. Rep. (n.s.) M.C. 100; 8 E. & B. 900.

The Marylebone Act, 53 Geo. 3. c. lxxiii. s. 179, makes the occupiers of houses liable to be assessed to parochial rates, and section 187. enacts that the lessor, landlord, owner or proprietor of houses let out in parts shall be deemed the occupier, and be liable to the payment of rates; and section 188. enacts that every person renting or occupying any such part shall be liable and compellable to pay such rates, and may deduct the same out of the next or any other rent due to such lessor, &c.:—Held, that to render the occupier of part liable to pay, and to enable him to deduct the rates for the whole of the house, under section 188, the landlord must be assessed to the rates. *Lobban v. Cook*, 27 Law J. Rep. (n.s.) M.C. 254.

In assessing to the poor-rate of a parish a part of a canal which passes through several parishes, in order to ascertain its rateable value, the expense of maintaining locks situate in the parish is not to be deducted from the gross earnings of the canal in the parish, as it is not a local expense and ought to be thrown on the whole line of canal. *The Queen v. the Company of Proprietors of the Coventry Canal*, 28 Law J. Rep. (n.s.) M.C. 102; 1 E. & E. 572.

The Tyne Improvement Commissioners were empowered by act of parliament to make and maintain the Northumberland Docks, and to borrow money upon the security of the rates and dues. The rates and dues were ordered to be applied, first, in payment of the expenses of managing and maintaining the docks, next in paying the interest of the money borrowed, next in creating a sinking fund for the purpose of paying off the money borrowed, and if there were any surplus afterwards, the rates were to be lowered to that extent. The Commissioners were also authorized after the payment of the expenses above mentioned, and after the extinction of the debt for money borrowed, to set apart a sum of money annually to be applied in defraying extraordinary repairs, &c.; and whenever there was any surplus, the Commissioners were to lower the rates and dues so as to reduce them to the annual amount of the expenses of the management, maintenance and working of the docks. The docks, having been built, were used by the shipping frequenting the Tyne, and the rates and dues had amounted to as much as 10,000l. a year:—Held, that the Commissioners were liable to be rated for their occupation of the docks. *The Queen v. the Churchwardens and Overseers of Chirton*, 28 Law J. Rep. (n.s.) M.C. 131; *nom. The Tyne Improvement Commissioners v. the Overseers of Chirton*, 1 E. & E. 516.

By way of endowment of the minister of a new district constituted under the provisions of the 6 & 7 Vict. c. 37, the 7 & 8 Vict. c. 94. and the 19 & 20 Vict. c. 104, the rector of the parish of T granted to such minister and his successors "one clear yearly rentcharge or sum of 150l., to be payable half-yearly," &c. "to be for ever issuing and payable out of and charged upon and being part of all that the rectory," &c. The deed gave a power of entry and distress in case of non-payment of the money, but the money had been paid and the power had not been exercised. The parish officers of T assessed the minister for the relief of the poor:—Held, that

he was not liable to be assessed. *Frend v. the Churchwardens and Overseers of the Parish of Tollerhant Knights*, 28 Law J. Rep. (n.s.) M.C. 169.

A port extended from the bar at the mouth of a river and low-water mark of the sea up the river about eight miles, and included so much of the river as was within those limits, and was in the several contiguous parishes on each side of the river, the parishes on either side extending *usque ad medium flum aqua*. The Bishop of D was the owner of the whole soil and freehold of the port below low-water mark. Every ship entering the port might have to cast anchor therein, or to be moored to moorings affixed and sunk in the river. Beacons had been set up, and mooring-buoys, posts and rings placed and fixed within the port by the Bishop's officers and maintained by them, for the use of ships using the port, and also other works were done by the Bishop for the benefit of ships resorting to it. One payment of 1s. 2d. had been made immemorially to the Bishop, called "anchorage and beaconage tolls," by every ship entering the port:—Held, that the tolls were not tolls in gross, but connected with the occupation and use of the soil, and were rateable to the poor-rate in all the parishes in which the port was situate and to which ships paying the toll came, in the proportion of the number of ships coming into each of the parishes respectively. *The Queen v. the Earl of Durham*, 23 Law J. Rep. (n.s.) M.C. 232.

By a rate for the relief of the poor of the parish of T the appellant was rated as the occupier of the N estate. From the year 1698, up to the time the rate was made, N had maintained its own poor, and had never been charged with the support of the poor of any other place. On the 1st of April 1858 an agreement relating to the N estate was found by P among the title-deeds of a large estate in the parish of T, of which he was owner. The agreement purported to have been made in 1698, between a former owner of the N estate and certain parishioners and owners of land in T parish, and it was thereby agreed that, notwithstanding the N estate was lying and being in T parish, the same should be in no way liable to maintain and keep, or be at any charges for maintaining any poor that should at any time be in any other part of T parish, but only such as should come from the N estate. It was sealed by the owner of the estate:—Held, that this was an instrument which might reasonably be expected to be found among the title-deeds of a large estate in the parish; and that, therefore, it was properly receivable in evidence to shew that the N estate was part of T parish. *Mytton v. the Churchwardens and Overseers of the Poor of Thornbury*, 29 Law J. Rep. (n.s.) M.C. 109.

By 20 Vict. c. 19. s. 1. it is enacted that after the 31st of December 1857 every place entered separately in the Report of the Registrar General on the last census, which now is or is reputed to be extra-parochial, and wherein no rate is levied for the relief of the poor, shall, for all the purposes of the assessment to the poor-rate, &c., be deemed a parish for such purposes. In the Report there was an entry of "Thornbury with Netherwood," with one number annexed to them:—Held, that Netherwood was not entered separately; and therefore that it could not

be deemed a parish in consequence of being named in such Report. *Ibid*.

Semble—that if it had been entered separately, it must have been taken to be a separate parish for the purposes of the poor-rate. *Ibid*.

By the statute 52 Geo. 3. c. cxcv. s. 1, the R Canal Company was incorporated, and power was given to the corporation to hold lands without restriction as to amount or locality, and to take lands and to form a canal in certain enumerated parishes, amongst which H was not. By section 101. lands "of and belonging to the said company" were to be rated like other lands of a like quality in the same parishes. Subsequently, lands were purchased in the parish of H in the name of a trustee, and occupied by the R Canal Company as a reservoir:—Held, that section 101. of statute 52 Geo. 3. c. cxcv. was prospective, and applied to all lands acquired by the R Canal Company; and that the lands in H, the fee of which was in another party, but which were substantially occupied by the R Canal Company, were to be rated as other lands of a like quality in the parish of H. *Regent's Canal Company v. Hendon*, 6 E. & B. 852.

F moored a barge in the Thames between high and low water mark: the moorings were stationary, in the bed of the river; and the barge floated at high water and grounded at low water on the posts in the bed of the Thames by which it was moored, and which were in the parish of G. The barge was connected by a chain with stairs on the land, the soil of which was not the property or in the occupation of A, and which was at that point a common highway to the Thames. Moveable planks were laid from the shore on to the barge, and thence to another barge moored further out in the Thames, and which always floated. By this means a pier was constructed, which was permanently kept there and used for embarking in steamboats and landing from them; and F was remunerated by the parties so using, and he had the sole control of the pier:—Held, that he was rateable to the poor-rate for G, as occupier of land in the bed of the river. *Forrest v. the Overseers of Greenwich*, 8 E. & B. 890.

(2) Special Exemptions.

A society called "The Working Men's Educational Union" was established for the support of the efforts variously put forth for the elevation of the adult operative population, as it regarded their physical, intellectual, moral and religious condition; and this object of the society was sought to be attained, first, by the preparation and publication in a cheap and popular form of diagrams, drawings and maps; secondly, the preparation or recommendation of lectures, or such other helps, references to authorities, &c. as should be found most useful in promoting the delivery of lectures; thirdly, the publication, selection or recommendation of works upon general literature, science, history and biography for the use of libraries, and which should be free from the party politics of the day, and scriptural and unsectarian in their character; fourthly, the promotion of adult classes, particularly upon the subjects respecting which interest had been excited by the lectures and libraries. The operations of the Union were conducted by a committee in London, appointed annually from amongst the members, and communi-

cation and co-operation were kept up with the provinces by means of local branches. Amongst the subjects for discussion recognized and supported by the Union were such questions as, "Ought we to ask for the ballot?" "The voluntary principle or an establishment—which?"—Held, that some of the purposes of the Union and the means employed, were different from those of science, literature or the fine arts; and, therefore, that the premises occupied and used for the purposes of the Union were rateable to the relief of the poor. *Scott v. the Churchwardens of St. Martin-in-the Fields, Westminster*, 25 Law J. Rep. (n.s.) M.C. 42; 5 E. & B. 558.

By a local act Commissioners were empowered to raise water to be applied to no other purpose than watering the streets of the town of L, except in case of fire. Under this act the Commissioners purchased land in the township of D, without the borough of L, and erected works thereon for raising water, which was conveyed and distributed by pipes in D, partly without and partly within the borough, the latter being rated to a reservoir in D, and in the borough which was not rated to the poor. The whole of D was within the limits of this act. By a subsequent act, which repealed the above statute, the powers and property of the Commissioners were transferred to the corporation of L, who were empowered to supply water for public purposes to the borough, which comprised part of D and other townships and places. This act provided for raising money by rates for defraying the expenses thereof. Under this act the corporation became occupiers of the before-mentioned works, plant and pipes. The above acts related solely to the supply of water for public purposes, and water for domestic purposes in the borough was supplied by two private companies. By another act, passed in 1847, the works of these water companies were transferred to the corporation, who were empowered to supply water to the inhabitants both for public and private purposes, and to make and use new works for that purpose. This act provided for raising rates and keeping a "water account," on the credit of which money might be borrowed, and for the reduction of the rates so that no more should be raised than was necessary to meet the expenditure on the water account. Under this act the corporation occupied the works of the two companies, and supplied certain inhabitants with water. By subsequent acts the corporation was empowered to supply water for all or any of the purposes for which it might be supplied under the above acts. Since the act of 1847 they supplied water for both public and private purposes in the borough, and occupied the property before mentioned solely for supplying water under the authority of the acts, and connected the mains formerly belonging to the Commissioners with those of the two companies, so that the water arising from both sources was used indiscriminately for public and domestic purposes; and they charged rates and appropriated them to "the water account":—Held, that the corporation were rateable to the relief of the poor in D, in respect of the land, works, &c. occupied by them as before mentioned in that township. *The Mayor, &c. of Liverpool v. the Overseers of West Derby*, 25 Law J. Rep. (n.s.) M.C. 112; 6 E. & B. 704.

A building was rented of a private person by the Postmaster General, and occupied by his deputy

as a local post-office. The building consisted of three rooms, one for the use of the letter-carriers, one for the issue and payment of money-orders, and the third for sorting letters, and for paying, registering and delivering post-letters and for the sale of stamps to the public, the deputy-postmaster being allowed a commission on such sale, in addition to a fixed salary. There were in this room a number of boxes or pigeon-holes, each appropriated to different persons, into which the letters addressed to them were sorted, and delivered to them at the post-office, instead of at their respective addresses by the letter-carriers, for which accommodation an annual gratuity of from one to two guineas each was paid, but the money so received was appropriated to the public revenue. No one resided in the building, the whole of it being continuously used for the above purposes:—Held, that the building was exempt from rateability, being occupied by the Crown, and used only for purposes strictly connected with the public department of the Post Office. *The Queen v. Smith*, 26 Law J. Rep. (n.s.) M.C. 105.

The University of Oxford is exempt from liability to be rated to the relief of the poor in respect of the occupation of the Bodleian Library, the Divinity and other Schools, the Convocation House, the Old Convocation House and Law School, the Clarendon Buildings, and the University Galleries, such occupation being necessary for the public purposes for which the University was erected, namely, the advancement of national religion and learning, and appearing not to be used for any quasi private purpose inconsistent with the public purposes of the University. The same exemption applies to the parts of the Sheldonian Theatre, the Ashmolean Museum, and the Taylor Institution used for the ordinary purposes of the University; but not to a cellar under the Theatre which is used by an individual as a place of deposit for his books, though no rent be paid to the University; nor to the lower part of the building containing the Ashmolean Museum, which is fitted up and used as a residence by the reader in mineralogy; nor to so much of the Taylor Institution as is used as a residence for the librarian, not necessarily, but for his own convenience. The University is also exempt in respect of the Botanic Garden; but this exemption does not apply to the residences of the Professor of Botany, the porter, and the gardener. The colleges are liable to be rated in respect of the occupation of college chapels and college libraries. *In re the Oxford University and the City of Oxford Poor-Rate*, 27 Law J. Rep. (n.s.) M.C. 88; 8 E. & B. 184.

A public officer who occupies premises under the Crown, in which he is required by the Crown to reside for the discharge of his duties, is rateable to the poor-rate for the excess only beyond the accommodation reasonably necessary for him in the discharge of his duties. *Per Coleridge, J. and Erie, J.*—the accommodation reasonably necessary for the officer must be taken with reference to his rank and position, and the number, if any, of his family. *R. v. Stewart*, 27 Law J. Rep. (n.s.) M.C. 81.

A building, which is used as a district police station, and in which certain of the constables reside, being required to do so for the purposes of the county constabulary, each having no more accommodation than is requisite for his grade in life, and

a deduction being made from their wages as a charge for rent for this occupation, is not rateable to the relief of the poor. *The Queen v. the Justices of Lancashire*, 27 Law J. Rep. (N.S.) M.C. 209.

A society, called the Bradford Library and Literary Society, were owners and occupiers of a library and reading-room, the books consisting of the standard authors, of reviews, magazines, pamphlets and novels; the number of proprietors, or subscribers to the society, was limited to 600 (temporary residents being admitted at a quarterly subscription); and they had the exclusive privilege of using the library and reading-rooms, and of having a certain number of books at their own houses, and of each introducing one non-resident to the library. Every person becoming a proprietor by the purchase of a share paid eight guineas, and an annual subscription of one guinea in advance, or he might compound for his annual subscription during his life by one payment of fifteen guineas; fines were imposed for allowing the subscription to get in arrear, and if the subscription was not paid within three years the share became forfeited. There were also fines for other infringements of the rules. Any proprietor not indebted to the society might transfer his share, subject to the regulations for the time being. No bonus or division of money was allowed by the laws among the shareholders; and the funds of the society were exclusively applied to the library and objects connected with it.—Held, that the society was instituted for the purposes of science, literature and the fine arts exclusively; and that the fact of the use of the library and its contents being confined to the subscribers did not make their purposes less the primary object of the society, or prevent it from coming within the exemption in the 6 & 7 Vict. c. 36, s. 1. Held, also, that the contributions were voluntary, the obligation to pay being voluntarily incurred; and that the personal benefit derived by the contributors, in return for their subscription, was not such as to take them out of the meaning of "voluntary contributions" in the proviso to the above section. Held, therefore, thirdly, that a building occupied by the society exclusively was exempt from rates. *The Queen v. the Bradford Library and Literary Society*, 28 Law J. Rep. (N.S.) M.C. 78; *nom. The Bradford Library Society v. the Churchwardens of Bradford*, 1 E. & E. 88.

The property of the Liverpool Library, designed to provide a fund of literary instruction and entertainment for the proprietors, is held in a limited number of transferable shares, having a market value, the holders of which subscribe one guinea annually, entitling them to the use of books, but the rules of the institution provide that it shall not be lawful to make any dividend, gift, division, or bonus in money or otherwise unto or between the members.—Held, that the library was, under the 6 & 7 Vict. c. 36, exempted from local rates as an institution for the purposes of literature; and Held, also, that it was so exempted even from local rates imposed under a local act passed after the 6 & 7 Vict. c. 36. *The Shareholders of the Liverpool Library v. the Mayor, &c. of Liverpool*, 29 Law J. Rep. (N.S.) M.C. 221.

A storekeeper or porter employed by the Crown in the public service, occupying premises belonging to the Crown for the purpose of performing such

service, is not rateable in respect of such occupation, although it constitutes part of the emolument of his office. But, if he have an occupation of more than is reasonably necessary for the performance of such service, he is rateable in respect of the excess, and of no more. In estimating the question of excess, the station of the party employed should be taken into consideration; and reasonable accommodation for his family will not constitute an excess. An excess which is merely trifling ought to be disregarded. The same rule applies to the governor of a garrison town, occupying Crown property within the town, though he is also commanding officer of a military district much more extensive than the town. The rule is applicable, though none of the duties are executed in the premises occupied. *Regina v. Stewart*, 8 E. & B. 860.

Houses, the property of a subject, were taken on lease by the Postmaster General, and occupied as a post-office, for the purposes of the Post-office revenue:—Held, that the premises, being occupied by the servants of the Crown for public purposes, no one was rateable in respect of the occupation of them. *Smith v. the Guardians of Birmingham*, 7 E. & B. 483.

Buildings were provided by Justices of a county, under the statutes 2 & 3 Vict. c. 93, and 5 & 4 Vict. c. 88, for a police district of a county. The furniture belonged to the Justices, who paid for it out of the police rate. The buildings consisted of premises used exclusively for the police offices, cells, and rooms for the residence and accommodation of the police serjeant and constables, who reside there (one of them with his wife), and had a deduction made from their wages in respect of the rent: but they enjoyed no accommodation more than was necessary for their convenient occupation in their official capacity, and for the purposes for which they were placed there:—Held, that the buildings were occupied exclusively for public purposes, and the Justices were not rateable to the poor in respect thereof. *Justices of Lancashire v. the Overseers of Stretford*, E. B. & E. 225.

(c) Rateable Value and Principle of Assessment.

In assessing a commutation tithe-rentcharge of a benefice to the poor-rate, deductions are to be allowed in respect of the expenses of collection, including law expenses and losses by ultimate non-payment; but no allowance is to be made for the personal services of the incumbent in discharging the duties of his cure. The principle of such assessment is, that the rentcharge is to be assessed, like all other property, according to what it might reasonably be expected to let for from year to year; but beyond allowances for the expenses of collection, law expenses and bad debts, a deduction by way of tenant's profits is not necessarily to be made—(*Coleridge, J. dissenting*). The poor-rate is to be deducted: and this, though the composition, before commutation, had been calculated on the principle of being paid free from poor-rate, and the rentcharge had been fixed with an addition in respect of this circumstance. Tenant's property-tax is to be deducted; but not landlord's property-tax or land-tax. First-fruits and tenths (and other ecclesiastical dues, if any, of the same character) are to be deducted in the proportion which the rentcharge bears to the whole *annui proventus*

of the living. An allowance is to be made of any sum contributed by the incumbent towards a district chapel in the parish, if not a mere voluntary contribution; and a reasonable allowance is also to be made for curate's stipend, where the curate is not employed as the mere substitute of the incumbent, but is required by law in addition to the incumbent from the population or value of the living, or where, if not required by law, the wants of the parish make his services necessary in addition to those of the incumbent properly discharged. In metropolitan parishes, the general rate and lighting rate, levied under the 18 & 19 Vict. c. 120. s. 161, are tenant's rates, and are to be deducted. *The Queen v. Goodchild*, 27 Law J. Rep. (n.s.) M.C. 233; E. B. & E. 2.

In assessing the commutation tithe-rentcharge and parsonage-house of a benefice to the poor-rate, no deduction is to be allowed, in order to ascertain the rateable value, in respect of a sum paid annually by the incumbent to the governors of Queen Anne's Bounty, as interest and part principal of money borrowed by him to rebuild the house, such payment being secured by a mortgage on the profits of the benefice. *The Queen v. Hawkins*, 27 Law J. Rep. (n.s.) M.C. 248; E. B. & E. 2.

A tenant occupied land under a parol demise to him from year to year, the right to the game and of entering for the purpose of taking and killing it being reserved to the landlord. The rateable value of the occupation of the land without the right was 11l. 5s. 8d., and with the right, 26l. 19s. 8d. The Quarter Sessions having found the above facts in a case on appeal against a poor-rate, in which the tenant was rated at the higher value,—Held, that he was only liable to be rated at the lower value. *The Queen v. the Inhabitants of Thurlstone*, 28 Law J. Rep. (n.s.) M.C. 106; 1 E. & E. 502.

A waterworks company was empowered by act of parliament to construct works and lay down mains and pipes under certain highways, and to supply certain parishes with water; in the parish of H, not being one of these parishes, the company erected engine-houses and other buildings, containing apparatus for raising water from the Thames, and laid down a main under the highway, which ran about a mile through H, and conveyed the whole of the water supplied by the company to reservoirs in another parish, whence the water was distributed by other mains and pipes to the customers in these several parishes. The company derived no direct profit whatever in H, and had no freehold or leasehold interest in the soil of the highway:—Held, first, that the company was rateable to the poor-rate for its mains, being fixed capital vested in land, the company being in possession of the mains buried in the soil, and so, *de facto*, in occupation of the space in the soil filled by the mains for a purpose beneficial to itself. Secondly, as to the principle on which the company was to be rated in H in respect of the plant, engine-houses, buildings, wharfs, mains, lands and premises,—that it was to be rated as for so much land and buildings, with fixtures and machinery attached, and deriving some additional value from their capacity of being applied to such purposes as those of a water company: such additional value being derived from an increase of demand beyond supply, according to the principle regulating exchangeable value, and not by reference to receipts earned in another

parish, beyond assuming that they were sufficient to pay all outgoings, including profits on capital. *The Queen v. the Company of Proprietors of the West Middlesex Waterworks*, 28 Law J. Rep. (n.s.) M.C. 135; 1 E. & E. 716.

The Archbishop of Canterbury, being owner of the impropriate rectory and tithe-rentcharge of the parish of H, and of a piece of land thereunto appertaining, granted (under the Augmentation Acts, 29 Car. 2. c. 8. and 1 & 2 Will. 4. c. 45.) to the perpetual curate, for the time being, of T an annual rent of 40l., to be charged upon and yearly issuing out of the said rectory, tithe-rentcharge and land; and he afterwards leased the same to G for twenty-one years, G yielding and paying yearly to the Archbishop 9l. 18s., and also 6l. 16s. for redeemed land-tax, and to the perpetual curate, for the time being, of T, the said sum of 40l.:—Held, that, in assessing G to the poor-rate of H, as occupier of the tithe-rentcharge, G was not entitled to any deduction in respect of the yearly payment of 40l., such payment being so much rent paid for his occupation of the tithe-rentcharge, and not a charge upon him as occupying tenant, nor so much tithe-rentcharge withdrawn from his occupation. *The Queen v. Groves*, 29 Law J. Rep. (n.s.) M.C. 179.

Where a waterworks company use pipes and reservoirs for the conveyance of water in and through several parishes, in such a manner that the whole form together one apparatus, and so that a part is rateable in each parish, it is not the correct principle, in ascertaining the rateable value of the apparatus in any particular parish, to take the rateable value of the whole apparatus in all the parishes in which it is situate, and then to divide that value among the several parishes according to the quantity of land occupied by the apparatus in each parish. *The Chelsea Waterworks Co. v. the Overseers of Putney*, 29 Law J. Rep. (n.s.) M.C. 286.

(d) Appeal against.

Where a party has appealed against a poor-rate, on the ground that other persons are omitted or under-rated, and has served the notice of appeal on the parish officers, but not on the parties objected to, as required by the 41 Geo. 3. c. 23. s. 6, the next Sessions are bound to enter and respite the appeal, under the 17 Geo. 2. c. 38. s. 4. *Regina v. Eyre*, 26 Law J. Rep. (n.s.) M.C. 14; 6 E. & B. 992.

On appeal to Quarter Sessions against a poor-rate, the appellant having paid the amount, the rate was reduced, but no order under the 41 Geo. 3. c. 23. s. 8. was made for repayment by the overseers of the overplus. The overseers were willing to allow the overpayment on account of subsequent rates which it more than covered; but the poor-law auditor intimated that he should not certify such allowance, as there had been no order of Quarter Sessions. On motion for a mandamus to Justices to issue a distress warrant for the subsequent rates, the Court refused the writ. *The Queen v. Parker*, 26 Law J. Rep. (n.s.) M.C. 199; 7 E. & B. 155.

(B) CHURCH RATE.

The vestry of a parish in 1826 resolved to enlarge the parish church, and authorized the churchwardens, with the assistance of a committee, to borrow for the purpose, under the 58 Geo. 3. c. 45, 2,000l.

on the credit of the rates; and the consent of the incumbent and of the bishop of the diocese was given to this resolution. The work was done, and, in 1830, a sum of 400*l.* remaining due to the contractors, it was resolved by the vestry that the said sum should be treated as a loan by the contractors, and as a portion of the 2,000*l.*, and that the payment thereof should be secured by deeds of charge upon the rates. Bonds dated the 29th of March 1830 were accordingly executed by the churchwardens, each of which, after reciting the above facts, charged the rates with 50*l.*, part of the said sum of 400*l.*, and interest thereon at 5*l.* per cent.; the said principal sum and interest to be repaid on the 29th of March then next. The whole of the work was done between 1826 and the 29th of March 1830, at which time the whole 400*l.* had become due. Interest on all the sums of 50*l.* secured by the bonds had been regularly paid until after March 1850, but no demand had been ever made to have a fund provided, nor had a fund been provided for payment of the said sums of 50*l.* Upon a mandamus to the churchwardens to make rates to pay the said principal sums of 50*l.* and the arrears of interest due thereon,—Held, first, that the consent of the committee to the borrowing of the money, if essential, was, under the circumstances, to be presumed. Secondly, that the transaction was in substance a borrowing of the 400*l.*, and therefore within the statute. Thirdly, that the bonds were not given to secure a past debt, but to pay a present debt as soon as it became due. Lastly, that there was no duty on the obligees of seeing that one-twentieth of the principal was paid off annually, and that they had not forfeited their right of proceeding against the ratepayers by their omission in that respect. *Regina v. the Churchwardens of St. Michael, Southampton*, 25 Law J. Rep. (n.s.) Q.B. 379; 6 E. & B. 867.

Upon the hearing of a summons against the defendant for non-payment of a church-rate, he gave notice to the Justices that he disputed the validity of the rate and his liability to pay it, and stated his reasons for doing so. The Justices were of opinion, though without any evidence to justify that opinion, that the allegations and notices of the defendant were not made and given in good faith, but were put forward as a pretext for avoiding payment of the rate, and therefore they made an order for payment:—Held, that they were wrong, as by the course adopted by the defendant, they were deprived of all jurisdiction to make such order. *The Queen v. Nunneley*, 27 Law J. Rep. (n.s.) M.C. 261; E. B. & E. 852.

In order to oust the jurisdiction of Justices to make an order for the payment of a church-rate, on the ground that the validity of the rate, or the liability to pay, is disputed, there ought to be a clear declining of the jurisdiction. Therefore, where upon the hearing of an information for non-payment of a church-rate the churchwardens proved their case, and the attorney for the person summoned took objections to the rate which were overruled by the Justices, and he then gave them notice that he *bond fide* disputed the validity of the rate, it was held, that the jurisdiction of the Justices was not taken away, and therefore the Court refused to grant a *certiorari* to remove the order. *The Queen v. the Justices of Salop*, 29 Law J. Rep. (n.s.) M.C. 39.

When a person summoned before Justices for non-payment of a poor-rate *bond fide* objects before them to the validity of the rate, the Justices have no power to make an order, though he does not object to their jurisdiction to decide on the points which he has raised. *The Queen v. the Justices of Leicester and Compton*, 29 Law J. Rep. (n.s.) M.C. 208.

(C) COUNTY RATE.

Tenants of lands in ancient demesne are not by reason of their tenure exempted from liability to pay county rates. *The Queen v. the Inhabitants of Aylesford*, 29 Law J. Rep. (n.s.) M.C. 83.

(D) BOROUGH RATE.

Under the 84th and 92nd sections of the Municipal Corporations Act, 5 & 6 Will. 4. c. 76, all property within a borough, except property more than 200 yards distant from a street or continuous line of houses, may be made rateable to a rate for, amongst other purposes, defraying the expenses of watching and police within the borough. *Hallett v. the Churchwardens and Overseers of the Poor of the Parish of Brighton*, 26 Law J. Rep. (n.s.) M.C. 61; 7 E. & B. 342.

(E) HIGHWAY RATE.

Where the district for which a local board of health is appointed under the 11 & 12 Vict. c. 63, is conterminous with a single parish, the local board have power to make a highway rate under the 5 & 6 Will. 4. c. 50, for the repairs of the highways in the district, and are not bound to raise money for that purpose by a general district rate. *Hanson v. the Local Board of Health, Exsom*, 25 Law J. Rep. (n.s.) M.C. 27; 5 E. & B. 599.

(F) LIGHTING, WATCHING AND PAVING RATES.

The London Dock Company, under their local acts, were liable to be rated for paving expenses, in respect of property situate within the streets, lanes and places which were paved, and adjoining to or opening into the same. By the 90th section of 18 & 19 Vict. c. 120, all powers relating to paving are vested in vestries and district boards. By the 158th section, vestries shall require overseers of the parish to levy the sums which such vestries shall require for the execution of the act. By the 159th section, vestries may exempt parts of parish if not benefited by the expenditure from payment; and by the 161st section, such rates shall be levied on the persons and in respect of property by law rateable to the relief of the poor, and shall be assessed on the net annual value of such property ascertained by the rate for the time being for the relief of the poor:—Held, that although the 18 & 19 Vict. c. 120, does not direct that the rating for paving expenses should be laid only upon such property as was at the time of passing that statute rated thereto, yet by the 159th section a duty is cast on the vestry to apportion the burden according to the benefit, and that if part of the property of the Dock Company had not equal benefit with the rest of the property in the parish rated to the poor from the paving expenses, in respect of that part the company was entitled to be relieved *pro tanto*. Held, also, that if the fact of the inequality of benefit exists—although it has not

appeared to the vestry—the Court of Appeal would be bound to direct the rate to be amended according to the truth of the fact. Held, also, that the Dock Company were exempt from being rated in respect of profits which are not immediately connected with any use of paved streets, such as those accruing from the use of the area covered with water by ships, and from the use of bonded warehouses for goods which, having been imported, remain there for a time and are then exported. *Howell v. the London Dock Co.*, 27 Law J. Rep. (N.S.) Q.B. 177; 8 E. & B. 212.

A commutation tithe-rentcharge is liable to the general rate and lighting rate levied under the Metropolitan Local Management Act (18 & 19 Vict. c. 120.) s. 161, but not to the sewers rate, being within the exemption of section 164, when the practice, before the 11 & 12 Vict. c. 112, was to exempt the tithes of the parish from the sewers rate. *The Queen v. Goodchild*, 27 Law J. Rep. (N.S.) M.C. 251; E. B. & E. 2.

Semble—that a commutation tithe-rentcharge is not liable by law to contribute to a sewers rate. *Ibid.*

By the 3 & 4 Will. 4. c. 90. s. 33, the Watching and Lighting Act, the owners and occupiers of houses, buildings and property, other than land, rateable to the relief of the poor, shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of the act. The appellants were the occupiers of certain docks, covering an area of 165 acres, 95 of which formed a wet dock, or tidal basin:—Held, by *Lord Campbell, C.J., Wightman, J. and Crompton, J.*, that this dock or basin was property *quodam generis* with the houses and buildings mentioned in the act, and therefore that the appellants were rateable at the higher amount. Held, by *Erie, J.*, that they were only rateable at the lower amount, as the area of 95 acres was “land.” *Peto v. the Parish of West Ham*, 28 Law J. Rep. (N.S.) M.C. 240.

Real property within the district of a local board of health cannot be assessed to a district rate, unless there be some person having such an occupation as would make him liable to the poor-rate in respect thereof. *Hodgson v. Local Board of Health of Carlisle*, 8 E. & B. 116.

A water company were occupants of pipes under the surface of the soil in a parish in which the provisions of the General Lighting Act (3 & 4 Will. 4. c. 90.) had been adopted. The parish was within the metropolitan district. In a lighting rate imposed under the Metropolitan Local Management Act, the company were rated as coming within the description in section 165. of occupants of “houses, buildings and property, other than land,” at a rate three times greater than that at which the occupiers of land were rated:—Held, that they were rateable at the lower rate, as occupiers of land. *Regina v. the Southwark and Vauxhall Water Co.*, 6 E. & B. 1008.

(G) SEWERS RATE.

By section 96. of the Metropolitan Sewers Act (11 & 12 Vict. c. 112), a person, who has neglected to complain against a sewers rate within one month after the making, cannot afterwards dispute his liability

to pay it, on the ground that it was assessed on an erroneous principle. *The Metropolitan Board of Works v. the Vauxhall Bridge Co.*, 26 Law J. Rep. (N.S.) Q.B. 253; 7 E. & B. 964.

Section 76. has not altered the ancient principle of rating for sewers; and in assessing property, under that act, to a sewers rate, regard must be had to whether any and what benefit is derived by the property from the sewers. *Ibid.*

By section 170. of the 18 & 19 Vict. c. 120. (the act for the better Local Management of the Metropolis), the Metropolitan Board of Works are empowered from time to time to ascertain and assess upon the city of London and the other parts of the metropolis the sums which, in their judgment, ought to be charged upon the said city and such other parts respectively, for defraying the expenses of the board in the execution of the act. By section 172, for obtaining payment of the sums so assessed, the said board are empowered to issue precepts requiring payment thereof to their treasurer, &c., and every such precept for any sum assessed upon any parish shall be directed to the vestry thereof. By section 174. all sums which any vestry may be required by such precepts to pay shall be raised in like manner as if the same were required by the vestry for defraying the expenses of such vestry in execution of their powers and duties under this act in relation to the sewerage of their parish. By section 168. every vestry is empowered, by order under their seal, to require the overseers of their parish to levy and pay over to the treasurer of such vestry, &c. the sums which such vestry may require for defraying the expenses of the execution of the act in relation to sewerage, &c. By the 4 Vict. c. xvii. ss. 7, 12, 18, the guardians of the poor of the parish of C alone have the power of making and levying the poor-rates in that parish; and by section 250. of the 18 & 19 Vict. c. 120, the words “overseers of the poor” shall include any person authorized to make or collect, or cause to be made or collected, the rate for the relief of the poor. Under the provisions of the 18 & 19 Vict. c. 120, above referred to, a precept was issued by the Metropolitan Board of Works to the vestry of the parish of C, requiring them to pay to the treasurer, &c. of the said board a sum of money for defraying the expenses of the said board in the execution of the act. The vestry of the said parish of C thereupon issued their order to the overseers of their parish, requiring them to levy and pay over the said sum of money. This order was duly served upon the guardians, who, in pursuance thereof, made a rate in which the appellant was rated. The heading of the rate shewed that it was made “for defraying the expenses of the Metropolitan Board of Works in the execution of the act,” &c. After the heading appeared the names of five persons, who were guardians of the parish, and at the end of the rate was the usual declaration—“We, the guardians of the poor,” &c., signed by six guardians, three of whom were three of those who had signed the rate. Proceedings were taken against the appellant in consequence of his refusing to pay the sum at which he was assessed:—Held, upon a case stated by Justices, that the rate was good, though it did not set out the precept of the board or the order of the vestry. Held, also, that it was no objection to the rate that the order of the

vestry was addressed to the overseers instead of to the guardians. Held, also, that the rate was sufficiently signed. *Quare*—whether there is any power of appeal to the Sessions against such a rate. *Christie v. the Guardians of the Poor of St. Luke, Chelsea*, 27 Law J. Rep. (N.S.) M.C. 153; 8 E. & B. 992.

(H) DISTRESS FOR RATES.

On a summons before Justices to enforce a poor-rate of a parish, as soon as the person summoned is shewn to be in the visible occupation of the property rated within the parish, the Justices are bound to issue a warrant of distress, and cannot go into the question of whether or not the occupation be beneficial, which is matter only for the Quarter Sessions on appeal. *The Queen v. Bradshaw*, 29 Law J. Rep. (N.S.) M.C. 176.

A rate made in fact for the relief of the poor, but which does not shew by intrinsic evidence, either by the heading or by something in the body of the rate, for what purpose it is made, is void; and this Court discharged a rule in lieu of a mandamus to order Justices to issue their distress warrant to levy such a rate. *Regina v. the Eastern Counties Rail. Co.*, 5 E. & B. 974.

Quare—whether a rate for the relief of the poor, duly headed, in which the description of property rated is "land," &c., be valid. The Court would not decide this on motion, but made absolute a rule ordering the Justices to issue their distress warrant to levy such a rate. *Ibid*.

(I) EXEMPTION FROM.

By public acts of parliament for the improvement of the town of M, in the county of K, Commissioners were authorised to levy annually for the purposes of the acts (*inter alia*) a certain rate on all gaols and other public buildings situate within the said town. A subsequent act, reciting "that it was expedient that the county of K should be relieved and exonerated from any taxes in respect of any of the county gaols," enacted, "that no rate, tax, or assessment whatsoever, parliamentary or parochial, should be raised, assessed, or levied in, or be payable by the said county, for or on account of any of the said gaols."—Held, that this exempted a county gaol situate in M from rates assessed under the former acts. *The Queen v. the Justices of Kent*, 29 Law J. Rep. (N.S.) M.C. 191.

RECEIVING GOODS STOLEN OR SUSPECTED TO BE PURLOINED.

The prisoner, out of the county of W, received a bank note knowing it to have been stolen, and sent it from a place out of the county of W to bankers in the county of W, by whom the note had been issued, in a letter requesting them to cash it:—Held, that the Post Office authorities in W were to be considered agents of the prisoner; and that, therefore, their possession of the note in W was his possession of it there. Consequently, that he might properly be convicted in W of the receiving it knowing it to have been stolen, under the statute 7 & 8 Geo. 4. c. 29. s. 56, which enacts that a receiver may be tried in any county in which he shall have the stolen pro-

perty in his possession. *The Queen v. Orger*, 26 Law J. Rep. (N.S.) M.C. 192; Dears. & B. 824.

On a charge for receiving goods knowing them to have been feloniously stolen and carried away, the prisoner may be convicted if the goods have been embezzled, and he received them knowing them to have been embezzled; for by the statute 7 & 8 Geo. 4. c. 29. s. 47, embezzlement is deemed stealing. *The Queen v. Frampton*, 27 Law J. Rep. (N.S.) M.C. 229; Dears. & B. 585.

By section 10. of the 17 Geo. 3. c. 56. it shall be lawful for any two Justices of the Peace, upon complaint made to them, upon oath, that there is reason to suspect that purloined or embezzled "materials" are concealed in any dwelling-house, outhouse, yard, garden, or other place or places, by warrant to cause every such, &c. to be searched; and if any such materials shall be found therein, to cause the same and the person or persons in whose house, &c. the same shall be found to be brought before any two Justices; and if the said person or persons shall not give an account, to the satisfaction of such Justices, how he, she or they came by the same, then the said person or persons so offending shall be deemed or adjudged guilty of a misdemeanour. E, who carried on business as a silk dealer and manufacturer, and as a seller of goods on commission, had a warehouse upwards of a mile and a half from his dwelling-house. The warehouse was used for business purposes only. In it were found certain materials of the description mentioned in the statute, and such materials were suspected to have been purloined or embezzled. E failed to give an account, to the satisfaction of the Justices before whom he was charged, under the 10th section, of how he came by the same, and was convicted by the Justices:—Held, that the warehouse was a "place" within the meaning of the section, and that the Justices had jurisdiction to convict. *The Queen v. Edmundson*, 28 Law J. Rep. (N.S.) M.C. 213.

RECOGNIZANCES.

At the Quarter Sessions, held on the 18th of October, an appeal against a refusal to grant an alehouse licence was heard and dismissed, and an order made that the appellant should "forthwith pay the respondents" their costs. A blank was left in this order for the amount of the costs, which was not filled up till the taxation took place, which was at some time between that day and the 14th of November, to which the Sessions were adjourned. At the next Quarter Sessions, held in January, the recognizances which had been entered into by the appellant under the 9 Geo. 4. c. 61. s. 27, conditioned for his appearance at the Michaelmas Sessions, and then and there trying his appeal and paying such costs as the Court might award, were estreated, upon affidavit of a demand and refusal to pay the costs specified in the order having been made previous to the January Sessions:—Held, that the January Sessions had jurisdiction to estreat the recognizances: also, that it was not necessary the order should direct the costs to be paid to the clerk of the peace under 11 & 12 Vict. c. 43. s. 27. *Regina v. the Justices of the Isle of Ely*, 25 Law J. Rep. (N.S.) M.C. 1; 5 E. & B. 489.

REGISTRATION OF BIRTHS, DEATHS AND MARRIAGES.

[Amendment of the Act concerning Non-parochial Registers, and the Acts for Marriages, and for registering Births, Deaths and Marriages in England, and concerning Vaccination, by 21 Vict. c. 25.—Two Acts of the Seventeenth and Eighteenth Years, and of the Eighteenth Year, of Her present Majesty, relating to the Registration of Births, Deaths and Marriages in Scotland, amended by 23 & 24 Vict. c. 85.]

RELEASE.

[*Solomon v. Graham*, 5 E. & B. 309; 6 Law J. Dig. 642.]

To an action for 337*l.* 1*s.* 10*d.* the defendant pleaded a release generally, to which the plaintiff replied *non est factum*, and also that at the time when he executed the release a blank was left in it for the amount of the debt released, which was afterwards filled up, without his knowledge or consent, with an erroneous amount, and that he had never ratified or adopted it. The facts were, that the defendant being indebted to the plaintiff in 337*l.* 1*s.* 10*d.*, and the plaintiff being indebted to the defendant in 142*l.* 9*s.* 7*d.*, an arrangement was made by which the defendant was to be released on payment of 10*s.* in the pound to his creditors by a third party. Accordingly, a composition deed was executed by the plaintiff and the other creditors, which recited that the defendant was indebted to the several creditors parties thereto, in the sums set opposite to their respective names, and such creditors, in consideration of the covenant to pay them 10*s.* in the pound on the amount of their respective debts, released the defendant from all debts then owing to them by the defendant. At the time when the deed was executed by the plaintiff a blank was left for the sum to be set opposite to his name. This blank was subsequently filled up, without the knowledge or authority of the plaintiff, by inserting in it the full amount of 337*l.* 1*s.* 10*d.* due from the defendant to the plaintiff. The jury found that it was the intention of the parties that the deed should operate only on the balance due by the defendant to the plaintiff, after setting off the cross debt due by the plaintiff to the defendant:—Held, that the effect of the deed was to release the balance only, and not the whole of the 337*l.* 1*s.* 10*d.*, and that the issue on *non est factum* ought to be found for the plaintiff. *Semble*—that the second replication was proved, and afforded an answer to the defendant. *Fasakery v. M'Knight*, 26 Law J. Rep. (N.S.) Q.B. 30; 6 E. & B. 795.

To a declaration for goods bargained and sold the defendant pleaded that the cause of action accrued to the plaintiff against the defendant and A, B and C jointly, and not otherwise, and that the defendant was not separately liable, and that the plaintiffs by deed released A, B and C from the cause of action. Replication, that the deed was a deed of assignment from A, B and C of their estate and effects for the benefit of their creditors, and contained words purporting, if considered without reference to any other part of the deed, to release, as in the plea pleaded, but that in another and earlier part of the same deed

it was agreed as follows: "that it shall be lawful for the creditors to execute these presents without prejudice to any mortgage, lien or security which they may have for their respective debts, or any part thereof, or to any claim against any surety or sureties, or any other person or persons who may be liable for the payment thereof;" that all the creditors who executed the deed executed without prejudice as aforesaid:—Held, on demurrer to the replication, that, construing the deed as pleaded in the plea with the qualification introduced by the replication, it amounted only to a covenant not to sue, and not to a release, and that the liability of the defendant was reserved, whether it was originally joint only or joint and several. *Willis v. De Castro*, 27 Law J. Rep. (N.S.) C.P. 245; 4 Com. B. Rep. N.S. 216.

In an action in the county court by executors, the defendant, having shewn that the action was brought by one executor without the concurrence of his co-executor, put in evidence a release, which had been given to him the day before the trial by the non-concurring executor. The Judge refused to allow the plaintiffs' counsel to examine the executor who had executed the release as to the circumstances under which he had executed it, for the purpose of eliciting from him whether it had been fraudulently obtained:—Held, that the Judge was wrong in so refusing; and that such examination ought to have been allowed. *Robinson v. Vernon*, 29 Law J. Rep. (N.S.) C.P. 135; 7 Com. B. Rep. N.S. 371.

REPLEVIN.

To maintain the proceeding by replevin there must be a taking of the chattel out of the possession of the owner (the plaintiff). *Mennie v. Blake*, 26 Law J. Rep. (N.S.) Q.B. 399; 6 E. & B. 842.

The plaintiff allowed F to purchase with his (the plaintiff's) money a horse, harness and cart, which were to be the property of the plaintiff, but of which F was to have the possession and use, subject to the occasional use that the plaintiff might require, and to their being given up to the plaintiff when he required. F, being about to emigrate, used the horse, harness and cart in taking his effects to the pier at which he was to embark, and on leaving he delivered them to the defendant, telling him to take them for a debt due to him from F for fodder supplied to the horse, and adding that he also owed money to the plaintiff, and that if he discharged the defendant's debt the defendant was to give them up to the plaintiff. This, some time after, came to the knowledge of the plaintiff, and he demanded the horse, harness and cart from the defendant, who refused to give them up unless his debt was paid, and thereupon the plaintiff proceeded in replevin to recover the possession:—Held, that the case was not one in which the plaintiff could proceed by replevin. *Ibid.*

The 9 & 10 Vict. c. 95. s. 121. enables either party to an action of replevin to remove the cause from the county court, if he declares that the title to a corporeal or incorporeal hereditament is in question, or that the rent or damage in respect of which the distress was taken exceeds 20*l.*, and becomes bound with two sureties to prosecute the suit with effect and without delay, and to prove that such title is in dispute, or that there was ground for believing that

the rent or damage exceeded 20l.:—Held, that the words "prosecute the suit with effect" are applicable to the case of a removal by a defendant, who is bound, so far as in him lies, to carry the suit to a successful termination. *Tummons v. Ogle*, 25 Law J. Rep. (n.s.) Q.B. 403; 6 E. & B. 571.

Quære—whether, under such a bond, the party is liable for more than the taxed costs as between party and party. *Ibid.*

RENT-CHARGE.

If an estate, upon which two rent-charges exist, becomes unable to pay both, the owner of the first rent-charge cannot enter and expend money upon the estate so as to oust the owner of the second rent-charge of his rights. *Hooper v. Cooke*, 25 Law J. Rep. (n.s.) Chanc. 62.

A bill by the owner of a first rent-charge against the owner of the second rent-charge, claiming monies which he had expended to make the estate available for the payment of his claim, cannot be sustained. *Ibid.*

The plaintiffs were entitled to a rent-charge, created by a deed of 1778, which contained a power on non-payment to enter upon the premises charged, and receive the rents, &c. until satisfaction of all arrears of the rent-charge, "together with all such costs, &c. as should be laid out, &c. by or by reason of the non-payment thereof." In 1844, the rent-charge being in arrear, and the property so dilapidated as to be unproductive, the plaintiffs entered into possession and expended money in repairs, &c.:—Held, affirming a decision of the Master of the Rolls, that they had no lien on the land for the monies so expended, whether the defendants, the owners of a subsequent rent-charge, had notice of such repairs and had acquiesced in the making thereof or not, and that the remedy of the plaintiffs, if any, was at law, and depended on the construction of the deed of 1778. *Hooper v. Cooke*, 25 Law J. Rep. (n.s.) Chanc. 467.

The owner in fee of a small freehold estate granted twenty-two separate rent-charges to several persons and their heirs, each of which was made subject to the others; the whole fell into arrear, and the power of distress and entry could not be enforced. Upon a bill by one of the grantees, on behalf of himself and the other grantees,—Held, that the arrears must be raised by a sale of the estate. *White v. James*, 28 Law J. Rep. (n.s.) Chanc. 179; 26 Beav. 191.

RETURNS.

[Certain Enactments requiring Returns to be made to One of the Secretaries of State repealed by 21 & 22 Vict. c. 67.]

REVENUE.

[The Mode of providing for certain Expenses now charged upon certain Parts of the Public Revenue altered by 19 & 20 Vict. c. 59; 34 Law J. Stat. 107.—Repeal and Reimposition under new Regulations of the Duty on Race-horses by 19 & 20 Vict.

c. 82.—Valuation of Lands in Scotland. See 20 & 21 Vict. c. 58.—The Levying and Collection of the Inventory Duty payable upon Heritable Securities and other Property in Scotland regulated by 23 & 24 Vict. c. 80.]

- (A) CUSTOMS AND EXCISE.
- (B) INCOME AND PROPERTY TAX.
- (C) SUCCESSION DUTY.

(A) CUSTOMS AND EXCISE.

[The Use of Rice in the Distillation of Spirits permitted by 19 & 20 Vict. c. 51.—The Laws and Duties of Customs further altered and amended by 19 & 20 Vict. c. 75.—The Laws and Duties of Customs altered and amended by 20 & 21 Vict. c. 64.—Alteration of certain Duties of Customs by 21 Vict. c. 12.—Certain additional Rates and Duties of Excise granted by 21 Vict. c. 15.—Further Amendment of the Duties of Customs by 21 Vict. c. 16.—Amendment of the Laws relating to the Customs, 22 & 23 Vict. c. 37.—The Laws relating to the Customs amended by 23 Vict. c. 22.—Duties on Wine Licences and Refreshment Houses granted, and for the licensing of Refreshment Houses and the granting of Wine Licences regulated by 23 Vict. c. 26.—The Appointment and Approval of Places for the warehousing of Goods for the Security of Duties of Customs authorized by 23 & 24 Vict. c. 36.—An Act for granting to Her Majesty certain Duties on Wine Licences and Refreshment Houses, and for regulating the licensing of Refreshment Houses and the granting of Wine Licences, in Ireland, 23 & 24 Vict. c. 107.—An Act to reduce into one Act and to amend the Excise Regulations relating to the distilling, rectifying and dealing in Spirits, 23 & 24 Vict. c. 114.—Amendment of an Act of the Eighteenth Year of Her present Majesty, to amend the Law for the better Prevention of the Sale of Spirits by unlicensed Persons and for the Suppression of illicit Distillation in Ireland, 23 & 24 Vict. c. 35.—An Act to grant Duties of Excise on Chicory, and on Licences to Dealers in Sweets or Made Wines; also to reduce the Excise Duty on Hops and the Period of Credit allowed for Payment of the Duty on Malt and Hops respectively; to repeal the Exemption from Licence Duty of Persons dealing in Foreign Wine and Spirits in Bond; and to amend the Laws relating to the Excise: 23 & 24 Vict. c. 113.—An Act to grant Excise Duties on British Spirits and on Spirits imported from the Channel Islands, 23 & 24 Vict. c. 129.]

L carried on the business of a retailer of sweets or made wines, having only an Excise licence under 6 Geo. 4. c. 81, which did not extend to the sale of sweets or made wines to be consumed in the house or premises of the retailer. In the course of business L sold sweets or made wines for consumption in his shop and premises in quantities less than fifteen gallons, and as small as a glass. Thereupon L was convicted under 9 Geo. 4. c. 61. s. 18, for the offence of selling exciseable liquors not being duly licensed so to do:—Held (*Erie, J.* differing in opinion), that by the operation of the statute 4 & 5 Will. 4. c. 77, sweets or made wines ceased to be

"exciseable liquors" within the meaning of 9 Geo. 4. c. 61, and that the conviction, therefore, could not be supported. *Lancashire v. the Justices of Staffordshire*, 26 Law J. Rep. (N.S.) M.C. 171.

A substance, resembling paper, made out of the fibres of animal skin, but by a process similar to the manufacture of paper, is liable to duty as such. *Attorney General v. Barry*, 28 Law J. Rep. (N.S.) Exch. 211; 4 Hurl. & N. 470.

By stat. 9 Geo. 4. c. 61. s. 18. a penalty is imposed on every person who shall, without a licence, sell any exciseable liquor by retail to be drunk on the premises; and by section 37. "exciseable liquor is to include sweets or wine which now are, or hereafter may be, charged with duty, either by Customs or Excise. By stat. 4 & 5 Will. 4. c. 77. s. 9. the excise duty on sweets or made wines is repealed; but, by section 10, the duty on licences to be taken out by retailers thereof is continued, and all such licences shall still be taken out:—Held, that a person who, since the stat. 4 & 5 Will. 4. c. 77, sold sweets or made wines by retail, &c. without a licence, could not be convicted under section 18. of stat. 9 Geo. 4. c. 61, sweets and made wines being no longer exciseable liquors within the meaning of that act. *Dissentiente Erie, J. Regina v. Lancashire*, 7 E. & B. 839.

(B) INCOME AND PROPERTY TAX.

[See INSURANCE ON LIFE.]

[Relief granted in assessing the Income Tax on Lands in Scotland in respect of certain Public Burdens charged thereon; the Allowances to Clerks to the Commissioners of Income Tax altered and regulated; and the Laws relating to the Land, Assessed and Income Taxes, and the Redemption and Purchase of the Land Tax, amended by 19 & 20 Vict. c. 80.—The Act for extending for a limited Time the Provision for Abatement of Income Tax in respect of Insurance on Lives continued by 20 & 21 Vict. c. 5.—The Laws relating to the Payment of the Land and Assessed Taxes and Property and Income Tax in Scotland amended by 20 & 21 Vict. c. 28.—Additional Rates of Income Tax granted, and the Period of Credit allowed for Payment of the Excise Duty on Malt, reduced by 22 & 23 Vict. c. 18.—Duties on Profits arising from Property, Professions, Trades and Offices granted by 23 Vict. c. 14.]

By deed T, in consideration of 1,880*l.*, to be paid by instalments, granted, bargained, sold, assigned and transferred to E a coal mine, for fifty years, E covenanting to pay T the "sum of 1,380*l.*, being the purchase-money for the said mine of coal, by the following instalments: 150*l.* on the execution of the deed, and 150*l.* per year after that time, whether a quantity of coal equal to that amount, at the rate of 100*l.* per Lancashire acre, should be got and worked out of the said mine in the same year or not; and when in any year so many coals should be got and worked out of the said mine, &c. as would, at the rate of 100*l.* per Lancashire acre, amount to more than 150*l.* per year, then to pay 100*l.* for every such acre until the said sum of 1,380*l.* should be paid; it being the intention of the parties that, until such payment, T should not receive a less sum than 150*l.* per year, the same yearly rents or sums to be paid half-yearly on every

24th day of June and 24th day of December in each year." E having been assessed to the income tax in respect of the coal mine,—Held, that he was not entitled, under any of the provisions of the 5 & 6 Vict. c. 35, to deduct the income tax out of the half-yearly payments to T. *Taylor v. Evans*, 25 Law J. Rep. (N.S.) Exch. 269; 1 Hurl. & N. 101.

On a demise of land for a term of years, with power to the lessee to dig brick earth, and make and sell bricks, paying yearly 17*l.* 10*s.* for surface rent, and 100*l.* for royalty or brick rent, clear of all deductions except landlord's property or income tax, and also paying 2*s.* in respect of every 1,000 bricks above the first million, clear of all deductions except as aforesaid,—Held, that, under the 5 & 6 Vict. c. 35, income tax was payable by the lessor in respect of all three species of rent, and was properly assessable on the lessee, who might deduct the amount from the rent. *Edmonds v. Eastwood*, 27 Law J. Rep. (N.S.) Exch. 209; 2 Hurl. & N. 811.

Where the defendant enjoyed an annuity charged upon real property, which was to be paid "free and clear of all taxes and assessments," and refused to allow the owner to deduct the income tax charged in respect of the property,—Held, that notwithstanding the provision in the deed, the defendant was liable upon an information for penalties, imposed by the Income-Tax Acts for refusing to allow deductions of income tax, authorized by those acts, from "rents or annual payments." *Attorney General v. Shield*, 28 Law J. Rep. (N.S.) Exch. 49; 3 Hurl. & N. 834.

The defendants agreed to purchase an estate from the plaintiff for 46,000*l.*, and by deed covenanted to pay the purchase-money by instalments at the times and subject to the provisos and agreements, and in the manner thereafter expressed, that is to say, 768*l.* on every 24th of June and the 24th of December until 1884, the first instalment to be paid on the 24th of June 1855, and that in case either of the instalments should not be paid upon the day appointed or within one month after, the defendants would pay the plaintiff interest to be computed from the 24th of June or the 24th of December, as the case might be, upon which the instalment should have become payable. Provided, that no instalment payable pursuant to the covenants should be recoverable or capable of being enforced, nor should any proceedings for that purpose be commenced until after the expiration of one month from the day upon which the same should have become payable:—Held, that the defendants could not deduct income tax from the instalments. Held, also, that the proviso that no action should be brought for a month, did not operate merely as a covenant not to sue, but that the effect was to extend the period for payment for one month, and, therefore, that no action was maintainable until the month had expired. *Foley v. Fletcher*, 28 Law J. Rep. (N.S.) Exch. 100; 3 Hurl. & N. 769.

A firm of merchants having their principal establishment at New York, but having also branch establishments in England and other countries, carried on the business of buying goods in America, England and other European countries, and of selling them at a profit in New York. The defendant, a partner resident in England, and at the branch establishment, bought goods in England and

shipped them to New York for the firm:—Held, that the firm was not liable to be assessed to the income tax in respect of the profits earned by the firm from the purchase of the goods in England, and that the defendant was not bound to make a return of the profits of the firm, as the firm did not exercise trade in this country within the meaning of the Income-Tax Acts, but in America, where the profits were received and the principal place of business was situated. The defendant, however, was liable to be assessed in respect of his own share of the whole profits as a partner in the firm. *Sully, or Sulley, v. the Attorney General* (Ex. Ch.), 29 Law J. Rep. (N.S.) Exch. 464; 5 Hurl. & N. 711: reversing the judgment below. 28 Law J. Rep. (N.S.) Exch. 320; 4 Hurl. & N. 769.

(C) SUCCESSION DUTY.

J M, by will, devised his real estates to Sir S M for life, with remainder to J N M (the successor). J N M having afterwards married in 1849, his father-in-law covenanted with trustees to pay to him an annuity of 500*l.* for his life and that of his wife, provided that if J N M should, by reason of the death without issue male of Sir S M, come into possession of his estates, then the annuity should cease. Sir S M died without issue. The Succession Duty Act, 16 & 17 Vict. c. 51. s. 38, enacts that, "where any successor, upon taking a succession, shall be bound to relinquish, or be deprived of, any other property, the Commissioners shall, upon the assessable value of his succession, make such allowance to him as may be just in respect of the value of such property":—Held, on appeal against the decision of the Commissioners of Inland Revenue, that J N M was entitled to an allowance in respect of the loss of the annuity, and the Court gave judgment for the appellant, with costs. *In re Micklethwaite*, 25 Law J. Rep. (N.S.) Exch. 19; 11 Exch. Rep. 452.

In such a case the appellant is entitled to begin. *Ibid.*

G, tenant in tail, and nephew of C, tenant for life in possession, who was without issue male, joined with C in a disentailing deed to bar the estate tail of G, and all remainders expectant thereon; and subject to all estates antecedent to the estate tail of G, they limited the lands to such uses as they should jointly appoint, with remainder to the old uses. An immediate annuity of 2,250*l.* was then granted by C during his life, and secured upon his life estate to G, in consideration of which C and G joined in appointing the estates, after the death of C, to trustees for 3,000 years; and subject thereto, to the use of G in fee. The trusts declared of the term were to raise 25,000*l.*, and stand possessed of 5,000*l.* for such purposes as C should appoint, and of the 20,000*l.* for the purposes of a deed, by which C and G declared that it was to be held by the trustees for the three daughters of C, their husbands and issue, in equal shares. A further declaration was also made that the 25,000*l.* on G coming into possession of the estates, but not otherwise, should be a debt payable by G upon the death of C:—Held, that the 20,000*l.* was purchased and settled before the Succession Duties Act; and that it made the purchaser the "predecessor," and his daughters, on whom the settlement was made, his "successors"; and that a duty of 1*l.* per cent. attached. Held, also, that the gene-

ral power to appoint the 5,000*l.* reserved by the purchaser, and exercised for the general purposes of his will, made the fund a part of his general assets, and that no succession duty was payable upon it. *In re Jenkinson*, 26 Law J. Rep. (N.S.) Chanc. 241; 24 Beav. 64.

The Succession Duties Act, 16 & 17 Vict. c. 51, received the royal assent in August 1853, but came into operation on the 19th of May 1853. The tenant for life of an estate, under a will made in 1826, died in July 1853, and his eldest son, as tenant in tail, thereupon came into possession of the estate which was vested in him at his birth, under the will of 1826. The Court held, that the tenant in tail was liable to succession duty under the act. *Wilcox v. Smith*, 26 Law J. Rep. (N.S.) Chanc. 596; 4 Drew. 40.

The exemption in the Succession Duty Act, 1853 (16 & 17 Vict. c. 51.) s. 18, which enacts that no duty shall be payable "by any person in respect of a succession who, if the same were a legacy bequeathed to him by the predecessor, would be exempted from the payment of duty in respect thereof under the Legacy Duty Acts," applies only to exemptions expressly provided for by those acts. *Attorney General v. Fitzjohn*, 27 Law J. Rep. (N.S.) Exch. 79; 2 Hurl. & N. 465.

H, who died in 1803, by his will, bequeathed a sum in trust for his daughter A for life, and after her death in trust for her children. A died after the 19th of May 1853, when the Succession Duty Act (which includes every past or future disposition of property) came into operation:—Held, that although by reason of the testator's death before the passing, in 1803, of the 45 Geo. 3. c. 28, which first imposed a duty on legacies by parents to children or to descendants of children, no duty would have been payable on the bequest as a legacy, it was not exempted from duty within the meaning of the above-mentioned provision of section 18. of the Succession Duty Act; the exemption there, if applicable at all, applying to express exemptions in the Legacy Duty Acts in favour of gifts to husbands and wives, to the Royal Family, and to certain charities. *Ibid.*

Quare—whether the exemption in section 18, being in respect of a "succession," applies to the case of a succession by way of legacy. *Ibid.*

The Succession Duty Act, 16 & 17 Vict. c. 51. s. 21, by which instalments, not become due at the death of a "successor," cease to be payable, "except in the case of a successor who shall have been competent to dispose, by will, of a continuing interest," refers to the quantity of interest, and not to the personal capacity of the individual. *Attorney General v. Hallett*, 27 Law J. Rep. (N.S.) Exch. 89; 2 Hurl. & N. 368.

A person, therefore, becoming entitled to the disposable interest of a "successor" who, being insane or a feme covert, dies intestate before all or any of the instalments of succession duty are payable, is liable to the payment of such instalments. *Ibid.*

Under the Succession Duties Act a party is liable to duty in respect of property to which he has succeeded after the act came into operation, although he became entitled to it, in immediate expectancy, on the death of a person dying before the passing of the act. *Attorney General v. Middleton*, 27 Law J. Rep. (N.S.) Exch. 229; 8 Hurl. & N. 125.

Thus, where an estate was limited to A, B and C in succession, and B died in the lifetime of A, before the passing of the act, but C succeeded, on the death of A, after the act came into operation.—Held, that he was liable to pay duty on the succession. *Ibid.*

A, by will, devised real estate to B for life; remainder to C in tail male. After the testator's death B and C executed a disentailing deed, by which the property was conveyed to trustees to such uses as B and C should by deed jointly appoint, and in default, to the uses under the will. By deed of appointment the property was conveyed by them to trustees on trust for B for life, subject to an annuity of 1,000*l.* to C during the joint lives of B and C; remainder to C for life; remainder to C's eldest son for life; remainder to the second and other sons of C, with divers remainders over, with an ultimate remainder to C in fee:—Held, that on the death of B, after the Succession Duty Act, 1853, (16 & 17 Vict. c. 51.) came into operation, C was chargeable with duty as on a "succession." Held, also, that C was not entitled to an allowance under section 38, from the value of such succession in respect of the annuity which ceased to be payable on the death of B. *Attorney General v. Sibthorp*, 28 Law J. Rep. (N.S.) Exch. 9; 3 Hurl. & N. 424.

In calculating the value of an assessment under the Succession Duties Act, the Commissioners are not to allow deductions on account of income-tax upon real property, or on stock the produce of real property, nor for the cost of collecting rents of real property during a temporary absence of the owner abroad. *In re Blues*, 28 Law J. Rep. (N.S.) Exch. 46; 3 Hurl. & N. 719.

It was held by one of the Vice Chancellors that the 2nd section of the Succession Duty Act, 1853, did not apply to the case of donees of powers; and that the 4th section of the same act did not operate by way of exception out of that section, but laid down the general rule to commence from a given time, for donees and predecessor in every case. Therefore where a settlor, having, by a settlement executed prior to the time fixed for the coming of the act into operation, reserved to herself a general power of appointment, executed that power by will, and died after the act came into operation, his Honour held, that the case was governed by the 4th and 12th sections of the act, and the property was not liable to succession duty. Held, upon appeal, reversing that decision, that the property was subject to the payment of the duty, and that the case was within the 2nd section of the act; that the 4th section had no application, nor did the 12th section have any bearing on the question. *In re Lovelace's Settlement*, 28 Law J. Rep. (N.S.) Chanc. 489; 4 De Gex & Jo. 840.

Where a person entitled by an existing disposition of property to some interest, to vest on the death of a life-tenant, has concurred with him, before the Succession Duties Act of 1853, in a re-settlement merely to carry out some family arrangement between them, reserving a part of that interest to which he was so entitled, and the life-tenant dies after the act came into operation, such re-settlement is not (even although new property is brought under it, and rights on each side dealt with.) such a disposition as will get rid of the old one or create a new "succession"; nor does the life-tenant become, under such re-settlement, the "predecessor" of the successor; but the

successor is chargeable with the duty with which he would be chargeable under the old "disposition"; nor is he entitled to any deduction from it in respect of an annuity charged on the property, which, by virtue of the new arrangement, ceases on the death of the life-tenant.—The case of *Attorney General v. Sibthorp* confirmed. *Attorney General v. Braybrooke*, 29 Law J. Rep. (N.S.) Exch. 283; 5 Hurl. & N. 488.

In 1797, the first Lord B left the family estates to R N, his cousin, remainder to his eldest son in tail male, &c. In 1841, the third Lord B, being protector of the settlement, executed, with his son, the defendant, who was then tenant in tail in remainder under the will, a disentailing deed enrolled under the Fines and Recoveries Act, vesting the estates in trustees to such uses as he and his son (or the son surviving him) should appoint. In 1850, the third baron and his son, the defendant, concurred in a deed (in pursuance of that power of appointment) carrying out an arrangement between them, whereby, in consideration of other estates being brought into the settlement, and the defendant having an annuity for life charged on the settled estates (he giving up certain other rights), the whole estates were re-settled to him for life, remainders in tail male. After the Succession Duties Act, 1853, came into operation, the third baron died, and the defendant succeeded to the estates:—Held, that the defendant was liable to pay duty at the rate of 10*l.* per cent. upon the value of the "succession"; that the deed did not amount to a new "disposition," changing the "succession," or making his father his "predecessor"; and that he was not entitled to any deduction or allowance with respect to the annuity which ceased on his coming to the succession. *Ibid.*

Upon an information by the Attorney General to recover succession duty, payable in respect of the succession of one E to a sum of 2,000*l.* derived from W P as predecessor, a special verdict was found, which stated that J P died intestate, leaving W P his brother; and A S, the wife of J H S, claimed to be a daughter of a sister of J P. That by indenture, reciting that letters of administration had been granted to W P; and in order to obviate any doubts or differences which might arise touching any share which J H S or A S might be entitled to in the personal effects of J P, W P had proposed and agreed, on having a general release from J H S and A S, to transfer 30,000*l.* to be settled upon trusts for J H S and A S and the children of their marriage, to which proposal J H S and A S had consented and agreed; that the sum of 30,000*l.* had been directed to be transferred to trustees by W P, and that J H S and A S had that day executed a general release to W P of all claims against him as administrator of J P or otherwise; it was declared that B and O should stand possessed of the 30,000*l.* in trust to pay the interest to J H S for life, and after his death to A S for her life, and after the death of the survivor, if there should be an only child, in trust for such child; and if there should be two or more children, in trust for such children, in such shares as J H S and A S, or the survivor, should appoint; and in case no child should live to attain a vested interest, in trust for the survivor of J H S and A S absolutely. Contemporaneously with the indenture a release was executed by J H S and A S to W P. There were

ten children of the marriage; and J H S and A S having appointed a sum of 2,000*l.* to E, one of such children, J H S and A S died in or before March 1854:—Held, that the defendant was entitled to judgment, because it could not be inferred that W P was either the sole predecessor of E within the meaning of section 2, or a joint predecessor within the meaning of section 13.—*dubitante Channell, B.* Per *Watson, B.*, that J H S and A S were the settlors. *Attorney General v. Baker and Platt*, 4 Hurl. & N. 19.

ROYAL BURGHS IN SCOTLAND.

Law relative to the Legal Qualifications of Councillors and the Admission of Burgesses in Royal Burghs in Scotland amended by 23 & 24 Vict. c. 47.

SALE.

[See ENCUMBERED ESTATES—WARRANTY.]

[The Laws of Scotland affecting Trade and Commerce amended by 19 & 20 Vict. c. 60; 34 Law J. Stat. 106.]

(A) OF GOODS.

- (a) *By Sample.*
- (b) *By Sheriff.*
- (c) *Stoppage in transitu.*
- (d) *Vesting of Property.*
- (e) *Evidence.*

(B) BY AUCTION.

- (a) *Note or Memorandum in writing.*
- (b) *Conditions of Sale.*
- (c) *Sale without Reserve.*

(A) OF GOODS.

(a) *By Sample.*

Where goods are sold by sample, the handing over the samples to the buyer does not, in the absence of evidence of a usage or custom to the contrary, amount to a delivery and acceptance of a part of the thing sold, so as to take the case out of the 17th section of the Statute of Frauds: but it is otherwise where the buyer draws samples from the bulk after he has purchased the goods. *Gardner v. Groul*, 2 Com. B. Rep. N.S. 340.

(b) *By Sheriff.*

A sheriff having received a *fi. fa.* and issued a warrant to his bailiff, the latter seized the goods of the debtor, valued them, made out an inventory or sold note, and delivered one article in the name of the whole to the defendant:—Held, that the sale was valid, although there was no public auction or bill of sale from the sheriff. *Hernaman v. Bowker*, 25 Law J. Rep. (N.S.) Exch. 69; 11 Exch. Rep. 760.

(c) *Stoppage in transitu.*

H ordered hemp of the plaintiffs. It was sent him in a general ship. On the ship's arrival, being in embarrassed circumstances, and contemplating stopping his business, H ordered that the hemp

should not be delivered at his premises till further orders. It was, however, delivered at his premises in his absence, and put by his servants in his warehouse, of which H kept the key. He stopped payment the same evening. The next day he wrote to the plaintiffs, stating the circumstances connected with the hemp and his own position, and that his object was to have had the hemp warehoused for them, but that his solicitor had told him that he could not return the hemp; and ended by regretting that he was under the necessity of depriving the plaintiffs of what he considered their right. On the plaintiffs demanding the hemp, H did not deliver it to them, but referred them to his solicitor. He subsequently delivered it to the defendants, who were trustees for his creditors under a deed of assignment by H of his whole estate for their benefit:—Held, in trover for the hemp, that the plaintiffs were not entitled to recover it, as they were too late to stop *in transitu* after the 4th of February, and there had been no rescinding of the contract by mutual agreement. *Heinekey v. Earle* (Ex. Ch.), 28 Law J. Rep. (N.S.) Q.B. 79; 8 E. & B. 410.

(d) *Vesting of Property.*

In March 1854, J agreed with the plaintiff to build for him a screw steamer, according to specifications rendered by H, for 16,000*l.*, payable by instalments as follows: Four sums of 1,000*l.* each, on days named in March, April, May and June; 3,000*l.* on the 10th of August 1854, "provided the vessel is plated and decks laid"; 3,000*l.* on the 10th of October, "provided the vessel is ready for trial"; 3,000*l.* on the 10th of January 1855, "provided the vessel is according to contract and properly completed"; and 3,000*l.* on the 10th of March 1855, or by bill of exchange dated the 10th of January. The building commenced in March and continued till December 1854, when J became bankrupt. At that time the ship was on the slip in frame, not decked, and about two-thirds plated. The instalments contracted for were paid to J by the plaintiff in advance. The building of the ship was carried on under the superintendence of H, on behalf of the plaintiff, who examined and rejected the materials and caused others to be substituted. Soon after the building began the plaintiff named the ship the *Britannia*, and she was thenceforth known by that name by J and his workmen. In October the plaintiff's name was punched on the keel by J's assent, for the purpose of securing the ship to the plaintiff. In November J was pressed to assign the *Britannia* and her engines and fittings to the plaintiff, but he declined, on the ground that he would thus be signing himself and his creditors out of all he possessed; but, at the same time, he admitted that she was the property of the plaintiff. The steam-engines were designed on a peculiar plan, and the engine-room was adapted to them, and the engine-work was carried on by J at the same time as the vessel, the parts of the engine being made and marked so as to fit together, and no other engines were made by J during the same period. Iron plates and angle-irons made for the *Britannia* and pre-arranged for different parts of her, but not rivetted to her, and plankings prepared for but not fastened to her, were on J's wharf at the date of his bankruptcy:—Held, that the property in the ship and in the engines, plates, &c. prepared

for her passed to the plaintiff as she advanced in her progress towards completion, and that the plaintiff was entitled to recover them in their existing state from the assignees of J. Held, also, that in an action for converting the ship, &c., the plaintiff could recover special damages beyond the value of the property. *The Spanish and Portuguese Screw Steam Shipping Co. v. Bell*, and *Wood v. Bell*, 25 Law J. Rep. (n.s.) Q.B. 148; 5 E. & B. 772.

A purchased of the defendant certain hogsheads of sugar and gave his acceptances, which were afterwards dishonoured and were never paid. His name was entered as a purchaser of the sugar in a book kept by the defendant for that purpose. On the same day the plaintiffs purchased twenty hogsheads of the same sugar from A, giving him a bill for the amount, and which bill was duly paid by them. At the time of the re-sale A gave the plaintiffs a delivery order for the whole, which was handed by the plaintiffs to the defendant, who thereupon placed it on his file, and entered in the book the names of the plaintiffs opposite to the hogsheads which they had purchased; at the same time the plaintiffs handed a delivery order of their own to the defendant for two hogsheads, and he thereupon gave his usual order upon his warehouseman, and the two hogsheads were delivered upon payment of the duty upon them. The warehouse was a double-locked bonded warehouse, one key of which was kept by the officer of Customs and the other by the warehouseman of the defendant. Four other parcels of the sugar were delivered in like manner to the plaintiffs, subsequently to which and while twelve hogsheads still remained in the warehouse, A became insolvent, and the defendant refused to deliver these twelve hogsheads unless the plaintiffs would pay for them the same amount as A had undertaken to pay:—Held, in an action to recover the value of the twelve hogsheads of sugar, that the plaintiffs were entitled to recover. *Pearson v. Dawson*, 27 Law J. Rep. (n.s.) Q.B. 248; E. B. & E. 448.

The defendant ordered some earthenware and crockery goods of the plaintiff to be sent down to him. A crate of goods was sent by the plaintiff, including besides the goods ordered a large number of other articles of earthenware and crockery. The plaintiff sent one invoice to the defendant including the goods ordered and the extra articles, with their prices. The defendant refused to take in the crate or to receive any of the articles. In an action for goods sold and delivered, it was held, that the defendant was justified in his refusal, as the sending the extra goods in this particular case imposed on him trouble and risk of breakage in severing the articles ordered from the rest, and also subjected him to the liability of being supposed to have accepted the whole of the articles sent. *Lery v. Green* (Ex. Ch.), 28 Law J. Rep. (n.s.) Q.B. 319.

An appeal in error lies under the 17 & 18 Vict. c. 125, s. 34, against the decision of the Court on a rule to enter a verdict or nonsuit pursuant to leave reserved by an under-sheriff before whom the trial takes place. *Ibid.*

(c) Evidence.

The defendant, in payment of some goods, accepted two bills drawn on him by the plaintiff, the vendor, and returned them to him by post. The

plaintiff, in a letter, to which a receipt stamp was affixed, acknowledged the receipt of the bills, and that they had been placed to the defendant's credit. The plaintiff afterwards sent the same bills by post to the defendant in a letter, requesting him to accept the bills payable at a banker's and then to return them. The bills never were returned to the plaintiff; the defendant denied having received them back, but there was other evidence that he had so received them. It was found as a fact, that the plaintiff had not accepted the bills as payment:—Held, that the plaintiff might recover the price of the goods sold to the defendant in an action for goods sold and delivered, without producing the bills. *Widders v. Gorton*, 26 Law J. Rep. (n.s.) C.P. 165; 1 Com. B. Rep. N.S. 576.

In an action for goods sold and delivered, to which the defence was, that the plaintiff had sold them to the defendant on certain terms, the defendant was not allowed to call witnesses to prove that the plaintiff had sold the same quality of goods to other persons on the same terms. *Hollingham v. Head*, 27 Law J. Rep. (n.s.) C.P. 241; 4 Com. B. Rep. N.S. 388.

Quære—whether the plaintiff could be asked, on cross-examination, for the purpose of pressing his memory or testing his credit, whether he had not sold the same quality of goods to other persons on the same terms? *Ibid.*

If a party orders, in writing, goods of a certain person and the goods are supplied by another person, the party giving such order, at all events if he has a set-off against the party to whom he sent it, is not, if he received and consumed the goods without notice, liable to the party sending them. *Boulton v. Jones*, 27 Law J. Rep. (n.s.) Exch. 117; 2 Hurl. & N. 564.

The defendant bought goods upon the following terms of payment:—"Four months' bill on the 10th of the month following delivery, or 2% for cash." After the delivery of the goods he paid part of the price in cash:—Held, that he had exercised his option of paying ready money, and therefore that the plaintiff might sue him for goods sold without waiting for the expiration of the four months. *Schneider v. Foster*, 2 Hurl. & N. 4.

(B) BY AUCTION.

(a) Note or Memorandum in writing.

On the 26th of October a sale of timber took place by auction, at which some lots remained unsold. A few days afterwards, the defendant having inquired of the auctioneer what lots were unsold, and having been shewn the sale catalogue, selected two lots, which were then sold to him by the auctioneer, who wrote the defendant's name opposite to them in the catalogue. On the 9th of November the defendant again inquired about two other lots, for the purchase of which he agreed, the auctioneer writing the defendant's name as before, together with the agreed price, opposite the lots in question. The defendant then stipulated that as the prompt-day fixed by the printed conditions of sale, being twenty-eight days, was very near, the twenty-eight days should be calculated from the 9th of November. He afterwards cleared and paid for the first two, but not for the second two lots. Slight evidence was given of a custom in trade to treat goods unsold at an auction but sold afterwards in the manner above

stated as being sold subject to all the conditions attaching to the sale by auction. The plaintiff having re-sold the timber pursuant to the conditions of sale, and brought an action against the defendant for not clearing the lots and paying for the same according to such conditions,—Held, that there was no sufficient note or memorandum of the bargain to satisfy the Statute of Frauds. *Moss v. Carr*, 26 Law J. Rep. (N.S.) Exch. 39; 1 Hurl. & N. 484.

(b) *Conditions of Sale.*

The plaintiff purchased a house and premises at a sale by auction. The third and fourth conditions of sale stipulated that the vendors would deliver an abstract of title, commencing with a conveyance of the property to J D, dated in January 1800; that the quantities (which in the particulars of sale were stated to be 76 feet frontage and upwards of 217 feet into the main road) were to be taken, more or less. The fifth condition stated that the said J D died in 1800, having devised the property to his wife for life or widowhood; that he appeared to have made no devise of the reversion, and the property had been since dealt with on that supposition. The abstract of title traced the title from J D, through his sons and co-heirs-at-law (the property being gavelkind). J D had made a will, by which he devised the property in question to his wife for life, or so long as she should remain a widow; and with the rest, residue and remainder of the produce of the sale of certain other property directed to be sold, after payment of certain legacies, he directed the same to be placed at interest, and he gave to his wife for life or widowhood the whole of such interest; and after her decease or second marriage, to his three sons and his said daughter Ann, equally to be divided between them, share and share alike; but if the share of his said daughter should not be legally claimed within three years after his wife's decease, then to his said three sons equally, or the survivors of them. The title deeds stated the property to be only 204 feet in depth:—Held, that, assuming that J D did not die intestate as to the reversion in the property devised to his wife for life (and, *semble*, that he did), and that his daughter Ann took an equal share in it with his three sons, under the residuary clause, yet, as it appeared Ann had made no claim within three years, according to the condition in the will, her title never accrued; and that a good title had been deduced according to the contract of sale. Held, also, that the fifth condition precluded the plaintiff from objecting that the persons beneficially interested in the property should join in the conveyance, and that the slight difference as to measurement between the particulars and the title deeds was not material. *Lethbridge v. Kirkman*, 25 Law J. Rep. (N.S.) Q.B. 89.

A portion of the property of R H, deceased, sold by auction, was described in the particulars of sale as a freehold messuage or tenement, &c., and "also a yearly fee-farm rent reserved out of two messuages and premises, in, &c., amounting to 1*l.* 1*s.* per annum. This lot is subject to an apportioned fee-farm rent of 1*l.* 1*s.*" There were conditions of sale stipulating that the vendors should deliver an abstract of title to this lot, commencing with indentures of lease and release of the 24th and 25th of June 1816, and that "no evidence shall be required of the

receipt or payment or existence of the two ground rents of 1*l.* 1*s.* each, other than that disclosed by the conveyance to the said R H, deceased, which is produced, nor shall any objection be taken to the title in consequence of the non-payment or non-receipt of either of the said rents":—Held, that the vendee was precluded from objecting to the sufficiency of the title, on the ground that the rents had not been paid or received within twenty years. *Hanks v. Pulling*, 25 Law J. Rep. (N.S.) Q.B. 375; *a.c. nom. Hanks v. Pulling*, 6 E. & B. 659.

One of the conditions of a sale by auction was: "If the purchaser shall fail to comply with the conditions, the deposit shall be actually forfeited to the vendor, who shall be at liberty to re-sell, and any deficiency upon re-sale, together with the expenses, shall be made good by the defaulter, and on non-payment shall be recoverable as liquidated damages, but any increase of price at the second sale shall belong to the vendor." Default having been made by a purchaser at the auction, and the property re-sold at a reduced price,—Held, that the vendor could recover from the defaulter, in addition to the deposit, only so much of the difference between the two prices and of the expenses of re-sale, as the deposit did not cover. *Ockenden v. Henly*, 27 Law J. Rep. (N.S.) Q.B. 361; E. B. & E. 485.

(c) *Sale without Reserve.*

If an auctioneer inserts in the conditions of a sale by auction that the property is to be sold "without reserve," he by so doing contracts with the highest *bond fide* bidder that the sale shall be without reserve, and the contract is broken if, during the auction, a bid is made by or on behalf of the owner of the property sold, and in such case the auctioneer is liable to an action at the suit of the highest *bond fide* bidder. The auctioneer ought not on such a sale to take a bid from the owner. *Warlow v. Harrison* (Ex. Ch.), 29 Law J. Rep. (N.S.) Q.B. 14; affirming the judgment below, 28 Law J. Rep. (N.S.) Q.B. 18; 1 E. & E. 295.

The owner may at any time before the contract is complete revoke the auctioneer's authority, but he does so at his peril; and if the auctioneer has contracted any liability in consequence of the employment and revocation, the auctioneer is entitled to be indemnified by the owner. *Ibid.*

If an auctioneer, not having authority from the owner to sell property without reserve, undertakes to sell it without reserve, he is liable on his undertaking—per *Willes, J.* and *Bramwell, B.* *Ibid.*

SAVINGS BANK.

[The Establishment of Savings Banks for Seamen further provided for by 19 & 20 Vict. c. 41.—The Laws relating to Military Savings Banks amended and consolidated by 22 & 23 Vict. c. 20.]

SCHOOL AND SCHOOLMASTER.

[Concerning Parochial Schoolmasters in Scotland, see 20 & 21 Vict. c. 59.—The Law relating to Endowed Schools amended by 23 Vict. c. 11.]

under the circumstances, declined granting costs. On the 20th of October the pauper was removed to L. On the 23rd of December the appellants served notice and grounds of appeal for the next (the Epiphany) Sessions, but at the Epiphany Sessions the Court refused to hear the appeal:—Held, upon an application for a mandamus, that, under the circumstances, the Sessions in October were the next practicable Sessions, and that the Epiphany Sessions were right in refusing to hear the appeal. *The Queen v. the Justices of Peterborough*, 26 Law J. Rep. (N.S.) M.C. 153; 7 E. & B. 643.

Notice of appeal for the next Quarter Sessions for the county of Lancaster, against a certificate for stopping up a highway in the division of M, in the said county, was served on the 24th of June. The next Quarter Sessions for Lancashire were held at Lancaster on the 29th of June, and by adjournment, at Salford, for the division of M, on the 6th of July:—Held, that under the proviso in the 88th section of 5 & 6 Will. 4. c. 50, the Quarter Sessions holden at Salford had no jurisdiction to hear the appeal, ten days' notice of appeal not having been given before the holding of the Quarter Sessions at Lancaster. *The Queen v. the Justices of Lancashire*, 27 Law J. Rep. (N.S.) M.C. 161; 8 E. & B. 668.

On an appeal against an order of removal the appellants are entitled to take the twenty-one days and the fourteen days mentioned in the 11 & 12 Vict. c. 31. s. 9; and if at the expiration of the last of those days there is time to give effective notice of trial at the then next Sessions, such notice ought to be given; but if there is not time to give such notice, the appeal ought to be entered and respited at those Sessions. *The Queen v. the Justices of the West Riding of Yorkshire (Bromsgrove v. Halifax)*, 27 Law J. Rep. (N.S.) M.C. 269; E. & B. E. 713.

An order and grounds of removal were served on the appellants on the 21st of November; they applied for a copy of depositions on the 9th of December, and received it on the 12th of December. On the 24th of December they served the respondents with a notice that they intended to commence and prosecute the appeal at the Quarter Sessions next after the expiration of fourteen days at the least from the service of the notice. By the practice of the Sessions ten days' notice of appeal was in general required. The next Sessions were held on the 5th of January, and nothing was done at those Sessions. On the 16th of March grounds of appeal were served on the respondents, and at the Sessions held on the 5th of April the appellants entered the appeal and sought to try it, but the Justices refused to entertain it:—Held, that the Justices were right, for that the appellants, if not bound to try at the January Sessions, at all events ought to have entered and respited the appeal at those Sessions. *Ibid.*

(d) *To Borough or County Sessions.*

An order, under the 16 & 17 Vict. c. 97. s. 97, adjudging the settlement, &c. of a pauper lunatic confined in the borough lunatic asylum, was obtained by a parish situate wholly within a borough having separate Quarter Sessions, and was made by two Justices of the borough, the asylum being also within the borough:—Held, that the appeal against the order, under section 103, was to the county, and not to the borough, Quarter Sessions. *The Queen v. the*

Justices of Warwickshire, 28 Law J. Rep. (N.S.) M.C. 249.

(e) *Notice of Appeal: Time.*

[*In re Blues*, 5 E. & B. 291; 6 Law J. Dig. 646.]

A notice of appeal against a poor-rate, addressed to the parish officers and to each of the persons named in a schedule following, (one of the grounds of appeal being that these persons were omitted or under-rated), was served on the officers before the next Sessions, but not on the persons scheduled; and the appeal being entered was dismissed by the Sessions on account of this want of service. This Court having held that those Sessions, being the first, were bound to have entered and respited, continuances were entered; and the appeal was called on at a subsequent Sessions, when it appeared that the appellant had not served the scheduled persons with a notice, but had served a fresh notice on the officers, addressed to them only, containing substantially the same grounds of appeal as the former notice, but omitting the ground relating to the scheduled persons:—Held, that it was not competent to the appellant to do this, and that the Sessions were right in dismissing the appeal. *The Queen v. Eyre*, 26 Law J. Rep. (N.S.) M.C. 125; 7 E. & B. 619.

By the 22nd section of the Nuisances Removal Act, 1855, the local authorities are empowered in certain cases to lay down a sewer, and to assess every house using it to such payment, either immediate or annual or distributed over a term of years, as they shall think reasonable, and, after fourteen days' notice left on the premises so assessed, to levy and collect the sum and sums so assessed in the same manner and with the same remedies as highway rates, and with the same right of appeal against the amount of assessment reserved to the person assessed, as by the law in force for the time being shall be given against the highway rate: provided that such assessment shall in no case exceed 1s. in the pound on the assessment to the highway rate. By the Highway Act (5 & 6 Will. 4. c. 50), s. 105, the right is given to any person aggrieved by any rate to appeal to the next Quarter Sessions, first giving to the opposite party notice within fourteen days after such rate shall have been made:—Held, first, that the fourteen days for giving notice of appeal against an assessment under the former act ran from the service of the notice of assessment on the premises assessed, and not from the time when the amount was fixed by the local authority. Secondly, that the proviso in the 22nd section limited the annual assessment only to 1s. in the pound on the rateable value as assessed in the highway rate, but did not prohibit the whole assessment of the premises in respect of one structure, to be distributed over several years, from exceeding that amount. *The Queen v. the Nuisances Removal Committee of Middleton*, 28 Law J. Rep. (N.S.) M.C. 41; 1 E. & B. 98.

By section 40. of 18 & 19 Vict. c. 121, the Nuisances Removal Act, 1854, an appellant shall not be heard in support of an appeal to the Sessions against an order of Justices, unless within fourteen days after the making of the order he give a notice in writing, &c., "and shall within two days of giving such notice enter into a recognizance before some Justice of the Peace," &c.:—Held, that Sunday is to be counted in the two days; and, therefore, where notice of

appeal was given on Friday, but the recognizance was not entered into till the following Monday, it was held that the Sessions could not hear the appeal. *Ex parte Simpkin*, 29 Law J. Rep. (N.S.) M.C. 23.

(f) *Entry and Respite.*

Fourteen clear days before the Sessions next after the making of a poor-rate, a notice, accompanied by grounds of appeal, was served on the parish officers, of an intention to enter an appeal at those Sessions, but not then to try, but to petition for a respite to the next following Sessions. The respondents informed the appellant that they should oppose a respite. At the Sessions the respite was opposed; and the Sessions called on the appellant to proceed, and, on his declining, dismissed the appeal, with costs:—Held, that the Sessions acted within their jurisdiction, and were not bound to respite after this notice of appeal had been given. *The Queen v. Eyre*, 26 Law J. Rep. (N.S.) M.C. 121; 7 E. & B. 609.

An order of removal was served on the 13th of September. Notice of appeal was given on the 2nd of October. The next Sessions were held on the 18th of October, and at those Sessions the appeal was entered and respited, and came on for hearing at the following Sessions, on the 4th of January, when the order was quashed:—Held, that this Court would not interfere, as the Justices had jurisdiction to adjourn the appeal to the January Sessions, and as they had so adjourned it. *The Queen v. the Inhabitants of Skircoat*, 28 Law J. Rep. (N.S.) M.C. 224.

But held, also, that in each particular case the Justices should exercise their judgment whether justice requires that the appeal ought to be adjourned, and that if there be time to try at the first Sessions, and no reason for the delay be assigned, they ought to refuse to enter and respite. *Ibid.*

(g) *Fresh Grounds of, after Adjournment.*

The appellants, fourteen days before the next Sessions, served the respondents with a notice of prosecuting an appeal against an order of removal, accompanied with a statement of grounds of appeal. At the Sessions, the appeal was accordingly called on, and when the respondents' counsel was beginning to state his case, the appellants applied to have the hearing adjourned to the next Sessions, on the ground of the absence of a material witness, and the Court adjourned it accordingly. Fourteen days before the next Sessions, the appellants served another statement, containing fresh grounds of appeal, and at those Sessions the Court quashed the order of removal on evidence given in support of one of the fresh grounds:—Held, on the authority of *The Queen v. Derbyshire*, that, under the 4 & 5 Will. 4. c. 76. s. 81, the appellants had power to serve the fresh grounds of appeal, and that the Quarter Sessions were right.—*The Queen v. Arlecdon* distinguished. *The Queen v. the Inhabitants of Kendal*, 28 Law J. Rep. (N.S.) M.C. 110; 1 E. & E. 492.

(h) *Costs.*

On appeal from the decision of Justices on an information by an Excise officer, the Quarter Sessions have no power to order costs to a successful defendant. *The Queen v. Beadle*, 26 Law J. Rep. (N.S.) M.C. 111; 7 E. & B. 492.

The Crown, and not the officer, is the party to

such proceedings, and, not being named, is not bound by the 12 & 13 Vict. c. 45. s. 5, which empowers Quarter Sessions to give costs against the unsuccessful party in any appeal. *Ibid.*

The 18 & 19 Vict. c. 90. s. 2, which gives costs against the Crown in certain cases, is confined to such informations, &c. as are mentioned in section 1, and to which the Attorney General or Lord Advocate must be a party. *Ibid.*

Upon an appeal against an order adjudicating the settlement of a lunatic pauper, the Sessions at which the appeal was heard confirmed the order, subject to the opinion of this Court upon a case to be afterwards stated, nothing being then said as to costs. The appellants afterwards abandoned their intention of stating the case, and at a subsequent Sessions the respondents applied for and obtained an order granting them the costs of the appeal:—Held, upon an application for a *certiorari* to quash the last-mentioned order, that the Sessions at which the appeal was heard and determined alone had jurisdiction to grant costs, and that the order of the subsequent Sessions was therefore invalid. *The Queen v. the Justices of Staffordshire*, 26 Law J. Rep. (N.S.) M.C. 179; 7 E. & B. 935.

The provisions of the 12 & 13 Vict. c. 45. ss. 5, 6, with regard to the allowance of costs, apply to the case of an appeal to the Quarter Sessions against a decision of the Special Sessions of Highways dismissing an appeal against the allowance of the accounts of surveyors of highways. Therefore, where the Special Sessions had dismissed such an appeal, and there was an appeal against that decision to the Quarter Sessions, which was dismissed there on the ground that the Court had no jurisdiction to hear it, and an order was made on the appellant to pay the costs of the respondents,—Held, that the Sessions had power to give costs, and therefore that the order was good. *The Queen v. Padwick*, 27 Law J. Rep. (N.S.) M.C. 113; 8 E. & B. 704.

The appellants were assessed in a poor-rate, made on the 22nd of September 1858. They gave notice of appeal against the rate to the next Epiphany Sessions. At those Sessions the appeal was, on the application of the respondents (the overseers of the parish), adjourned to the Easter Sessions, held on the 4th of April, with full costs to the appellants. On the 26th of March the respondents gave notice that they would not oppose the appeal, and accordingly they did not attend at the Easter Sessions, whereupon the rate was ordered to be quashed, with full costs to the appellants, to be paid by the respondents. Upon the 29th of March 1859 new overseers were appointed; and in the month of December an application was made to them for payment of the costs. Upon their refusing to pay them, the order of Sessions was, by order of a Judge, removed into this Court for the purpose of being enforced:—Held, upon an application for a rule to set these orders aside, that they were unobjectionable, and that the Court could not interfere. *Ex parte the Overseers and Churchwardens of the Poor of Pletton*, 29 Law J. Rep. (N.S.) M.C. 205.

The statute 12 & 13 Vict. c. 45. s. 5, which empowers a Court of Quarter Sessions before whom an appeal shall be brought to order "the party or parties against whom the same shall be decided" to pay costs, authorizes them on an appeal against a

conviction under the Vagrant Act, 5 Geo. 4. c. 83, to find that the original complainant was the real respondent in the appeal, and to direct him to pay the costs; although, by the last-mentioned statute, notice of appeal is required to be given to the Justices alone, and their names were entered as the formal respondents on the appeal. *The Queen v. Smith*, 29 Law J. Rep. (N.S.) M.C. 216.

F) CLERK OF THE PEACE.

The 11th section of 7 & 8 Vict. c. 71. (the Act for the better Administration of Criminal Justice in Middlesex) enacts, that after the session of the peace which shall be holden in and for the city and liberty of Westminster next after the passing of that act, Sessions of the peace in and for the said city and liberty shall cease to be holden, and the Sessions to be holden in and for the county of Middlesex shall be holden by adjournment within the said city and liberty, and shall have full jurisdiction over all things cognisable by the Sessions for the said city and liberty; and that the inhabitants of the said city and liberty shall not be exempted from serving on juries at the Sessions of the peace for the county of Middlesex, holden within the said city and liberty. The 12th section enacts, that the persons holding the several offices of high bailiff of Westminster, clerk of the peace, and all other officers of the Court of Sessions of the Peace for the said city and liberty, shall, so long as they shall be entitled to hold their several offices, execute the duties and be entitled to the emoluments within the said city and liberty of the several offices of sheriff, clerk of the peace, and other corresponding officers of the county of Middlesex: provided always, that the records of every Session of the peace for the said county, holden within the said city and liberty, shall be sent within fourteen days after such session by the clerk of the peace of the said city and liberty to the clerk of the peace of the said county, and shall be kept by him with the other records of his office. There are duties belonging to the office of clerk of the peace for Westminster other than any which he may have in respect of business done at General or Quarter Sessions. After the passing of the act, the person who had acted as clerk of the peace for Westminster, at the Sessions held in and for the city of Westminster, continued to act as clerk of the peace at the adjourned Sessions for the county until his resignation, and received a sum of money annually, in lieu of the emoluments belonging to his office. Upon his resignation, the plaintiff was appointed clerk of the peace for Westminster, and claimed to be entitled to the emoluments of clerk of the peace within the said city and liberty:—Held, by *Lord Campbell, C.J.* and *Crompton, J.*, that he was not so entitled; for that the provisions in the 12th section applied only to those who held the offices at the time of the passing of the act, and not to their successors in office. Held, by *Coleridge, J.* and *Wightman, J.*, that the above provisions were not limited to the persons who held the offices when the act was passed, and therefore that the plaintiff was entitled to the emoluments of all business actually transacted at the Sessions holden within the city and liberty, to which the clerk of the peace for Middlesex would otherwise be entitled. Held, by the Court of Exchequer Chamber, that he was not so entitled; for that the provisions

in section 12. applied only to those who held the offices at the time of the passing of the act, and not to their successors in office. *Nicholson v. Ellis*, 27 Law J. Rep. (N.S.) Q.B. 369; *E. H. & E. 267*; in the Exchequer Chamber, 28 Law J. Rep. (N.S.) Q.B. 238; *E. B. & E. 267*.

The borough of Brighton was incorporated in 1854, under the provisions of the 5 & 6 Will. 4. c. 76, and a separate Court of Quarter Sessions granted to it, and E appointed clerk of the peace for the borough. L, who was clerk of the peace for the county of Sussex, claimed compensation by reason of the grant of the borough Sessions, and the appointment of E as clerk of the peace of the borough:—Held, that he was not entitled to compensation under the 5 & 6 Will. 4. c. 76. s. 66, as his office was not abolished, nor was he removed therefrom; and the 5 & 6 Vict. c. 111. s. 2, which gives a right to compensation where an officer of a county has been deprived of any part of his emoluments in consequence of a grant of incorporation, not applying to the borough of Brighton. *The Queen v. the Town Council of Brighton*, 26 Law J. Rep. (N.S.) Q.B. 153; *7 E. & B. 249*.

SET-OFF.

An executor sued, as such, for a debt which accrued to the plaintiff from the testator in his lifetime cannot set off a debt (alleged to be equal to the damages sued for) for money had and received to defendant's use, as executor, and money due on an account stated with him, as executor, since the death of the testator; the debt sued for and the debt sought to be set off not being mutual within statute 2 Geo. 2. c. 22. s. 13:—So held by the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench. *Mardall v. Thellusson*, 6 E. & B. 976.

To a declaration for money had and received by the defendant to the use of the plaintiff as administrator and on accounts stated between them, the defendant cannot plead a set-off of money lent by him to the intestate. *Ross v. Watts* (Ex. Ch.), 25 Law J. Rep. (N.S.) Exch. 30; 11 Exch. Rep. 410.

Defendant pleaded as to 55*l.*, parcel, &c., a tender. Replication, that a larger sum than 55*l.* was due upon one entire contract, and that the plaintiff, at the time of the tender, required payment of such larger sum, which the defendant refused to pay. Rejoinder, that the defendant had a set-off to the extent of such larger sum, except 55*l.*, wherefore he tendered only the 55*l.*, and refused to pay the whole of such larger sum:—*Semle*—that the rejoinder was bad, and that the set-off ought to have been pleaded in the first instance. *Seavles v. Sadgrove*, 25 Law J. Rep. (N.S.) Q.B. 15; *5 E. & B. 639*.

To a debt due from the defendant to the plaintiff, the defendant may set off the plaintiff's joint and several promissory note payable to the defendant. *Owen v. Willkinson*, 28 Law J. Rep. (N.S.) C.P. 3; *5 Com. B. Rep. N.S. 526*.

Bankers assigned the securities given by a customer indebted to them without giving him any notice of the assignment. The bankers afterwards became bankrupt. In a suit, by the debtor, against

the assignees of the securities.—Held, that he was entitled to set off the monies due to him on his running account, against the debts due from him; and that the assignees had merely the rights of the assignors, and could claim no advantage beyond what the bankers were entitled to. *Cavendish v. Geaves*, 27 Law J. Rep. (n.s.) Chanc. 314; 24 Beav. 168.

In a suit by the next-of-kin of John against the representatives of James to recover John's estate, voluntary payments which had been made to the plaintiffs by the representatives of James out of his estate, under verbal directions given by him, were held not to be a satisfaction, *pro tanto*, of the plaintiffs' right to John's residuary estate, or to be capable of being set off against the plaintiffs' demands. *Cowlishaw v. Hardy*, 25 Beav. 169.

SETTLED ESTATES ACT.

[Leases and Sales of Settled Estates facilitated by 19 & 20 Vict. c. 120.—Settled Estates Act of 1856 amended and extended by 21 & 22 Vict. c. 77.]

Leases to be granted by trustees under the provisions of the statute 19 & 20 Vict. c. 120, s. 10. (the Settled Estates Act, 1856), must be settled in the Judge's chambers. *In re the Settled Estates Act*, 19 & 20 Vict. c. 120, and *In re Procter's Settled Estates*, 26 Law J. Rep. (n.s.) Chanc. 464.

Under the Leases and Settled Estates Act, 19 & 20 Vict. c. 120, the examination of a married woman, who applies to the Court should be taken immediately after the presentation of the petition. *In re Foster's Settled Estates*, 26 Law J. Rep. (n.s.) Chanc. 886; 1 De Gex & J. 386; 24 Beav. 220.

The Commissioner for taking the consent of a married woman, under the 19 & 20 Vict. c. 120, s. 36, must be a solicitor of this Court. *Turner v. Turner*, 27 Law J. Rep. (n.s.) Chanc. 272; 2 De Gex & J. 534.

Under the Leases and Settled Estates Act, 19 & 20 Vict. c. 120, the appointment of a guardian to infant petitioners should be made after the petition has been presented. *In re Hargreave's Settled Estates*, 28 Law J. Rep. (n.s.) Chanc. 197.

The regulations of the 8th of August 1857 are not absolutely binding as orders. Therefore, though those regulations direct that a guardian to an infant petitioner must be appointed before the petition is presented, the Court authorized such an appointment on an application after the petition had been presented and answered. *Re Longstaffe's Settled Estates*, 1 Dr. & Sm. 142.

Real estate was given by will to trustees, upon trust, to pay an annuity; and after the death of the annuitant, upon trust for all her children who should attain twenty-one. Some of the children attained twenty-one, and the others were infants. Part of the property was contracted to be purchased, and a petition was presented by the infant children for an order authorizing the sale, under the Act to facilitate Leases and Sales of Settled Estates (19 & 20 Vict. c. 120); but one of the Vice Chancellors refused to make the order, and his decision was affirmed. *In re Burdett's Will*, 28 Law J. Rep. (n.s.) Chanc. 840.

The Court will not sanction the sale of any part of settled estates, that the purchase-money may be applied in laying out and making roads through

another part of the estates. *In re Chamber's Settled Estate*, 29 Law J. Rep. (n.s.) Chanc. 924; 28 Beav. 653.

Where land is sold pursuant to an order of the Court under the Settled Estates Act, 19 & 20 Vict. c. 120, the conveyance must be settled by the Judge, whether the parties differ or not. But where land is to be sold in lots, and one conveyance has been settled by the conveyancing counsel of the Court, it may be adopted by the chief clerk for all the rest, in which no special circumstances exist to render such a course improper. *In re Eyre's Estates*, 4 Kay & J. 268.

It is competent to a purchaser, under the Leases and Sales of Settled Estates Act, to object at any time before the completion, that the order for sale was in excess of the jurisdiction of the Court. *Re Thompson's Settled Estates (Green v. Thompson)*, Johns. 418.

Semble—nevertheless, that the conveyance when completed will give an indefeasible title by virtue of section 28, notwithstanding any excess of jurisdiction. *Ibid*.

Semble—that it is not necessary that the proceedings under the act should specify the particular settlement to which the property is at the time subject, provided the property be sufficiently identified and be actually under settlement. *Ibid*.

Semble—that the Court has jurisdiction to order a sale under the act, notwithstanding the existence of powers under which the proposed sale may be effected. *Ibid*.

A leasing power having been granted by the Court under the act to a tenant for life who had since died, a petition was presented by the succeeding tenant for life and her husband, praying that the power might be vested in one of the trustees of the settlement:—Held, that it was not necessary, under such circumstances, to repeat the advertisements; and order made accordingly. *Re Kentish Town Estate (Weeding v. Weeding)*, 1 Jo. & H. 230.

Whether the Court can direct leases and sales, under the 19 & 20 Vict. c. 120, in a cause without a petition—*quære*. *Harvey v. Clark*, 25 Beav. 7.

The effect and operation of the Settled Estates Act (19 & 20 Vict. c. 120.) explained. The expression "persons entitled" in the Settled Estates Act, means persons beneficially entitled, and all persons beneficially entitled must concur. Trustees can only consent for unborn children; but trustees with a power of sale may join in a sale which will bind all persons claiming under their trust. *Grey v. Jenkins*, 26 Beav. 351.

SETTLEMENT.

- (A) GENERALLY.
- (B) CONSTRUCTION OF.
- (C) COVENANT TO SETTLE.
- (D) BY THE COURT OF CHANCERY.
- (E) PORTIONS.
- (F) RECTIFYING.

(A) GENERALLY.

A statement was made by a father, previous to the marriage of his daughter, that he had settled the W estate upon her, which was of the value of about 40,000*l.*, and that he could do nothing more: the

fact being that he had settled the estate, subject to a charge for securing 5,000*l.*, which he had paid off previous to the marriage, and kept alive for his own benefit. After the decease of the settlor, upon a claim by the husband and wife to have the estate discharged from the 5,000*l.*,—Held, that they were bound to prove that the marriage took place upon a definite statement, by the father, of what he had done, or intended to do; and, in the absence of such evidence, that the father was justified in keeping alive the charge of 5,000*l.* for his own use; and that after his decease it formed a part of his residuary estate. *Jameson v. Stein*, 25 Law J. Rep. (N.S.) Chanc. 41.

A sale made of settled estates under a power by a party having no authority to sell was, under the circumstances, refused to be set aside by the Court, the sale having been made *bona fide*, and the money being obtainable from the parties who received it, or their estates. *Hope v. Liddle; Liddell v. Norton*, 25 Law J. Rep. (N.S.) Chanc. 90; 21 Beav. 183.

A sale made by a tenant for life, and adopted by a trustee acting under a power to sell, will be supported in equity against tenants in tail in remainder, although the contract was made in consideration of payments to be made to the tenant for life at long and indefinite periods, but for which the trustee gave a receipt at the time, though the money was not then paid. *Ibid.*

What acts will amount to acquiescence so as to bind tenants in tail and deprive them of settled estates, and compel them to follow the money for which they were sold. *Ibid.*

With what previous notice of title a purchaser will be allowed to retain an estate purchased from persons having no right or power to sell. *Ibid.*

A feme sole, by a settlement made three years before her coverture, declared the trusts of a fund, which she had previously transferred into the names of trustees, to be for such person or persons and for such uses as she should by deed appoint; and in default of such appointment, for herself so long as she should continue sole and unmarried; and in the event of her marriage, for herself for life for her separate use, without power of anticipation, with remainder for all or any one or more of her children, grandchildren, or other issue as she should by deed or will appoint; with remainder, in default of such appointment, for her children equally, with remainder, in default of children who should obtain a vested interest, for her next-of-kin as therein mentioned:—Held, that, upon the marriage of the settlor, her ability to exercise the general power of appointment reserved in the settlement became suspended; the trust declared of the fund in the event of marriage being inconsistent with the continuance of a general power of appointment in the settlor over the fund. *Gould v. Gould*, 25 Law J. Rep. (N.S.) Chanc. 642.

A husband and wife, under an erroneous idea that they were performing a covenant to settle the after-acquired property of the wife, directed a sum of money, to which she had become entitled, to be paid to the trustees of their marriage settlement, upon the trusts thereof. They executed a release, which recited these facts. After the decease of the husband, and the subsequent marriage of the wife,—Held, that the money was appropriated to the trusts of the settlement; that the direction to pay to the

trustees was, in effect, a declaration of trust; and that the transaction must be supported against the second husband, who claimed the money by virtue of his marital right. *Spicer v. Dawson; Spicer v. Spicer; and Lawford v. Spicer*, 26 Law J. Rep. (N.S.) Chanc. 704; 24 Beav. 365.

The income of property settled to the separate use of a married woman, if it accrues during her widowhood, loses the protection of the settlement if it is invested for her benefit by a party who was not a trustee of her settlement, and upon her second marriage it will pass to her husband, though the principal from which it was derived remains subject to the original settlement. *Ibid.*

A and his wife, joint tenants in fee, in 1818 mortgaged their estate to B, the proviso for redemption being, that on payment of the mortgage-money B should re-convey to A and his wife, their heirs or assigns, or unto such other person or persons, and for such intents and purposes, and in such manner and form as A and his wife, or the survivor of them, or the heirs or assigns of such survivor, should appoint. In pursuance of a covenant in the mortgage-deed, a fine was levied by A and his wife. In 1823 the mortgage-money was repaid, and in 1827, by a deed reciting these circumstances, B, by the direction of A and wife, conveyed, and A and wife appointed to a trustee the property to be held to the use of the wife for life, then of A for life, and afterwards of B (a daughter) and her children, &c. After the death of the wife, A in 1854 conveyed the estate to his son for a valuable consideration. The son, after A's death instituted a suit to set aside the settlement of 1827 as voluntary and void against himself, a purchaser for value. One of the Vice Chancellors made a decree in the plaintiff's favour; but, upon appeal,—Held, that a power was created by the proviso in the deed of 1818, which enabled A and his wife effectually to convey their interests, as they did by the settlement of 1827, without levying a fine; and that the wife's parting with her interest for the purpose of the settlement was sufficient to prevent the settlement being voluntary on A's part, and accordingly the plaintiff's bill was dismissed, with costs. *Atkinson v. Smith*, 28 Law J. Rep. (N.S.) Chanc. 2; 3 De Gex & J. 186.

By a post-nuptial settlement the wife's reversionary property was conveyed to trustees, to pay the interest to the husband during their joint lives, and after the death of either of them, the principal to be in trust for the survivor absolutely. Upon the joint application of the husband and wife, the Court, upon the property coming into possession, treated it as unaffected by the settlement. *Hogarth v. Phillips*, 28 Law J. Rep. (N.S.) Chanc. 195; 4 Drew. 360.

Real estate subject to a mortgage was devised in strict settlement, and a power of sale given to the trustees; a suit was instituted, and the Court ordered the estate to be sold, and E, S and V were appointed to execute the conveyance, and it was declared that the mortgagees should be bound by the order. The legal estate having been afterwards re-conveyed to the trustees of the settlement,—Held, that E, S and V had power to convey it, and that the trustees of the settlement were not necessary parties to the deed. *Ayre v. Sanders, ex parte Yeo*, 28 Law J. Rep. (N.S.) Chanc. 439.

If an estate is given to A simply during the life of

B, and A dies before B, any person getting possession of the land after the death of A will be entitled to hold it as the general occupant; but if an estate is limited to A and his heirs during the life of B, a general occupant is not permitted, but the heir will take as special occupant, and not by descent. *Northern v. Carnegie*, 28 Law J. Rep. (N.S.) Chanc. 930; 4 Drew. 587.

Semble—if an estate is given to A and his executors and administrators during the life of B, and A dies first, the executor would be capable of taking the estate as special occupant. In the case of an incorporeal hereditament limited to A *simpliciter pur autre vie*, an executor or administrator may be a special occupant, but there can be no general occupant. *Ibid*.

If A, having an estate to himself, his heirs and assigns, during the life of B conveys the legal interest to trustees, their executors, administrators and assigns, and the trustees die in the lifetime of the *cestui que vie*, the executors of the trustees will be special occupants, and A will have no interest in the legal estate. *Ibid*.

If A, tenant *pur autre vie*, parts with the beneficial interest contingently, and the contingency does not happen, then there will be a resulting trust in favour of A of the interest which he has not effectually parted with. *Ibid*.

Where a father, in the course of correspondence with his intended son-in-law on the subject of a provision to be made for his daughter, promised to leave all he and his wife possessed, in terms which referred to their own children, or to his daughter personally, and which, alluding to a previous conversation, the intended son-in-law in his first letter had referred to children "who survived the father," and a settlement was afterwards made in contemplation of the marriage, reciting that the father had paid 500*l.* as a marriage portion with his daughter, and the husband thereby settled a policy of assurance for 500*l.*; it was held, by the Master of the Rolls, that as the daughter died in the lifetime of her father, neither her husband nor her child had any claim on her father's property: and, upon appeal, the husband's bill to establish a claim against the father's estate was dismissed, but on the ground of the whole subject of the contract being included in the settlement, and not on the grounds upon which the Master of the Rolls decided. *Loaley v. Heath*, 29 Law J. Rep. (N.S.) Chanc. 313; 1 De Gex, F. & J. 489; 27 Beav. 523.

If a father, in contemplation of the marriage of his daughter, corresponds with his intended son-in-law, and makes promises which are personal to his daughter, they will not enure for the benefit of her husband or child—*per Master of the Rolls*. *Ibid*.

In 1813 a decree was made, under which the Master, by his report in 1815, approved of a settlement directed to be executed by the trustees of the will of S in favour of the testator's two daughters and their issue. The settlement so approved was erroneous in certain particulars, and especially in disposing of the ultimate reversion in the estates directed to be settled, by giving to each daughter a power of appointment over one moiety in default of issue, such reversion not being disposed of by the will, and descending to the two daughters as co-heiresses. The inaccuracy in the limitation was brought under the

notice of all parties to the suit, but no objection was made, the report was confirmed, and the settlement was executed by all parties. A, one of the daughters, was married at the time of executing the settlement, but no fine was ever levied. A exercised the power of appointment reserved by the settlement, and died without issue in 1822, leaving M, the other sister, her heiress-at-law, who, with full knowledge of the informality, repeatedly acknowledged and confirmed the appointment. M married in 1833 and died in 1854, having made a general appointment in favour of her husband, H. Upon a bill filed by H, praying a declaration that the proceedings in the suit and the settlement of 1815 did not bind the beneficial interest in the reversion, and praying consequential relief,—Held, that, although the insertion of the powers of appointment was not authorized by the will of the testator, and no fine had been levied by A, yet, as the decree and settlement were the result of a deliberate family arrangement, all parties being well informed of their rights, it was too late now to disturb the arrangement. *Head v. Godlee; Reynolds v. Godlee*, 29 Law J. Rep. (N.S.) Chanc. 638; Johns. 536.

Semble—the proper mode of obtaining relief from the decree of 1815 would have been by petition of rehearing and by supplemental bill, stating the additional matter, to come on with the petition of rehearing, it being impossible, without such rehearing, to get rid of the original decree. *Ibid*.

A trader, previous to and in consideration of his marriage, which was solemnized in pursuance of an engagement of several years' standing, the fulfilment of which had been delayed by circumstances not connected with the state of his affairs, made a settlement of part of his property. After his marriage he was adjudged bankrupt. Before the execution of the settlement he had, to the knowledge of the intended wife, committed acts of bankruptcy, subsequently to his contracting the debt due to the petitioning creditor, and within twelve months before the adjudication:—Held, that the settlement was invalid as against the assignees. *Fraser v. Thompson*, 4 De Gex & J. 659; 1 Giff. 49.

Bill to impeach a post-nuptial settlement, whereby the husband, who was indebted to the plaintiff and other persons, conveyed and assigned real estate and funds in Court accruing in right of his wife, upon trust to pay a part to the husband, and as to the rest, upon trust for her and her children—dismissed, with costs. *Turnley v. Hooper*, 3 Sm. & G. 849.

A settlement of real and personal property belonging to the plaintiff, executed in consideration of her marriage with the husband of her deceased sister, set aside on the ground of failure of the consideration. *Coulson v. Allison*, 2 Giff. 279.

A B settled property upon himself for life, with remainder to his children, with power, at his request, to advance any part thereof in his lifetime. Some advances were made to the children expressly under the power; besides which, on the marriage of two of his daughters, A B advanced to them certain sums out of his own monies, but there was no evidence of an intention to purchase their shares:—Held, that the latter advances were not to be treated as a satisfaction, *pro tanto*, of the daughters' shares under the settlement. *Samuel v. Ward*, 22 Beav. 347.

Satisfaction can only arise where the person who

makes the payment is himself the party bound to pay, or is the owner of the estate charged with the payment. *Ibid.*

A father directed a fund, given to his daughter, to be settled "upon her and her issue," so that "the same might not be liable or subject to the debts, control or engagements of any husband" whom she might happen to marry during her lifetime:—Held, that the settlement ought to give the daughter a power of appointment by will in default of issue. *Stanley v. Jackman*, 23 Beav. 450.

Form of settlement in such a case. *Ibid.*

A settled mortgages on himself for life, with remainder to B, with a power of revocation by deed. A transferred the mortgages to his nephew C, by a deed expressed to be made in consideration of the mortgage-money. C never paid the consideration, but alleged that A intended a gift to him:—Held, that there was no revocation, and that either the mortgage or the consideration-money was still subject to the settlement. *Cowlishaw v. Hardy*, 25 Beav. 169.

Where prior to a marriage the parties transfer a fund to trustees, upon trusts agreed on by parol only, and the instrument declaring the same trusts is executed after the marriage, it is perfectly valid as an instrument for valuable consideration. *Cooper v. Wormald*, 27 Beav. 266.

A and B were trustees of a will, and they and the widow were the executors. The widow, previous to her second marriage, transferred a sum standing in her sole name to A and B, upon certain trusts agreed on between her and her second husband. After the marriage, the trustees, A and B, declared the trusts accordingly. The fund was part of the testator's assets; but the second husband had no notice of that fact:—Held, that A and B held it on the trusts of the settlement, and not those of the will. *Ibid.*

By a settlement, the trustees were to use their utmost endeavours to renew an ecclesiastical lease on reasonable terms, and to raise the fines out of the rents or by mortgage. A renewal became impracticable:—Held, that the fund reserved by the trustees out of rents for the purpose of renewal belonged absolutely to the tenant for life. *Morris v. Hodges*, 27 Beav. 625.

A parol ante-nuptial contract is not a good consideration to support a post-nuptial settlement as against creditors. *Goldicutt v. Townsend*, 28 Beav. 445.

A parol promise by a father, prior to the marriage of his son, to make a future provision for him, his wife and children, cannot be enforced if the marriage did not take place by reason of any reliance on such promise, or if it was not acted on as a reason and consideration for the marriage. *Ibid.*

(B) CONSTRUCTION OF.

A sum of stock was in 1815 transferred to trustees and settled on the husband and wife for their joint lives and the life of the survivor, and power was reserved to them and to the survivor to appoint all or any part of the stock for the benefit of one or more of the children, which, in default of appointment, was to be an interest vested in sons at twenty-five and in daughters at that age or marriage, which should first happen, and to be paid on such of the days as should first happen after the death of the

surviving tenant for life. There was issue of the marriage two sons and two daughters; both the daughters were married, and the fund had been greatly diminished by appointments in favour of the children. Upon a petition by the surviving tenant for life,—Held, that the limitations for the benefit of the children were void for remoteness, but leave was given to apply to rectify the settlement. *In re Morse's Settlement*, 25 Law J. Rep. (N.S.) Chanc. 192; 21 Beav. 174.

The trustees under a settlement of real estate, against whom a trust or power given to them to sell the estate is to be enforced, are necessary parties. *Rooke v. Lord Kensington*, 25 Law J. Rep. (N.S.) Chanc. 567; 21 Beav. 470.

By a family settlement it was agreed that the K estate should exonerate the L estate from a charge of 60,000*l.*, which affected them both; and the trustees were empowered from time to time, as occasion should require, to sell the whole or part of the K estate to indemnify the L estate. The L estate was afterwards mortgaged, with the benefit of the provision from exoneration; and this mortgage came by assignment to the mortgagees of the 60,000*l.* A second mortgage of the L estate was made to the plaintiff, subject to the former mortgage thereof. *Ibid.*

The plaintiff filed his bill to have the K estate sold for the purpose of relieving the L estate from 60,000*l.* The interest on the 60,000*l.* not being in arrear, and no demand having been made for payment of the capital, and the defendants, who were beneficially entitled, undertaking to keep down the interest and to give notice to the plaintiff of any application for payment of the principal, the Court of Appeal held that no occasion for the sale had arisen, but retained the bill on the file, the plaintiff paying all costs up to the hearing. *Ibid.*

Real estate was settled on the marriage of E M to her separate use for life, with remainder, after a term of twenty-one years, created for the maintenance, &c. of children, to the use of the children of E M in tail, with remainder to the use of W M in fee, and the settlement contained a power of sale to be exercised by the trustees at any time thereafter:—Held, following *Boyce v. Hanning*, that the power was good during the life of E M, and after possibility of issue extinct. *Lansbery v. Collier*, 25 Law J. Rep. (N.S.) Chanc. 672; 2 Kay & J. 709.

By a settlement of personal property, trusts upon failure of all previous limitations were declared for the next-of-kin of the wife in case she had died unmarried and intestate:—Held, affirming a decision of the Master of the Rolls, that "unmarried" meant "not having a husband at the time of her death." *Pratt v. Mathew*, 25 Law J. Rep. (N.S.) Chanc. 686, 409; 8 De Gex, M. & G. 522; 22 Beav. 328.

By a marriage settlement, the fortune of the lady was settled, subject to certain life interests, in trust for the issue of the marriage as she should appoint, and in default of appointment equally, the shares of sons to vest at twenty-one, and the shares of daughters to vest at that age or marriage; and, in case no child should attain a vested interest, upon trust, as the wife should appoint; and, in default of appointment, in trust for her next-of-kin, as if she had died unmarried:—Held, that the word "unmarried" meant simply "not under coverture," and not

"without having been married." Therefore, the wife having died without exercising either of her powers of appointment, leaving only one child, who died without attaining a vested interest under the limitations, it was held, that the deceased child took as next-of-kin to her mother, and her personal representatives were declared entitled accordingly. *Mitchell v. Colle*, 29 Law J. Rep. (N.S.) Chanc. 408; Johns. 674.

By a settlement, certain freehold and leasehold property was conveyed to trustees, upon trust, after the death of the settlor's wife, to be sold, and the proceeds to be in trust for the sons and daughters of the settlor, share and share alike, their executors, administrators and assigns, with power to trustees, until any such sale, to lease the property; and it was declared that in case either of the sons of the settlor should, during the life of his widow or at any time previous to a sale taking place under the trusts aforesaid, be duly declared bankrupt or insolvent, then the share to which such son would have become entitled should go to the children of such son. Upon the death of the settlor's widow, the trustees sold all the property, except a small portion of the leaseholds, which was reserved, with the privy of the *cestui que trust*, in consequence of a difficulty having arisen as to the title. One of the sons became bankrupt before the sale of these leaseholds was effected:—Held, that the interest of the bankrupt in the unsold property was divested, and went over, upon his bankruptcy, to his children. *Kiallmark v. Kiallmark*, 26 Law J. Rep. (N.S.) Chanc. 1.

By a post-nuptial settlement real estate was conveyed to trustees and their heirs to the use of J L and his assigns for his life, with remainder to the use of A L his wife for life, with remainder to the use of D J and J N and their heirs, in trust to support contingent remainders; and from and after the death of J L and A L to the use of W L for a term of years upon certain trusts, and subject thereto to the use of J L for his life, with remainder to the use of D J and J N and their heirs to support contingent remainders, with remainders over:—Held, that the first limitation to the use of D J and J N and their heirs gave them the legal estate in fee, and not merely *pur autre vie*. *Lewis v. Rees*, 26 Law J. Rep. (N.S.) Chanc. 101.

The union of a life estate under a settlement with the reversion in fee, will extinguish a power of sale and exchange in the settlement. *Wolley v. Jenkins*, 26 Law J. Rep. (N.S.) Chanc. 379; 23 Beav. 53.

A power given by will to sell estates, which are the subject of a settlement which also contains a power of sale, is in abeyance so long as the limitations and trusts of that settlement remain unperformed. *Ibid.*

A settlement was executed upon a marriage, by which large estates were settled to the use of J A G for life, with remainder to the intent that his wife, if she survived him, should receive a jointure of 600*l.* a year; with remainder to the use of trustees for 500 years, to secure payment of the jointure; with remainder to the use of other trustees for 2,000 years, to raise portions, and, subject thereto, to the use of all the children of the marriage (except an eldest or only son), with an ultimate remainder to J A G in fee. Power was also given to the wife to appoint 2,000*l.* after her decease in aid of her personal

estate, and to create a term for securing its payment. A power of sale and exchange was also given to the trustees, "during the life of J A G, with his consent," and for twenty-one years after his decease, with the consent of the persons entitled to the rents. J A G died without issue. By his will, he devised the estates to trustees, upon trust for sale. The trustees, under the power in the settlement, sold the estates, but the title was objected to:—Held, that the power was confined by the limitations in the settlement, and that it was extinguished; that there was no person who could give any consent to the sale; and that as the trusts of the settlement were unperformed, no present power of sale existed in any one. *Ibid.*

A sum of stock was settled upon H T for life, with remainder to M A M for life; and at the decease of M A M to be paid or transferred unto all her children, except her eldest or only son, in equal shares, at their respective ages of twenty-one; and if there should be only one such child, and that child a son, living at the death of M A M, then over:—Held, that the age of twenty-one was the period at which each child's share vested. *In re Theed's Trusts*, 26 Law J. Rep. (N.S.) Chanc. 514; 3 Kay & J. 375.

Held, also, that a younger son who attained twenty-one, and became an eldest son before the period of distribution, was not excluded from a share in the fund. *Ibid.*

A fund was vested in the trustees of a marriage settlement, after the death of the husband and wife, to pay the same equally amongst the children of the marriage, or, if dead, the issue of such children leaving issue as the husband should appoint; and in default of appointment, to pay the same equally between all the children of the marriage living at the decease of the survivor of the husband and wife, share and share alike; but in case any child should die in the lifetime of the father and mother, leaving issue then living, the share to which such child would be entitled should go equally between the issue of such child so dying at such times as the respective shares of such child would, if living, have become payable:—Held, that the children of each parent whose share failed took the parent's share, and that the class to take must be in the same generation, and that no two generations could participate. *Robinson v. Sykes*, 26 Law J. Rep. (N.S.) Chanc. 782; 23 Beav. 40.

Held, also, that an indefinite execution of the power of appointment by the husband surviving was void. *Ibid.*

By a marriage settlement, an annuity and policy of assurance were assigned by the husband to trustees, upon trust for himself and his wife during their lives, and then for the benefit of the children of the marriage, and in default of children, to such person as the husband should by deed or will appoint, and in default of appointment, "unto the executors or administrators of the husband to and for their own use and benefit":—Held, that the executors took the property as part of the husband's general assets. *Johnson v. Routh*, 27 Law J. Rep. (N.S.) Chanc. 305.

The husband, by his will, directed the remainder of the produce of his real and personal estate to be placed out at interest, and the dividends and produce thereof to be paid to his wife during her life:—Held,

that she was entitled to have all the property of the testator, including the reversionary interest in the annuity, treated as converted at the time of the testator's death. *Ibid.*

By the settlement made on the marriage of R J M with S D, it was recited that upon the treaty for the said marriage P M proposed and agreed to secure, in manner and subject as thereafter expressed, to S D, after the decease of the survivor of them the said P M and R J M, an annual sum or yearly rent-charge for her jointure, to be issuing and payable out of the manors and other hereditaments therein-after charged therewith, and of or to which the said P M was seized or entitled in fee simple. By the operative part of the deed P M, in consideration of the intended marriage, gave, granted, bargained, sold and confirmed unto S D and her assigns, in case the marriage should take effect, and she should survive P M and R J M, an annual sum or yearly rent-charge of 800*l.*, to be charged and chargeable upon and yearly issuing and payable out of all and singular the manors, or reputed manors, of M, N and R, and also all that mansion-house called M in the same county, and also all and singular the messuages, &c. in the several parishes of R, &c., in the county of K, of or to which he the said P M, or any person in trust for him, was or were seized or entitled for an estate of inheritance at law or in equity; and by the same deed P M covenanted, granted and agreed with S D that so often as the annuity should be unpaid for twenty-one days she should have power to enter and distrain upon the manors, &c. charged therewith; and for further securing the annuity P M granted, bargained, sold, demised and confirmed to trustees the manors, &c. thereby charged therewith for a term of 100 years. P M and R J M died, leaving S D surviving. It was subsequently determined that P M had only a life interest in the estates charged. In a suit to administer the estate of R J M a small portion of the estates charged which belonged to R J M in fee was sold, and S D received the purchase-money in part discharge of the arrears of her annuity. Upon her claim against the general estate of P M in respect of the annuity, it was considered, by *Bramwell, B.* and *Watson, B.*, that there was no covenant in the settlement on which S D or the trustees could maintain an action; and accordingly *Wood, V.C.* held, that there being no covenant, S D could have no special or separate equity against the estate of P M; but the *Lord Chancellor*, considering that the deed contained a covenant, reversed the decision, and allowed the claim. *Monypenny v. Monypenny*, 28 Law J. Rep. (n.s.) Chanc. 303; 3 De Gex & J. 572; 4 Kay & J. 174; 27 Law J. Rep. (n.s.) Chanc. 369.

On the marriage of J A and S A a sum of stock was settled by deed, upon trust after the death of J A and S A, and failure of issue of the marriage, to transfer the same unto, amongst and between J F, R F, W F and E F equally; provided that if either of them, the said J F, R F, W F and E F, should depart this life without having acquired a vested interest, leaving issue, the share of such person so dying should go to such issue; but in case either of them should die without having lawful issue, then the share of him, her or them so dying should belong to the survivors or survivor of them. There was no issue of the marriage. J F and R F died in the

lifetime of J A and S A, leaving issue. W F survived J F, and died in the lifetime of R F without issue. E F survived both J A and S A:—Held, that she was entitled by survivorship to W F's share in the fund. *In the matter of Acott's Settlement*, 28 Law J. Rep. (n.s.) Chanc. 383.

A power in a marriage settlement to lease for twenty-one years was held to entitle the trustees to grant a lease for twenty-one years, determinable at the first seven or fourteen years, at the option of the lessee. *Edwards v. Milbank*, 29 Law J. Rep. (n.s.) Chanc. 45; 4 Drew. 606.

Where there is a limitation of real estate in strict settlement, and a declaration of trust of chattels to follow the limitations of the real estate *simpliciter*, this is a trust executed, and the chattels will vest absolutely in the first taker of an estate of inheritance. *Lord Scarisdale v. Curzon*, 29 Law J. Rep. (n.s.) Chanc. 249; 1 Jo. & H. 40.

An assignment or bequest of personal estate by way of trust executed in favour of one or more tenants for life, with remainder in tail, vests the property absolutely in the first tenant in tail immediately upon his birth, and this, whether the limitations are direct or by way of reference to the limitations of real estate, which reference may be made by simply declaring that the personality is to be treated as heirlooms. *Ibid.*

The addition of the words "so far as the rules of law and equity will permit" to the direction that chattels shall follow the limitations of the real estate, will not have the effect of altering this rule, or in other words, will not render the trust executory instead of executed. *Ibid.*

Where the trust is executory (that is, where the author of the settlement has directed trusts to be afterwards framed), *scilicet*, the Court will sanction the introduction of a clause deferring the period of vesting till the tenant in tail attains twenty-one. *Ibid.*

The introduction of doubtful words as to the intention that the tenant in tail shall be in possession before being entitled to the chattels will not have the effect of suspending the vesting. *Ibid.*

By indenture of settlement, real estate was settled in strict settlement to the use of A for life, with remainder to trustees to preserve contingent remainders, with remainder to B, his eldest son, for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of B in tail, with remainder to the other sons of A successively, with remainders, supported by interposed limitations to trustees, to their first and other sons in tail; and by the same settlement leaseholds were assigned to the trustees, in trust for the person or persons who for the time being should, by virtue of the limitations thereinbefore contained, be seized of or entitled to the freeholds; provided that the said leasehold premises should not, for the effect or purpose of transmission, vest absolutely in any child of any person thereby made tenant for life of the said freeholds who should not attain the age of twenty-one years; and personal chattels were also assigned to the same trustees, in trust for the person or persons who for the time being should, by virtue of the limitations therein contained, be seized of or entitled to the actual freehold of the estates, so that the same might, as far as the rules of law and other

circumstances of the case would admit, accompany the said freehold estates as heirlooms for the benefit of the person or persons who for the time being should, under the limitations thereinbefore expressed, be seized of or entitled to the said freehold estates, with a declaration that the same chattels should not, for the effect or purpose of transmission, vest absolutely in any child of any person thereby made tenant for life who should not attain the age of twenty-one years; but nevertheless that the child for the time being seized of or entitled to the actual freehold of the said estates should, during his or her minority, be usufructuary of the chattels for the time being. A died in 1837, and B died without issue in 1856. The second son of A left two sons, of whom the eldest, C, attained twenty-one and died in the lifetime of B, without issue, and without having barred the entail; the younger son, D, attained twenty-one, and came into possession on the death of B:—Held, that the personal representatives of C were entitled absolutely to the leaseholds, and that D was entitled to the chattels. *Ibid.*

Where under a settlement a person takes a life interest in remainder, determinable on bankruptcy or insolvency, the interest will be forfeited on bankruptcy or insolvency, though it should take place before the interest vests in possession. *Re Mugggeridge's Settlement*, 29 Law J. Rep. (N.S.) Chanc. 288; Johns. 625.

In such a case no technical meaning is attached to the word "insolvent," but it means simply a person who is incapable of paying his debts. *Ibid.*

By the settlement made on the marriage of J S and E G trustees were directed to pay the income of 10,000*l.* to J S for life, with remainder to E G for life; and after their deaths to divide the capital between the child and children of the marriage, his or their executors, administrators or assigns; the shares of infant sons at the death of J S and E G to be paid at twenty-one; and the shares of infant daughters at that period to be paid at twenty-one or marriage; with power, after the death of J S and E G, to apply the income of the shares of infant children for their maintenance; and if there should be no child, or, being such children, all of them should die before they became entitled, over. Two children of the marriage died infants, in the lifetime of their parents. Four children survived both parents, and attained twenty-one:—Held, that all the six children took vested shares in the fund. *Jopp v. Wood*, 29 Law J. Rep. (N.S.) Chanc. 406; 28 Beav. 53.

A power in a marriage settlement, in the event of there being issue of the marriage, to raise a sum of money for putting or placing such issue to any profession, trade or business, or for their advancement in life, authorizes the raising of a marriage portion for a daughter. *Lloyd v. Cocker*, 29 Law J. Rep. (N.S.) Chanc. 513; 27 Beav. 645.

In the event of there being no issue of a marriage, the settled fund was given to the wife, if she should survive her husband, for her absolute use; but if she should die in his lifetime, then to such persons as she should appoint, and in default of appointment to the persons who would then be entitled to the personal estate of the wife, in case she had survived her husband, and had died possessed of the same intestate:—Held, that the next-of-kin of the wife at

the death of the husband were entitled to the fund. *Pinder v. Pinder*, 29 Law J. Rep. (N.S.) Chanc. 527; 28 Beav. 44.

W L by a settlement assigned divers leasehold premises to trustees, that they might after his death, until his eldest son T should attain twenty-one, pay the rents, &c. to his, the settlor's, widow, for the maintenance and education of herself and their children; and when T should attain twenty-one, the trustees were to assign the leasehold premises to him, but so that the wish and desire of W L, thereby expressed, that his other children might be allowed by T to participate with him in the same, should be particularly observed and attended to by T:—Held, that the younger children were entitled to participate in the leasehold premises, and that T, who had obtained an assignment of the premises, was a trustee for himself and the other children of W L, and that they were entitled as tenants in common. *Liddard v. Liddard*, 29 Law J. Rep. (N.S.) Chanc. 619; 28 Beav. 266.

By a marriage settlement in 1802, two several sums of 1,000*l.* were to be paid by A, the father of the intended wife, to trustees for the husband and wife and their children. One of these sums was payable immediately, and the other on the death of A. In 1806 and 1810 respectively A advanced two sums of 1,000*l.* each to the husband, who signed a receipt for the same on the back of the settlement. In 1817, shortly before the death of A, he settled 5,000*l.* on his daughter and her husband and issue on trusts almost identical with those of the settlement of 1802, and contemporaneously he made his will, wherein he stated, "Whereas I have advanced to my two sons, and to my daughter Jane and her husband, in money, stock and by other means in value to a considerable amount: now, to prevent any question whether such advancements were meant and intended as loans or gifts, I hereby declare they were gifts, and not loans; and it is my will and intention that, as well what I have already given as what I give by this my will to my said sons, and to my daughters Jane and Elizabeth, they shall receive and take in full satisfaction and discharge of all claims and demands upon me in any right or manner whatsoever." Eleven years after the death of the daughter Jane and her husband, the plaintiff, who had married one of their children, filed his bill against the representative of the surviving trustee of the settlement of 1802, claiming his wife's share in the two several sums of 1,000*l.* under that settlement:—Held, dismissing the bill with costs, that though the trustees might have had no direct defence against the claim, yet that, having regard to the provision in A's will, and inasmuch as his estate would be ultimately liable, such claim was circuitously barred. *Davis v. Chambers*, 7 De Gex, M. & G. 386.

By a post-nuptial settlement, a wife settled savings of her separate estate upon trusts for herself and her husband successively for life, with remainder to their two sons, with a proviso that in the event of the death of either under twenty-five without issue his share should go to the survivor. There was also a proviso that the husband or wife should be at liberty to add any part of the dividends to the sum invested, and that the sum to be so added should be subject to the like trusts as the original fund. The wife

invested in the names of the trustees, but without communicating the fact to them, various sums, arising partly from accumulations of the dividends, and partly from funds derived from other sources; and after the death of the husband and of both of the sons without issue, the executor of the survivor of the sons instituted a suit to have the trusts of the settlement executed:—Held, that it was not a sufficient defence on the part of the settlor as to the additions to the fund that she had invested them under a misapprehension as to the effect of the settlement; and held, that all the additions were subject to the trusts of it; and there not appearing sufficient probability of establishing in a cross-suit a case of mistake, the Court refused to give an opportunity to institute such a suit. *Muggeridge v. Stanton*, 1 De Gex, F. & J. 107.

Where the calls on new shares allotted to trustees of a marriage settlement in respect of original railway shares held by them upon the trusts of the settlement had been paid out of the wife's separate income,—Held, that stock purchased with the proceeds of the sale of such new shares was subject to the trusts of the settlement as *corpus*, and that the wife had a lien for the amount so paid for calls by analogy to the case of tenant for life advancing money for fines payable on renewal of leaseholds. *Rowley v. Unwin*, 2 Kay & J. 138.

A settlement on marriage of real estate upon trust for the intended wife for life, remainder to the husband for life, and after the death of the survivor "in trust for and to be released and conveyed unto" the children as the parents or the survivor should appoint; in default, "in trust for and to be released and conveyed unto" the children as tenants in common in tail; and in default of issue, if the wife should survive the husband, "in trust for and to be released and conveyed unto" the wife, "her heirs and assigns for ever." By the same deed personal property was assigned to the same trustees, upon trust to pay the income and principal "to such person and persons, for such uses, ends, intents and purposes, and in such manner and form, and subject to the same powers, provisos, contingencies, declarations and agreements, as were thereafter expressed concerning the payment by the trustees of the rents and profits of the said real estate thereby conveyed, and concerning their release and conveyance of the same, or as near thereto as circumstances and the nature of the case would admit":—Held, that this trust of the personalty was not rendered executory by reference to the direction to release and convey the real estate, such direction being merely super-added to a distinct declaration of trust of such real estate. *Doncaster v. Doncaster*, 3 Kay & J. 26.

This construction was not altered by a proviso immediately following the limitation of the personal estate, that the ultimate limitation in favour of the heirs of the wife should, with respect to the personal estate, be construed to be for next-of-kin; the meaning of such proviso being only that if by the failure of the preceding limitations the real estate should at any time become vested in possession in the heirs of the wife, the personalty, which was settled upon corresponding trusts, should belong to her next-of-kin. *Ibid.*

There was only one child of the marriage, who died an infant in the lifetime of his father. On the

subsequent death of the father,—Held, that such child took an absolute interest in the personalty, subject to open and let in other children, if any. *Ibid.*

Part of the personal property consisted of a share of real estate under a will, by which it had been devised in trust for sale; and the settlement contained a power for the trustees, with the consent of the husband and wife, and with the concurrence of the persons entitled to the other shares of this property, to elect to take it as real estate, and to hold it upon the trusts of the other real estate contained in the settlement:—Held, that this power did not alter the construction of the limitations of the personal estate; but that when the settled personal estate became the absolute property of the child, the power could no longer be exercised. *Ibid.*

In a settlement the expression "in case she (the wife) had died intestate and unmarried, held equivalent to "in case she had died intestate and a widow." *In re Saunders's Trust*, 3 Kay & J. 152.

Accordingly, under a limitation at the wife's death to the persons who in the event above mentioned would have been entitled to her personal estate,—Held, her first husband having died without issue, that her children by a second husband who survived her were the persons designated. *Ibid.*

Dictum on this subject in *Smith v. Smith*, 12 Sim. 326, 327, disapproved. *Ibid.*

By a marriage settlement a fund belonging to the wife was assigned to trustees for her separate use for life, remainder to the children of the marriage, with power of appointment, and in default to her next-of-kin. On her death without issue and intestate, not having exercised the power of appointment, it appearing that she was illegitimate, the husband was held entitled to the fund in his marital right, as all the trusts of the settlement which intercepted the marital right had failed. *Anon.*, 1 Giff. 392.

Settlement by husband of all his personal estate to which he was then or might thereafter become entitled in trust for himself for life, with remainder absolutely to his wife,—Held, not to comprise his interest in a fund bequeathed to him for life, with remainder to his children. *St. Aubyn v. Humphreys*, 22 Beav. 175.

Bonuses on a policy held to be subject to the trusts of a marriage settlement. *Gilly v. Burley*, 22 Beav. 619.

Upon the construction of a settlement, it was held that a policy effected in the names of trustees was itself settled; but that under the covenant of the husband and the rules of the company, the husband was entitled to an option to have any bonus applied in reduction of premiums. Bonuses having been declared, the husband continued to pay the full premiums; and it was held on his death, that the bonuses were accretions to the trust, and did not belong to his executors. *Ibid.*

On the marriage of a female infant, a settlement of her personal estate was executed, giving an interest to the issue in the event of the husband surviving his wife, but none in the contrary event:—Held, that the issue could not, in the latter event, take by implication or construction. Held, also, that the husband had not by the settlement reduced the fund into possession. *Pringle v. Pringle*, 22 Beav. 631.

By a marriage settlement a fund was settled, after

the death of the survivor of the husband and wife in trust for the "children then living," to be paid at twenty-one; and in case the parents should die "without leaving any lawful issue," then as the husband should appoint; and in default, "in case there should be no child or children, as aforesaid," over. Children attained twenty-one; but they all died in the lifetime of their parents, leaving issue who survived the parents:—Held, that the gift over took effect. *In re Heath's Settlement*, 28 Beav. 193.

The settlor conveyed real estates to trustees in fee to the use of A, B, C and five others successively for life, and afterwards upon trust to convey to all and every the sons and daughters of the eight tenants for life "who should be then living, and the heirs male and female of his, her and their body and bodies respectively in a course of entail"; the sons and daughters of A and their heirs to take before all the other persons named, and the sons and daughters of B and their heirs to take next after the sons and daughters of A and their heirs (and similar as to the five others in succession); and the sons of all and every the person last above named, and the heirs, &c., to take before the daughters and their heirs:—Held, that the daughters of A took in priority of the sons of B. *Randell v. Daniel*, 24 Beav. 193.

An estate with "the mines and minerals" was settled, and power was given to the trustees to demise the hereditaments and the coal and minerals, &c., but so as the lessees should not be "dispunishable for waste":—Held, that the last clause was repugnant, and that the trustees might demise mines both opened and unopened at the date of the settlement. Held, also, that the royalty reserved by the lease was in the nature of rent and was payable to the tenant for life, and did not form *corpus*. *Daly v. Beckett*, 24 Beav. 114.

Under a trust for A for life, "and after her decease to be divided equally between her younger children,"—Held, first, that the children took vested interests at their births; and, secondly, that the character of younger child was to be determined at the period of vesting, and not that of distribution. *Adams v. Roberts*, 25 Beav. 658.

Distinction in regard to vesting between a direction "to divide amongst a class" at once, and such a direction after a tenancy for life. *Ibid*.

Beck v. Burn, 7 Beav. 492, doubted. *Ibid*.

By a marriage settlement a rentcharge out of the husband's property was to become payable to his wife if he mortgaged it or became bankrupt. He mortgaged it, and afterwards became bankrupt:—Held, that a valid rentcharge having arisen upon the mortgage, it was not avoided by a subsequent bankruptcy. *Brooks v. Pearson*, 27 Beav. 181.

A fund was settled on trust for the wife for life, and in case she should leave any issue living at her death for the husband for life; and after his decease, upon trust, to divide it amongst the children of the marriage "that should be then living on their respectively attaining the age of twenty-one years"; and in case there should be no child or of their all dying in the wife's lifetime, to pay the fund to such person as the wife should by will appoint; and in default, to the executors or administrators of the husband and wife, or the survivor of them; and in case the wife

should survive her husband without leaving issue then living, to pay the fund to the wife. The wife died leaving children who had attained twenty-one, and the husband was still living:—Held, that the limitation to the children remained contingent until the death of their father. *In re Wollaston's Settlement*, 27 Beav. 642.

Money was settled upon trust, after the death of the survivor of the parents, to pay, &c. unto all the sons and daughters, and the children of such as should be dead leaving issue (the children to take the share of their parents), with a gift over if there should be no child of the marriage, or, being such, all sons should die under twenty-one, and the daughters under twenty-one or marriage:—Held, that the shares vested in the children on their births, and that the representatives of those who died unmarried, in their infancy and in the life of the parents, took a share. *Re Minor's Trusts*, 28 Beav. 50.

By a marriage settlement personal estate of the wife was settled in trust for the husband and wife for their respective lives, and afterwards for the children of the marriage; and in default, for the wife if she survived her husband; but if she pre-deceased him, then (subject to his life interest) for such persons as at the decease of the wife would under the statute have been entitled to her personal estate as her next-of-kin in case she had survived her husband and had afterwards died intestate. The husband survived the wife:—Held, that her next-of-kin ascertained at her husband's death were entitled. *Chalmers v. North*, 28 Beav. 175.

The ultimate limitation in a marriage settlement was "for the next-of-kin of the wife as if she had not been married, and not including the husbands of both or either of her sisters":—Held, that the sisters who were her next-of-kin took as joint tenants. *Lucas v. Brandreth* (No. 2), 28 Beav. 274.

By a marriage settlement real estates were conveyed to trustees "and their heirs," upon trusts for the parents for life, and afterwards for the children; and in default, as the wife should appoint; and in default, for her next-of-kin. The gift to the next-of-kin contained no words of inheritance:—Held, that they took for life only. *Ibid*.

(C) COVENANT TO SETTLE.

A marriage settlement contained a covenant by the husband that all and every the estate and effects, of what nature or kind soever, whether real or personal, to which the wife should at any time during the intended coverture become seised, "possessed of," or entitled unto, should be accounted, reckoned and taken as a separate and distinct estate of and from the estate of the husband, and be in no ways liable or subject to his debts, contracts or engagements; but that the same and every part thereof should be conveyed, settled and assured, upon the trusts before declared of and concerning the same:—Held, that the wife's interest in a leasehold house, to which she was actually entitled at the time of the marriage, and her interest in personal property to which she was then entitled, but of which she was not then in the actual possession, were not within the operation of the covenant; and, also, that there were three senses in which the word "possessed" might be used. In this case it meant "having a right to the immediate possession"—"having an interest in

possession." *Wilton v. Colvin*, 25 Law J. Rep. (N.S.) Chanc. 850; 3 Drew. 617.

By a marriage settlement it was declared and agreed between the parties, and the husband covenanted with the trustees, that in case the wife, or the husband in her right, should at any time during his life become possessed of, interested in, or entitled to, any personal estate, monies, effects or other property, in possession, reversion, remainder or expectancy, by gift, bequest, or under the Statute of Distributions, the husband and wife would, within six months, transfer, assure, assign and make over all such property to the trustees upon the trusts of the settlement. Subsequently to the marriage, the father of the wife, by his will, vested a sum of 5,000*l.* in trustees to hold the same upon such trusts as the wife should by deed or will appoint; and in default of such appointment, to pay the dividends and interest of the said sum of 5,000*l.* to the wife for her separate use, and after her death upon trust for her executors or administrators:—Held, that the covenant in the settlement did not affect or control the general power of appointment given to the wife over the 5,000*l.* by her father's will; and that it did not affect her life interest to her separate use, but that it did affect the reversionary interest so far as her husband, in the event of his surviving his wife, would be entitled to the property in her right, or as her executor or administrator. *Townshend v. Harrowby*, 27 Law J. Rep. (N.S.) Chanc. 553.

A father, on the marriage of his son, covenanted with trustees to bequeath one full fourth part of all his real and personal estate, after payment of his debts, to the trustees of the marriage settlement, who were to sell and convert the same into money and stand possessed of the proceeds upon the trusts of the settlement. After the father's death, in a suit to administer his estate, it was held, that the covenant meant a fourth in value and not a fourth in specie. *Bell v. Clarke*, 27 Law J. Rep. (N.S.) Chanc. 674; 25 Beav. 437.

By a marriage settlement, the husband and wife covenanted to settle any property to which the wife should become entitled during the coverture. The wife was at the time of the marriage entitled in reversion to certain real estates, which came into possession during the marriage; and she was also at that time absolutely entitled to a sum of stock then standing in the names of trustees:—Held, that the real estates came within the covenant in the settlement, but not the personalty. *Archer v. Kelly*, 29 Law J. Rep. (N.S.) Chanc. 911; 1 Dr. & Sm. 300.

By an ante-nuptial settlement the intended husband and wife covenanted with the trustees that if the intended husband and wife, or either of them, in her right, should at any time during the coverture "be or become entitled" to any personal property of the value of 100*l.* or upwards, the same should be settled. At the time of executing the settlement the wife was interested in a legacy which had been bequeathed in trust for all the daughters of her father, living at the time of his death, who shall attain twenty-one or marry, in equal shares. The marriage was solemnized, and the wife's father survived her husband:—Held, first, that the interest of the wife in the legacy during the coverture was contingent; and, secondly, that it was not within the

covenant in the settlement. *Atcherley v. Du Moulin*, 2 Kay & J. 186.

A covenant by a husband in marriage articles to join his wife in assuring to the trustees all property, real or personal, to which the wife should become entitled or interested in during the marriage,—Held, not to bring within the settlement a legacy subsequently given to the wife to be at her own disposal and control, and not to be subject to the *jus mariti*, or liable to be affected by his debts or deeds. *Grey v. Stuart*, 2 Giff. 398.

By a post-nuptial settlement a husband and wife covenanted with trustees to settle all the property which the wife might become entitled to during the coverture on themselves for life, with remainder to their children. During the coverture part of such property was allowed by the husband to be paid over to the trustees; the other part was not reduced into possession at the husband's death:—Held, that originally the settlement was binding on either party; secondly, that the part paid over had been effectually made subject to the trusts by the husband; and, thirdly, that the wife, refusing after the death of her husband to perform her covenant, was not entitled to a life interest in the portion settled which was applicable to recoup the children. *Ander-son v. Abbott*, 23 Beav. 467.

In a settlement of personal property the parties covenanted to settle all future-acquired property upon the same trusts, &c., and subject to the same powers, &c., or as near thereto as the nature and tenure of the property would admit of:—Held, that this authorized the insertion of a power to grant mining leases in the settlement of subsequently-acquired freeholds, the prior owner having granted such leases, though the mines had never been effectually worked under them. *Scott v. Stewart*, 27 Beav. 367.

A settlement of personal estate contained a power to alter and vary, and a covenant to settle future-acquired real and personal estate on similar trusts:—Held, that a power of sale might be introduced into a settlement of subsequently-acquired real estate. *Ellon v. Ellon* (No. 2), 27 Beav. 634.

(D) BY THE COURT OF CHANCERY.

A female ward of Court married a fortnight after attaining twenty-one. Upon a joint petition of herself and her husband, asking for payment of a fund in court, part of her fortune, to her husband, the Court refused to examine the lady, who offered to attend for that purpose, and it also refused to accede to the prayer of the petition, but made an order directing the dividends of the fund to be paid to the husband during the joint lives of himself and his wife, without prejudice to any question. The order of the Court was made precisely on the same footing as if the lady had been examined in court, and had expressed in the strongest manner her desire that not any part of the fund should be settled. *Biddles v. Jackson*, 28 Law J. Rep. (N.S.) Chanc. 40, 290; 3 De Gex & J. 544; 26 Beav. 282.

(E) PORTIONS.

By a voluntary settlement a father covenanted with trustees that his heirs, executors or administrators should, within six calendar months after his death, pay to them 10,000*l.* if he should die in the

lifetime of his only daughter, C H T, who was then an infant and unmarried; and he charged his real estates with the same. The trusts were declared to be for investment and payment of the interest to C H T for life, with ulterior trusts for her children; if none attained twenty-one, to hold the money as part of the settlor's personal estate. The settlor borrowed money on mortgage of his real estates, and out of the money paid the trustees of the settlement the 10,000*l.*, and they executed a release. The trustees lent part of the 10,000*l.* to the settlor on a mortgage of his real estate; the remainder they lent upon mortgage to other persons. The settlor, by his will, gave his personal estate to his wife, and his real estate to trustees in trust for his wife for life, with successive life estates to other persons, and an ultimate remainder over. He died leaving his wife and daughter surviving, and the latter died an infant and without having been married:—Held, affirming a decision of one of the Vice Chancellors, that the whole 10,000*l.* was personal estate. *Tucker v. Loveridge*, 27 Law J. Rep. (N.S.) Chanc. 731; 2 De Gex & J. 650.

Tenants for life of a fund settled on their marriage had a power to appoint the same among the children of the marriage. Upon the marriage of a daughter, one of the children of the marriage, under age, a deed was executed by the tenants for life, by which the reversion in 2,000*l.*, part of the fund, was assigned by the tenants for life to trustees to pay the income to the intended husband for life, with remainder to the wife for life, with remainder to the children of the marriage:—Held, to be a valid appointment to the daughter, and that the settlement was a good declaration of trust by the intended husband of the fortune of his wife, though an infant. *Fitzroy v. the Duke of Richmond*, 28 Law J. Rep. (N.S.) Chanc. 752; 27 Beav. 190.

A second son becoming the eldest son in the lifetime of his father, who was tenant for life, with remainder, subject to trusts for younger children's portions, in strict settlement, was prevented from taking an interest in the bulk of the estate by reason of a disentailing deed executed by his father and elder brother:—Held, that he was entitled to a share of the portions provided for younger children, notwithstanding a proviso for accruer in the event of a younger son becoming an eldest son; the Court being of opinion that, in being excluded by the disentailing deed, he was in effect excluded by the settlement, of which the disentailing deed was necessarily an incident, and the intention was clear to exclude none from the portions who were excluded by the settlement from taking the bulk of the estate. *Peacock v. Pares* (2 Keen, 689) observed upon. It is in conflict with *Spencer v. Spencer* (8 Sim. 87), and not to be followed as an authority. *Macoubrey v. Jones*, 2 Kay & J. 684.

Where marriage articles directed, if there were but one younger child of the marriage 8,000*l.*, to be raised for portions; if two 12,000*l.*; and if three or more, 15,000*l.*: and there were three younger children of the marriage, of whom two died infants:—Held, that the trust to raise 15,000*l.* had arisen in favour of the surviving younger child. *Hemming v. Griffith*, 2 Giff. 403.

A B, on his marriage, settled real estates on himself for life, then to trustees for a term to raise

portions for his younger children, and subject thereto to his first and other sons in tail. The portions were to vest in sons at twenty-one, but to be payable after the decease of husband and wife. George, the second son, attained twenty-one; after which William, the eldest son, having barred the entail, died without issue, and subsequently the portions became payable:—Held, that George, though the eldest at the period of distribution, was entitled to a share of portions for younger children. *Adams v. Beck*, 25 Beav. 648.

An estate was charged with portions for the younger children "to be raised and levied" after the decease of the tenant for life, "and to be forthwith paid and payable":—Held, that a younger child who attained twenty-one, but died in the life of the tenant for life, took a vested interest. *Remnant v. Hoed*, 27 Beav. 74.

(F) RECTIFYING.

Where a settlement made before marriage purports to be in pursuance of the articles, but is not in conformity therewith, that is conclusive ground for correcting the settlement without further evidence; and though the articles and the settlement were both before the marriage, and the settlement does not purport to be made in pursuance of the articles, yet if it be clearly established that it was intended to be made in pursuance of the articles, and is not in conformity therewith, the Court will rectify the mistake. *Bold v. Hutchinson*, 25 Law J. Rep. (N.S.) Chanc. 598.

A recital in a marriage settlement, to which the father of the intended wife was a party, that the lady's fortune would amount to 10,000*l.*, is not equivalent to a covenant by the father to that effect—semble. *Ibid.*

In a settlement, made between persons severally entitled to interests under a will, A B, the settlor, who took a life interest under the settlement, covenanted that if he became entitled to any property exceeding in value the sum of —, he would assign the same to the trustees. A B afterwards became entitled to a reversionary interest, and filed a bill to have the settlement rectified, or that it might be declared that the covenant was void. One of the Vice Chancellors dismissed the bill, without costs:—Held, on appeal, that this decision was correct, as the Court would not make a declaration of right beforehand, and that the covenant could not be considered insensible, as it must apply to capital, and not income. *Pye v. Arbuthnot*, 26 Law J. Rep. (N.S.) Chanc. 646; 1 De Gex & J. 406; 5 Sm. & G. 547.

A marriage settlement, dated in 1823, was reformed in 1857, after the death of the husband, upon proof of the written instructions; so as to give the property to the wife absolutely in the event of her surviving the husband, and there being no issue (which events had happened). *Wolterbeek v. Barrow*, 23 Beav. 423.

In a suit to rectify a settlement, there being no blame imputable to any of the parties, the costs are payable out of the fund. *Stock v. Vining*, 25 Beav. 235.

Mode of rectifying a settlement by striking out the erroneous words and indorsing the decree. *Ibid.*

SEWERS.

[See RATE.]

SHERIFF.

[An Act to provide additional Accommodation for the Sheriff Courts in Scotland, 23 & 24 Vict. c. 79.]

[Sheriff's Notes, see PRACTICE, New Trial.—See ATTORNEY AND SOLICITOR, *Childers v. Wooler*, ante, page 40.]

- (A) FEES.
- (B) POUNDAGE.
- (C) DIRECTIONS TO.
- (D) ARREST BY.
- (E) RETURN.
- (F) SEIZURE OF EXCEPTED PROPERTY OF INSOLVENT.
- (G) SALE OF REVERSIONARY INTEREST.
- (H) LEVY BY BAILIFF'S FOLLOWER.
- (I) ESCAPE.
- (K) NEGLIGENCE.

(A) FEES.

By the table of fees allowed by the Judges pursuant to the statute 1 Vict. c. 55. s. 2, a sheriff's officer is entitled to charge one guinea for executing a warrant of *ca. sa.*, and 1s. per mile for travelling expenses; but he is not entitled to charge for an assistant, nor for conducting the party arrested to gaol. *Cooper v. Hill*, 28 Law J. Rep. (n.s.) C.P. 311; 6 Com. B. Rep. N.S. 703.

(B) POUNDAGE.

Where lands are extended under a writ of *elegit*, there is no interest in them left in the debtor which can be extended under a subsequent writ. The sheriff, under a second writ of *elegit*, at the suit of the same execution creditor, made at his request a special return extending the same lands, subject to the first extent:—Held, that the sheriff was not entitled to poundage on the second writ, although the amount of the first writ was less than the annual value of the lands. *Carter v. Hughes*, 27 Law J. Rep. (n.s.) Exch. 225; 2 Hurl. & N. 714.

(C) DIRECTIONS TO.

Notice from the plaintiff's attorneys to the bailiff charged with a warrant under a *ca. sa.*, that it is withdrawn, is sufficient to render the bailiff liable for an arrest; and, *semble*, it is notice to the sheriff. *Futcher v. Hinder*, 28 Law J. Rep. (n.s.) Exch. 28; 3 Hurl. & N. 757.

The plaintiff having issued a *ca. sa.* on a judgment against the defendant, directed the sheriff not to execute the writ until further notice. The defendant having been arrested at the suit of another creditor, and paid the debt, was detained by the sheriff's officer until instructions were obtained from the plaintiff, who thereupon directed the officer to let him go:—Held, that there was no lawful arrest or discharge under the plaintiff's writ, and consequently that the debt was not satisfied. *Semple v. Keen*, 28 Law J. Rep. (n.s.) Exch. 151; 3 Hurl. & N. 753.

(D) ARREST BY.

A sheriff's officer, having a writ of *ca. sa.*, went to a house in which the execution debtor was, and, climbing up a ladder against the house, put his hand through an aperture in a broken pane of glass, and touched the execution debtor, saying to him, "You are my prisoner":—Held, that this was a good arrest, and justified the officer in breaking open the outer door of the house, and carrying off the debtor to prison. *Sandon v. Jervis* (Ex. Ch.), 28 Law J. Rep. (n.s.) 156; affirming the judgment below, 27 Law J. Rep. (n.s.) Q.B. 279; E. B. & E. 935.

(E) RETURN.

A rule to compel the sheriff, six months after his retirement from office, to return a writ, is not a nullity; and if time is obtained on his behalf to return the writ, the relief conferred by the statute is waived, and the sheriff will be liable to attachment on default. *Waller v. Davies*, in *re Samuel*, 27 Law J. Rep. (n.s.) Exch. 387; 5 Hurl. & N. 374.

The sheriff having seized goods under a writ of *fi. fa.* employed an auctioneer to sell them, who was the brother of the execution creditor. The auctioneer sold the goods by private contract, and within an hour and a half afterwards the sheriff, who was ignorant at that time of the sale, returned to the writ of *fi. fa.* the seizure, and that the goods were in his hands for want of buyers. In an action by the execution creditor for a false return, the Judge at the trial refused to direct the jury that they must find some damage for the plaintiff in respect of a writ of *venditioni exponas*, which he had issued the day after such return:—Held, that, considering the circumstances under which the writ was issued, the Judge rightly refused to do so. *Levy v. Hale*, 29 Law J. Rep. (n.s.) C.P. 127.

To a writ of *venditioni exponas*, the sheriff made a return, in which he accounted for the proceeds of the goods by applying part thereof in the payment of rent due to the landlord of the premises wherein the goods were seized, and by retaining the residue for charges which he had a right to make, with the exception of a sum claimed for possession-money, to which the sheriff was not entitled. The premises, however, in which the seizure was made consisted of two houses held under separate landlords, and besides the sum so paid for rent to one of such landlords, there was owing for rent to the other landlord a sum exceeding the value of the proceeds. In an action against the sheriff for a false return,—Held, that the sheriff was not estopped by his return from shewing that such rent was due, and that (by reason of the statute 8 Ann. c. 14, requiring the sheriff to pay one year's rent out of the proceeds) the plaintiff had sustained no damage by the false return, and had, therefore, no cause of action. *Ibid*.

(F) SEIZURE OF EXCEPTED PROPERTY OF INSOLVENT.

An action for converting or detaining goods is not maintainable against a sheriff for seizing, under a writ of *fi. fa.*, the property of an insolvent after notice that it was excepted by him from his schedule under the 7 & 8 Vict. c. 96. s. 9. If such excepted property is exempt from seizure under an execution against the goods of the insolvent, the proper course

is to apply to have the execution stayed under the 5 & 6 Vict. c. 116. s. 1. *Rideal v. Fort*, 25 Law J. Rep. (N.S.) Exch. 204; 11 Exch. Rep. 847.

G) SALE OF REVERSIONARY INTEREST.

An action against the sheriff for selling the reversionary interest of the plaintiff in goods in the possession of an execution debtor, cannot be supported unless actual damage has been sustained. The declaration alleged that the plaintiff was the owner of goods let to hire to T, and that the defendant took them out of T's possession, and absolutely sold and disposed of them, so as to prevent them being followed, whereby the plaintiff was injured in her reversionary estate. Plea, that the defendant sold the goods as sheriff under a *f. fa.*, and not in market overt, and that the plaintiff had not sustained, and would not sustain any damage by reason of the premises:—Held, on demurrer, that the plea was an answer, the sale not affecting the plaintiff's rights. *Tuncard v. Allgood*, 28 Law J. Rep. (N.S.) Exch. 362; 4 Hurl. & N. 438.

(H) LEVY BY BAILIFF'S FOLLOWER.

J, a bond bailiff of the sheriff, received from the attorney of an execution creditor a writ of *f. fa.* to levy on the goods of the plaintiff, the execution debtor. L, the son and clerk of J, and who managed the business of J at his office, got the warrant from the sheriff directed to J, to execute the writ, and afterwards, by the authority of J (in J's absence), himself seized the plaintiff's goods, and put a man in possession. In a day or two afterwards the attorney of the plaintiff paid the amount due to L at the office of J, and L received the sum by J's authority. The money not being paid over by L or J, the sheriff treated the first levy as a nullity, and seized the plaintiff's goods again. In an action by the plaintiff against the sheriff, evidence was given, without objection by the plaintiff, that it was the practice of the sheriff's officers, either personally or by some representative at their office, to receive the amount due from the defendant, and thereupon to direct the man in possession to withdraw; and that it was the usual course when the execution was paid out for the party whose goods were seized to pay the amount at the office of the bailiff, who paid it over to the execution creditor. The counsel for the sheriff took this exception among others, that the Judge ought not to have admitted the evidence of the practice of the bailiff's office, and ought to have directed the jury to disregard it:—Held, that the sheriff was responsible for the seizure made by L under colour of the *f. fa.*; that, as far as the plaintiff was concerned, the payment to L was a payment to the sheriff; that the evidence of the practice was properly admitted, and that if it were not, no objection could be sustained, since the form of the exception was faulty, as an exception does not lie for a non-direction, but only for a misdirection. *Gregory v. Cotterell* (in error), 25 Law J. Rep. (N.S.) Q.B. 33; 5 E. & B. 571.

(I) ESCAPE.

In an action against a sheriff for wrongfully discharging the judgment debtor, the gist not being mere negligence, as in an action for an escape, it is doubtful whether it is a defence that the plaintiff's negligence contributed to the injury, by his sending

an order, which the sheriff might have understood as authorizing the discharge; and, *semble*, that the defence must be that the plaintiff authorized the discharge, and that it must be specially pleaded. *Hodges v. Paterson*, 26 Law J. Rep. (N.S.) Exch. 223.

Where it is so pleaded, and it is attempted to be supported by a written document, the construction of it being for the Judge, if he leaves it to the jury, and it is not, in the opinion of the Court, an authority to discharge, (as if it was a mere countermand sent without knowledge that the writ had been executed,) that being a misdirection, a verdict for the defendant cannot be sustained on the general issue, the Judge not having been desired to leave to the jury the question of negligence on the part of the plaintiff, even supposing such a question would be a proper one on that issue, which it should seem it would not be. *Ibid*.

T, having been taken in execution under a *ca. sa.* for 45*l.*, paid the debt and costs to the sheriff, who discharged him. The attorney employed to issue the execution authorized F to receive this money from the sheriff; and the latter paid to F 20*l.*, with which F absconded. The execution creditor having sued the sheriff for an escape, the latter pleaded payment to the plaintiff of 20*l.*, and paid the balance of the debt and costs into court. The plaintiff replied, damages *ultra*:—Held (*dissentiente Byles, J.*), that the defendant was entitled to the verdict. *Hemming v. Hale*, 29 Law J. Rep. (N.S.) C.P. 137; 7 Com. B. Rep. (N.S.) 487.

(K) NEGLIGENCE.

The sheriff had, in his office, two writs issued at different times against B: one at the suit of A, which, for certain reasons of form, was invalid; the other, at the suit of L, which was a valid writ. Warrants were granted on both writs; B was arrested on A's writ. B applied for his discharge, and on the hearing before a Judge, the sheriff claimed to detain B on L's writ. The Judge ordered his discharge. In an action for negligence brought by L against the sheriff, the direction given to the jury was, that there had been no arrest at L's suit; that the Judge's order discharging B from custody was no justification to the sheriff; that whether the sheriff had acted negligently in arresting B on A's invalid writ was a question of fact, and also that the jury must say whether the sheriff knew, or without negligence might have known, that A's writ was a void writ:—Held, affirming a judgment of the Court of Exchequer Chamber, that this direction was right. *Hooper v. Lane* (House of Lords), 27 Law J. Rep. (N.S.) Q.B. 75.

SHIP AND SHIPPING.

[See *FORBES* (D).]

- (A) CHARTER-PARTY.
- (B) INSURANCE.
- (C) BILL OF LADING.
- (D) CARGO.
- (E) OWNERS.
- (F) MASTER.
- (G) PILOT.
- (H) BROKER.
- (I) SHIPPER AND SHIPPING DOCUMENTS.

- (K) SHAMEN.
- (L) DESERTER.
- (M) PASSENGER ACT.
- (N) REGISTER.
- (O) BOTTOMRY.
- (P) SALE AND TRANSFER.
- (Q) FREIGHT.
- (R) DEMURRAGE.
- (S) LIEN AND MORTGAGE.
- (T) COLLISION AND DAMAGE.
- (U) SALVAGE.

(A) CHARTER-PARTY.

[*Bruce v. Nicolopulo*, 11 Exch. Rep. 129; 7 Law J. Dig. 659.—*Cuthbert v. Cumming* (in error), 11 Exch. Rep. 405; 7 Law J. Dig. 659.—*Thompson v. Gillespy*, 5 E. & B. 209; 6 Law J. Dig. 659.]

A declaration upon a charter-party alleged that it was agreed that the plaintiff's ship should proceed to Odessa, and load a cargo there from the defendant's agent, forty-five running days to be allowed, and averred that the ship proceeded to Odessa, and that the plaintiff did all things necessary to entitle him to have a cargo loaded at Odessa, and that the time for so doing had elapsed, yet that the defendant refused to load a cargo. Plea, that before the alleged breach of contract war was declared between Great Britain and Russia; that Odessa was a Russian port; that the plaintiff and the defendant were British subjects, and the ship a British ship; and that the defendant could not have procured or loaded a cargo without trading with the enemy. Issue thereon. The evidence was, that the ship arrived at Odessa on the 26th of February, and was ready to load on the 4th of March, and on the 10th of March notice to that effect was given to the defendant's agent. On the 1st of April the declaration of war between Great Britain and Russia was known at Odessa. On several occasions before that day the master of the ship demanded a cargo of the defendant's agent, who said he had none, but proposed that the ship should go away. This, however, the master declined to do, and remained at Odessa, still requiring a cargo to be loaded, until the 22nd of April, when he left Odessa in ballast:—Held, that this was not any evidence of a breach by the defendant before the declaration of war put an end to the contract. *Reid v. Hoskins*, 25 Law J. Rep. (N.S.) Q.B. 55; 5 E. & B. 729.

The communications between the master of the ship and the defendant's agent (a foreigner) were carried on through the medium of an interpreter:—Held, that evidence of the words used by the interpreter on these occasions, and purporting to be what was said by the defendant's agent, was admissible in evidence against the defendant, without calling the interpreter himself as a witness. *Ibid*.

By a charter-party the defendant undertook to load a vessel described in the instrument as "of the measurement of 180 to 200 tons, or thereabouts":—Held, that the defendant was not exonerated from loading her because the vessel happened to be of 257 tons burthen. *Windle v. Barker* (in error), 25 Law J. Rep. (N.S.) Q.B. 349; s. c. *nom. Barker v. Windle*, 875.

On an appeal to the Court of Exchequer Chamber,

under the Common Law Procedure Act, 1854; when the judgment below is affirmed costs will be given to the successful party, but no costs will be given to either when the judgment below is reversed. *Ibid*.

The description of a vessel in a charter-party as "A 1," warrants only that she was "A 1" at the time of making the charter-party, not that she should continue to be so. Where by a charter-party the plaintiff, the owner, agreed that the ship, then bound for H, should proceed, with all convenient speed, to the north of England for coals, from thence to Limerick, and there load a cargo of grain or other merchandise for the defendant, and the ship, having been delayed by bad weather, did not arrive at Limerick till long after the time expected,—Held, in an action by the owner on the charter-party, that evidence on behalf of the defendants that the Limerick export grain trade is carried on only at a certain season, which had expired before the ship arrived, was inadmissible. *Hurst v. Osborne*, 25 Law J. Rep. (N.S.) C.P. 209; 18 Com. B. Rep. 144.

The defendants agreed by charter-party to load the plaintiff's vessel at Sunderland with coke with all possible despatch, in the customary manner, in regular turn. In an action for delay in loading according to the terms of the charter-party,—Held, that evidence was not admissible to shew that, according to the custom of the port of Sunderland, under such a contract the shipowner is bound to wait until a manufacturer of coke not named in the contract has supplied all ships, whose names are put down in a turn-book kept by the manufacturer, which he has previously contracted to load with coke in the port, provided he uses reasonable despatch and that the manufacturer's name is mentioned at the time the contract is made. *Hudson v. Clementson*, 25 Law J. Rep. (N.S.) C.P. 234; 18 Com. B. Rep. 213.

A declaration on a charter-party stated that the instrument provided that the plaintiff should take in a cargo at S, in the Gulf of Bothnia, and without delay proceed to Southampton and deliver it, and on delivery should receive the highest freight which he could prove to have been paid for ships on the same passage by water, when the vessel passed Elinore, inwards, but not less than 90s. per St. Petersburg standard hundred. It was proved that higher freights than 90s. had been paid for vessels on the voyage from S to London, and that the freights to Southampton were always not less than 6s. higher than the freights to London:—Held, that there was no proof of higher freights than the 90s. being paid for ships on the same passage with the vessel in question. *Gether v. Cepper*, 25 Law J. Rep. (N.S.) C.P. 260; 18 Com. B. Rep. 866.

A declaration on a charter-party made between the plaintiffs and the defendant stated that it was agreed between the defendant, the owner of the ship *Maggie*, and the plaintiffs, the charterers, that the ship should load a cargo in London, and proceed to Hong Kong, and deliver the same, "the ship to be consigned to the charterers' agents in China, free of commission on that charter"; that according to the custom of merchants in London, when a ship, chartered in London for China, is agreed to be consigned to the charterers' agents, whether consigned free of commission on that charter or not, it is the right and duty of such agents to procure a charter or cargo for

the ship, and they are entitled to be paid the usual broker's commission on the amount of freight payable under such charter, unless excluded by special contract; but in case the owners of the ship procure a charter or cargo for the ship, without any default of the consignees, the consignees are entitled to the broker's commission on any freight payable under such charter-party, unless such right is excluded by special contract; that the ship arrived in China, and the plaintiff's agents, as consignees, performed their duty free of commission on the outward voyage, and were ready to procure a charter or cargo for Hong Kong; that the defendant did not permit them to procure such charter or cargo, but, without the default of the plaintiff's agents, himself procured a cargo. Breach, non-payment by the defendant of any commission on the said cargo:—Held, that parol evidence of the mercantile usage was not admissible to vary the terms of the charter-party; and, *per Bramwell, B.*, that the breach was wrongly assigned. *Phillipps v. Briard*, 25 Law J. Rep. (N.S.) Exch. 238; 1 Hurl. & N. 21.

A charter-party stipulated for the plaintiff's (a British) ship proceeding to Constantinople and thence to Odessa, and there loading a cargo from the defendant, a British subject; and that in case of war having commenced previous to and continuing on the ship's arrival at Constantinople, the defendant was to load the ship at the latter port:—Held, that the war contemplated was such a war as would render the voyage of a British ship from Constantinople to Odessa unlawful, that is, a war between England and Russia; and, therefore, that a war between Russia and Turkey existing at the time of the ship's arrival at Constantinople (no war having been then declared between Great Britain and Russia) was not within the provision. *Avery v. Bowden* (in error), 26 Law J. Rep. (N.S.) Q.B. 3; 6 E. & B. 953; affirming the judgment below, 25 Law J. Rep. (N.S.) Q.B. 49; 5 E. & B. 714.

In a second count upon another charter-party between the plaintiff and the defendant, both British subjects, the declaration stated that it was agreed that the plaintiff's (a British) ship should proceed to and load a cargo from the defendant at Odessa, forty-five running days being allowed for loading and unloading; that the ship proceeded to Odessa, and remained there a great part of the forty-five running days, and was ready to remain for the residue thereof, but that the defendant dispensed with her doing so, and requested her to depart from Odessa without remaining for the rest of the running days, and without a cargo; and alleged as a breach, that the defendant had not provided a cargo. The defendant pleaded that before the defendant dispensed, &c., and before breach by the defendant, war was declared between Great Britain and Russia, and that it thereby became impossible for the defendant to load a cargo without trading with the enemy. Issue thereon. The evidence was that the ship arrived at Odessa on the 11th of March; that the declaration of war between England and Russia was known there on the 1st of April; that on several occasions previous and subsequent to the 1st of April, the plaintiff's captain repeatedly asked the defendant's agent for a cargo, whose answer was, that he had none for him, and on the 16th of April he added, that the ship had better go away. The ship sailed

from Odessa without a cargo on the 17th of April, before the expiration of the running days. A verdict was found for the plaintiff, but leave was reserved to the defendant to move to enter a verdict for him, if the Court should be of opinion that there was no evidence to go to the jury of any dispensation by him before the declaration of war was known at Odessa:—Held, that on such a motion the verdict could not stand, unless there was reasonable evidence on which the jury were justified in finding it, and that a mere scintilla of evidence, or evidence leading only to a conjecture, was insufficient. Held, further, that there was no reasonable evidence of any dispensation by the defendant of the ship's remaining the running days at Odessa. *Ibid.*

A declaration upon a charter-party alleged, that it was agreed that the plaintiff's ship should proceed to Odessa, and load a cargo there from the defendant's agent, forty-five running days to be allowed, and averred that the ship proceeded to Odessa, and that the plaintiff did all things necessary to entitle him to have a cargo loaded at Odessa, and that the time for so doing had elapsed, yet that the defendant refused to load a cargo. Plea, that before the alleged breach of contract war was declared between Great Britain and Russia; that Odessa was a Russian port; that the plaintiffs and the defendant were British subjects, and the ship a British ship; and that the defendant could not have procured or loaded a cargo without trading with the enemy. Issue thereon. The evidence was, that the ship arrived at Odessa on the 26th of February, and was ready to load on the 4th of March, and on the 10th of March notice to that effect was given to the defendant's agent. On the 1st of April the declaration of war between Great Britain and Russia was known at Odessa. On several occasions before that day the master of the ship demanded a cargo of the defendant's agent, who told him that he had no cargo and could not load the ship, and proposed that the ship should go away. This, however, the master declined to do, and remained at Odessa, still requiring a cargo to be loaded by the defendant, until the 22nd of April, when he left Odessa in ballast:—Held, that this was not any evidence of a breach by the defendant before the declaration of war put an end to the contract. *Reid v. Hoskins* (in error), 26 Law J. Rep. (N.S.) Q.B. 5; 6 E. & B. 953.

It was mutually agreed by charter-party between shipowner and charterer, that the ship should sail from London to Bassein, there to receive a full cargo of rice, and proceed to London direct, and deliver it there on being paid freight, as follows:—5*l.* 5*s.* per ton net price delivered; other goods, if any, in proportion; cash for ship's disbursements to be advanced to the extent of 300*l.* free of interest, but subject to insurance and 2*l.* 10*s.* per cent. commission; the freight to be paid on unloading and right delivery as follows—cash less two months' interest, and, if required, 300*l.* to be paid in cash on arrival, less two months' interest. The ship reached Bassein, and whilst there money was advanced by the charterer's agent for the ship's disbursements. The ship was lost soon after sailing on her homeward voyage:—Held, that on the true construction of the charter-party, the stipulated advance was to be taken as pre-payment of freight, and not as a loan; and that therefore the charterer could not recover back his

advance. *Hicks v. Shield*, 26 Law J. Rep. (N.S.) Q.B. 205; 7 E. & B. 683.

By a charter-party the ship of the plaintiff, British subjects, was to proceed to Odessa, and after the discharge of her outward cargo was to load from the factors of the defendants, subjects of the Emperor of Russia, a full cargo, and forty running days were to be allowed. The vessel arrived at Odessa on the 11th of February and discharged her cargo; and on the 20th the master gave notice to the defendants that the ship was ready to receive their cargo. Before that time, and in answer to the notice, and on subsequent occasions, the defendants said that they had ceded the charter-party to K, and he would provide a cargo. K, however, refused to deliver a cargo; and, afterwards, on the 28th of March, a declaration of war was made by Great Britain against Russia, and it was known at Odessa on the 6th of April. The ship after this, but before the running days had expired, went out of the harbour of Odessa. In an action against the defendants for non-performance of the contract by not loading,—Held, that the above facts did not shew such a renunciation of the contract by the defendants before the declaration of war as to constitute a breach, and entitle the plaintiffs to maintain an action before the expiration of the running days under the doctrine laid down in *Hochester v. De Latour*.—Confirming *Avery v. Bowden*. *Barwick v. Buba*, 26 Law J. Rep. (N.S.) C.P. 280; *nom. Barrick v. Buba*, 2 Com. B. Rep. N.S. 563.

Stipulations in a charter-party that the vessel, being tight, staunch and strong, shall sail with convenient speed and within a reasonable time, are not conditions precedent to the performance of a contract to load, on the part of the charterer; although, if by reason of the non-compliance with those stipulations, the object of the charter-party and of the voyage was wholly frustrated, that may be an answer to an action for breach of the contract. *Tarrabochia v. Hickie*, 26 Law J. Rep. (N.S.) Exch. 26; 1 Hurl. & N. 183.

A declaration on a charter-party stated that it was agreed between the plaintiff, the owner of the vessel the *Zwaan*, now in Amsterdam, to sail from thence to Liverpool on or before the 15th of March, and that the vessel should be ready, &c., restrictions of princes, damage and accidents of the seas and navigation, the act of God, fire, pirates, and enemies throughout this charter-party always excepted. Breach.—That the defendants made default in loading the agreed cargo, and refused to load the ship, and repudiated the charter-party. Second plea, that the charter-party contained a stipulation that the vessel was to sail from Amsterdam to Liverpool on or before the 15th of March next, and that she did not sail from Amsterdam for Liverpool on or before that day. Third plea, that whilst the agreement was in the possession of the plaintiff it was, without the knowledge or consent of the defendants, altered in material particulars by the addition of the stipulations "wind and weather permitting, with cargo or in ballast for ship's benefit"; that the said alteration was not made in correction of any mistake, or to further the intentions of the parties, &c., by reason whereof the agreement became void. First replication to the second plea, that, before the time for the ship's sailing, the defendants refused to load her,

and repudiated the charter-party. Second replication to the second plea, that the ship was prevented from sailing before the 15th of March by dangers and accidents of the seas and by the act of God. Demurrer thereto. Demurrer to the second plea. Third replication to the second plea, that before the time for sailing of the ship the defendants refused to load her, and repudiated the charter-party. Demurrer thereto:—Held, that this replication was bad. *Crookewit v. Fletcher*, 26 Law J. Rep. (N.S.) Exch. 153; 1 Hurl. & N. 892.

Replication to the third plea, that the said addition was made without the knowledge of the plaintiff by a stranger, who forthwith informed the plaintiff thereof before the time for performing the charter-party had arrived, and before any repudiation thereof by the defendants on the ground of the said addition and interpolation, offered the defendants to strike out the additions and interpolations, if the defendants objected thereto, but the defendants did not then object to accept or perform the charter-party on the ground of such addition and interpolation having been so made as aforesaid; that afterwards, and as soon as the defendants did object to the addition and interpolation, and before the time for performing the charter-party in any respect had arrived, the said stranger wholly struck out and erased the said addition from the charter-party, and then returned the charter-party to the defendants in the same state and condition in which it was when executed by the parties, except as to the said erasure, and that the defendants never were prejudiced by the interpolation and addition having been struck out and erased. Issue thereon:—Held, that even if this replication had been proved, the defendants would have been entitled to judgment upon it *non obstante veredicto*. *Ibid*.

It appeared that, after the charter-party had been signed by the plaintiff in Amsterdam and returned by him to his agent in England, the agent inserted in the policy the words "wind and weather permitting, with cargo or in ballast for ship's benefit," and then returned it to the defendants, stating that he had made the alteration in question on his own responsibility, and that it did not affect the policy. The defendants objected to the alteration, and, shortly afterwards, on that ground, declined the vessel:—Held, first, that the stipulation as to sailing on the 15th of March was a condition precedent, and that the word "throughout" did not affect it; secondly, that the policy was vitiated by the insertion of the words "wind and weather permitting," &c. *Ibid*.

By a charter-party the owners agreed that a vessel, being then tight, staunch and strong, and well conditioned for the voyage, should sail from Callao, and load a cargo of guano at the Chincha Islands, calling on her way at Pisco, to obtain the necessary pass to load, to "be given to the captain by the charterers' agents, free of expense, within twenty-four hours of his application." To an action against the charterers for loading an insufficient quantity of guano, the defendants pleaded, that by the laws of the Republic of Peru, every vessel proceeding from Callao to the Chincha Islands for guano was obliged to procure from the government a written pass or permit, and that on inspection of the vessel the government refused to give a pass or permit, but on the plaintiffs

repairing the vessel a permit was granted to load a limited quantity of guano, which was accordingly loaded, and that if a greater quantity had been loaded, the vessel and cargo would have been liable to seizure:—Held, on demurrer, that the plea was no answer to the action, for the defendants undertook to procure the pass, and were not prevented from so doing by any act of the plaintiffs, there being no allegation that, in point of fact, the vessel was in an improper condition to load a greater quantity. *Kirk v. Gibbs*, 26 Law J. Rep. (N.S.) Exch. 209; 1 Hurl. & N. 810.

It is doubtful whether the captain has authority to bind the owner by stipulations in a charter-party with respect to advances to be made to the captain by the charterer against the freight. *Semble*—however, that if the owner accepts the freight under such charter-party, he may be bound by the stipulation, even if it makes the captain's receipts conclusive. But where the owner (a mortgagee) had received payment of freight from the charterer, under protest on the part of the charterer that there was a certain sum to be deducted on account of advances to the captain pursuant to stipulation in the charter, and the owner gave an undertaking to refund such sum as might appear on the charterer's account to be due by reason of such advances, and afterwards to be at liberty to dispute any of the items in the account,—Held, that the charterer was entitled to recover the sum (at all events in the first instance) in an action for money had and received, it appearing that the sum had, in fact, been *bond fide* advanced to the captain, leaving the shipowner to raise the question of his liability for such advances in a separate action. *Gibbs v. Charleston*, 26 Law J. Rep. (N.S.) Exch. 321.

A declaration on a charter-party, by which the defendant, the charterer, engaged to load at Odessa, by his factors, a cargo of wheat, thirty-five running days to be allowed, alleged as breaches that the defendant did not load the cargo, and, though he detained the ship on demurrage at Odessa, had not paid the demurrage. The plea stated, that the defendant was a British subject; that after the making of the charter-party, and before the arrival of the ship at Odessa, and before the defendant provided a cargo, war was declared by England against Russia; that Odessa was a hostile port; that it became impossible for the defendant to fulfil the charter-party without dealing or trading with the Queen's enemies, of which the plaintiff had notice before the expiration of the laying days. The replication set out an Order in Council of the same date as the declaration of war, by which Her Majesty waived her right of seizing enemy's property on board of neutral ships, and another Order in Council made before the expiration of the running days, and while there was time to load the vessel within them, allowing neutral vessels to export into the Queen's dominions goods and merchandise to whomsoever they might belong, and permitting British subjects to trade with all places not blockaded. It was alleged that the ship and the plaintiff, the shipowner, were neutral, and that Odessa was not in blockade:—Held, that the plea was good, as the contract was rescinded by the declaration of war; and that the replication was bad, as the Orders in Council could not revive it when once dissolved. *Espósito v.*

Bowden (Ex. Ch.), 27 Law J. Rep. (N.S.) Q.B. 17; 7 E. & B. 763.

"Memorandum for charter.—It is mutually agreed between Capt. W P, of the ship *Celerity*, now in the Tyne, and G W W (the defendant), agent for E W & Son, of Devonport, merchants," that the ship shall load, at &c., a certain cargo of coals, &c., "from the agents of the said freighter, and proceed therewith to Plymouth not higher up than Torpoint or New Passage, or so near thereunto as she may safely get, and deliver the same to the said freighters or their assigns, on being paid freight, &c. A keel a day to be allowed the said merchants for delivery; demurrage over and above the said lying days, 3*l.* per day. Ship to be addressed E. Winlo & Son, Devonport." This document was signed by the defendant simply with his own name. The ship loaded pursuant to the charter, and arrived off Plymouth at neap tides; the consignees, on receipt of notice that she was ready to discharge, ordered her to proceed to a wharf, which was within the limits stated in the charter-party, and was a usual place for the discharge of coals, and could be reached at ordinary spring tides by vessels of greater burthen than the *Celerity*; the master requested the consignees to send barges to lighten her, but, none being sent, she proceeded as she was towards the wharf, and became fixed on a mudbank till spring tides, when she got alongside the wharf. It was not the practice at Plymouth to use barges for the purpose of lightening ships:—Held, that, on the proper construction of the charter-party, and under the circumstances, the consignees had a right to name the wharf they did; and that the lay days did not begin till the ship reached the wharf. *Semble*, by the whole Court, that the defendant was personally liable on the charter-party. *Parker v. Winlo*, 27 Law J. Rep. (N.S.) Q.B. 49; 7 E. & B. 942.

A charter-party entered into between the plaintiff, who were shipowners, and the defendant "as agent for the freighter," contained the following clause: "it is further agreed that this charter being concluded by J. R. Yglesias" (the defendant) "for another party, the liability of the former in every respect, and as to all matters and things as well before as after the shipping of the said cargo, shall cease as soon as they have shipped the cargo." The charter-party was signed, "for J. R. Yglesias, Adolphus J. Harrison & Co.":—Held, in an action, by the plaintiffs, for demurrage at the port of discharge, that they could not recover, as the above clause protected the defendant from liability. *Oglesby v. Yglesias*, 27 Law J. Rep. (N.S.) Q.B. 356; E. B. & E. 980.

A charter-party, on its face, purported to be accepted by M G, by procuration of T G, the defendant. To shew the authority of M G, evidence was adduced that the defendant, although resident in London, carried on the business of a corn-factor at Limerick, where the charter-party was executed, and that M G was his brother, and had the general management of the defendant's business and warehouse there, and was in the habit of sending great quantities of corn to London, by vessels hired, and the charter-parties signed, by him, by procuration of the defendant:—Held, that the jury were at liberty to find that M G had a general authority so as to bind the defendant, although in fact no authority had been given by him to execute this charter-party,

and it was one in which he had no interest. *Semble*—the damages recoverable in an action for not loading pursuant to a charter-party, are the amount of freight which the ship would have earned if she had been loaded, minus the expenses in carrying the freight, and also deducting any sum the ship has actually earned elsewhere. *Smith v. M'Guire*, 27 Law J. Rep. (N.S.) Exch. 465; 3 Hurl. & N. 554.

Where a charterer agreed to load a vessel, when it arrived at a certain port, with a cargo of coals in the customary manner, and the question at the trial was, whether he had so loaded the vessel within a reasonable time, it was held, that the jury were rightly directed not to take into consideration a delay occasioned by a strike among the colliers and a dispute with a railway company, along whose line the coal had to be brought to the port for shipment, these not being matters contemplated by either party when the charter-party was made. *Adams v. the Royal Mail Steam Packet Co.*, 28 Law J. Rep. (N.S.) C.P. 33; 5 Com. B. Rep. N.S. 492.

Where, by a charter-party, a vessel then lying at Genoa was warranted to sail on or before the 30th of July to Monte Video and Lima, and thence to proceed to Callao for orders to load a cargo of guano, at the Chincha Islands, to which place the vessel should at once proceed, &c., and certain running and lay days having been specified, it was provided that should the vessel be unnecessarily detained at any other period of the voyage, such detention should be paid for at an agreed rate.—Held, that the detention of the vessel at Genoa till the 8th of September must, *prima facie* and unexplained, be taken to have been unnecessary; but that the voyage could not begin before the vessel left Genoa, and, consequently, that the clause as to unnecessary detention did not attach. *Valente v. Gibbs*, *Gibbs v. Valente*, 28 Law J. Rep. (N.S.) C.P. 229; 6 Com. B. Rep. N.S. 270.

A charter-party dated London, July 30, 1858, was as follows:—It is this day agreed between G D & Son, owners of the ship D, now lying in the port of London, of the one part, and Messrs. Gregory Brothers, as agents to S F, of Anamaboo, merchants and charterers, of the other part, that, &c. (the chartered voyage being from London to the West Coast of Africa and back; and the words "merchants" and "charterers" being printed in the plural throughout the charter-party). The document was signed "For G D & Son, of Jersey, owners, H G, as agent; for S F, Esq., of Anamaboo, Gregory Brothers, as agents":—Held, that Gregory Brothers were not liable on the charter-party as principals. *Deslandes v. Gregory*, 29 Law J. Rep. (N.S.) Q.B. 93.

The plaintiffs' ship was chartered by the defendants to proceed to Mayo (Cape de Verdes) and there load from charterers' agents, in regular turn as customary, a cargo of salt, which the captain was to deliver at the port of discharge on being paid freight. On the arrival of the ship at Mayo, there being several others waiting to be loaded, the charterers' agents, to avoid delay, directed the captain to go to Boa Vista, another of the Cape de Verdes Islands, 100 miles from Mayo, and get a cargo of salt there, which the captain accordingly did on receiving an indemnity from the agents. Boa Vista salt being very inferior to Mayo salt, the defendants repudiated the

transaction. The plaintiffs having sued the defendants for freight under the charter-party,—Held, that (whatever might be the extent of authority which the law would imply for the agents to deviate from the charter-party in small matters, so long as the contract was substantially fulfilled), there was no implied authority for the agents to vary the contract to the extent of substituting a voyage, port of loading and cargo different from those stipulated by the charter-party. *Sickens v. Irving*, 29 Law J. Rep. (N.S.) C.P. 25; 7 Com. B. Rep. N.S. 165.

By a memorandum of agreement made between the plaintiff, part-owner and captain, and the defendants, the charterers of a ship, and signed by the parties, but not under seal, it was provided, *inter alia*, that the said ship should load in the London Docks, and there receive and take on board all such lawful goods as might be required by the said charterers, and should therewith proceed to Geelong; that the captain should attend daily at the broker's office to sign bills of lading; that the whole of the ship should be at the disposal of the charterers for the conveyance of goods and specie (excepting cabin, &c.); if gunpowder to be shipped, the same to be taken on board where ordered below Blackwall, as customary; in consideration whereof the charterers agreed to pay freight for the use and hire of the said ship the sum of 1,400*l.*, with a gratuity of 25*l.* to the master, payable before leaving London; the freight to be paid as follows: so much as may be payable in the colony by bills of lading to the extent of 800*l.*, to be taken and received in part payment, and balance, 600*l.* in cash, less seventy days' discount from date of clearing from London; forty running days to be allowed the said charterers, Sundays, &c. excepted (if the ship be not sooner despatched), for loading the said ship, to commence from the date of her being ready at her loading berth to receive cargo. The owner further agreed, that the ship should be ready to sail for her destined port at the expiration of the said laying days, or sooner, if required by the charterers; if the ship were not ready, either on the owners' or charterers' part, at above-named dates, then demurrage to be paid by the party in default, at the rate of 7*l.* per diem; the ship to be ready on or before the 10th of November, or charterers to have the option of cancelling the agreement; penalty for non-performance of the agreement, 1,400*l.* Charterers to have the option of shipping acids on deck to the extent of 5 tons measurement, at shipper's risk, to which effect a clause to be inserted in the bill of lading:—Held, that the stipulation for the payment of the 600*l.* (portion of the 1,400*l.* freight) was an independent stipulation; and that the things to be done by the shipowner before clearance were not conditions precedent to his right to sue for the 600*l.* under the agreement, but that he was entitled to that sum as soon as the ship should have cleared from London, and to the 800*l.* (the remainder of the 1,400*l.* freight) on her arrival at Geelong. That the stipulation, that the captain should attend daily at the broker's office to sign bills of lading, was not a condition precedent to the right of the owner to sue for freight, but was an independent stipulation, for the breach of which an action for damages might be brought by the charterer against the owner. That in the stipulation that the ship should be ready on or before the 10th of November, or the charterers

to have the option of cancelling the agreement, time was of the essence of the contract, and the stipulation was intended by the parties to be, and was, in fact, a condition precedent to the plaintiff's right to recover under the agreement. And *per Byles, J.*—Inasmuch as no particular day for sailing was specified in the charter-party, a delay in sailing would not disentitle the owner to sue for freight, but would be ground for an action by the charterer for damages consequent on the delay. That the effect of the stipulation, that if the ship were not ready, either on the owners' or charterers' part, at above-named dates, then demurrage to be paid by the party in default at the rate of 7*l.* per diem, was to render the owner liable for demurrage for any delay caused by unreadiness of the ship in matters within the duty of the owner relating to the ship; and to render the charterer liable for demurrage for any delay caused by unreadiness of the ship in matters within his province relating to the cargo, although delay in this respect might have been caused by the previous default of the owner; and that for damages consequent on delays caused otherwise, the parties must be left to their cross-actions. That the contract being to pay 62*5*l.** on a given event, the sailing of the ship, when that event happened the money was payable on request, and recoverable in *indebitatus assumpsit*. That the captain, with whom, and in whose name, the contract was made, though only partly interested in it as part-owner, was entitled to sue. That any expenses incurred by the defendants, by reason of the plaintiff's refusal to load part of the cargo, could not be set off or deducted from the plaintiff's claim, but could only be recovered in a cross-action. *Seeger v. Duthie*, 29 Law J. Rep. (N.S.) C.P. 253; 8 Com. B. Rep. N.S. 43.

By a charter-party, it was agreed that the ship, then lying at Genoa, should sail "on or before the 30th of July 1859," to Monte Video and Lima (with goods for third parties), and thence proceed, with all convenient despatch, to Callao, where the master was to report his arrival to the agents of the charterers, by whom he was to be sent to the Chincha Islands for a cargo of guano for a port in the United Kingdom. Thirty days were to be allowed to the charterers for loading the ship, and to the owners for taking in certain specified light freight, and thirty days over and above the lay days, at 7*l.* per day; and then came the following provision: "Should the vessel be unnecessarily detained at any other period of the voyage, such detention to be paid by the party delinquent to the party observant, at the above-named rate of demurrage or compensation." The vessel did not leave Genoa until the 8th of September:—Held, that this was not a detention during the "voyage," within the meaning of the penalty clause. *Valentic v. Gibbs*, 5 Com. B. Rep. 270.

The plaintiff and defendant agreed by charter-party that the plaintiff's vessel should sail to Sydney and Moreton Bay, and thence proceed to Callao, Peru, where the captain should report his arrival to Messrs. G, who should send the captain orders for loading a cargo of guano at the Chincha Islands, to which place the vessel should at once proceed; and after completing her loading, proceed to any safe port in the United Kingdom: freight to be paid at the rate of 4*l.* sterling per ton weight of guano. "The owners guarantee that for the freight of 4*l.* per ton,

the ship shall be despatched from Australia within twenty-one days after arrival; if detained over twenty-one days, &c., 3*l.* 10*s.* per ton to be the rate of freight. If ordered from Sydney to Moreton Bay, the time so occupied not to be reckoned in the days as above." The vessel sailed from Liverpool on the 5th of July 1858, and anchored inside Sydney Heads on the 25th of October 1858. She was ordered to Moreton Bay, but bad weather and the insubordination of a portion of the crew prevented the vessel from leaving Sydney Harbour until the 4th of November, when she proceeded on her voyage, and on the 12th anchored inside the Flanders Rocks and outside Moreton Bay. She was taken in charge of a pilot up the channel, and on the 14th arrived at her anchorage, where she remained until the 5th of December. Some of the crew having deserted and others refused to work, the remainder was not sufficient to navigate the vessel safely to Callao, and no addition to the crew could be procured at Moreton Bay. On the 5th of December the master caused the anchor to be got up and the sails set by the men who were willing to work, with the assistance of the harbour-master and pilot's crew, and the vessel proceeded on her voyage to Callao, but shortly afterwards stopped from the wind failing. During the night several of the seamen deserted. On the 6th the vessel proceeded some distance further, when the greater part of the crew refused to proceed to Callao, on the ground that the ship was not sufficiently manned, and they compelled the captain to return to Sydney. The vessel arrived at Sydney on the 12th of December, and remained there until the 6th of January 1854, when she sailed to Callao, where she ultimately arrived, and brought home a cargo of guano:—Held, that under the above circumstances, the ship was not despatched from Australia within twenty-one days after her arrival, and consequently that the plaintiff was not entitled to the freight of 4*l.* per ton. *Sharp v. Gibbs*, 1 Hurl. & N. 801.

A being equitably entitled to a ship entered into a charter-party with C, and afterwards mortgaged the ship to B, B the mortgagee having notice of the charter-party. The ship proceeded on its voyage, but shortly afterwards was obliged to put into port for repairs, which were paid for by B, and B took possession of the ship. C filed a bill against A and B, praying specific performance of the charter-party and for an injunction to restrain the use of the vessel for any other purpose than in performance of the contract entered into with C. One of the Vice Chancellors dismissed the bill; and, on appeal, this decision was affirmed, the Lord Chancellor considering that specific performance of the charter-party could not be decreed, the highest right against B being to prevent him from actively interfering to stop the performance of the contract, while the contract remained in force, but that under the circumstances of the case the contract was virtually at an end upon B's taking possession of the ship. *De Mattos v. Gibson*, 28 Law J. Rep. (N.S.) Chanc. 498; 4 De Gex & J. 276.

(B) INSURANCE.

A policy of insurance was effected upon the passage-money of emigrants upon a voyage from Liverpool to Boston against the perils of the sea,

etc. At the end of the policy was a memorandum, "on passage-money of emigrants, subject to pay a loss *pro rata*, and subject to the clauses and conditions made under sections 47. to 51. of the Passengers Act, 1852, and against these risks only":—Held, that the policy extended to any expense occasioned by the perils insured against, which were thrown upon the shipowners by any of the enumerated sections; but not to the expense of maintaining the passengers during the detention of the ship at a foreign port for the purpose of repairs, the ship afterwards completing the voyage with the passengers on board; such expense being cast upon the owners by section 32. of the act. *Willis v. Cooke*, 25 Law J. Rep. (N.S.) Q.B. 16; 5 E. & B. 641.

A policy of assurance was effected on a ship and cargo from Galatz to London. The policy was in the usual form, but contained a stipulation, by way of exception, that the ship and goods, &c. were warranted "free from capture and seizure and the consequences of any attempt thereof." On the 17th of March 1854 (war not being declared between England and Russia until the 29th) the ship sailed from Galatz on her homeward voyage, and on the 19th passed the mouth of the Ismail river, where there was a Russian fort, and close enough to the shore to be hailed, with the English ensign flying, without being molested or receiving any communication from the shore. When about half a mile from the fort two guns were pointed at the ship, and the Russians, without any notice being given, fired at her, and although her sails were lowered and anchor dropped, they continued to fire at her until she sank. The officers and crew took to the boats to save their lives, and on reaching the shore were taken prisoners by the Russians, and detained some weeks, and then released. One of the Russian officers, by whom some of the crew were examined, stated that the English ensign had been mistaken for the Turkish flag, and that they thought the ship was a Turkish ship, and that he was sorry for the mistake that had been made:—Held, in an action upon the policy to recover for the loss of the ship and cargo, first, that the loss would have been a peril insured against within the meaning of the policy, but for the above exception; secondly, that the facts shewed an actual seizure of the ship by the Russians, and that such seizure came within the meaning of the exception. By *Lord Campbell, C.J.*, that the exception extended to any capture or seizure whereby the ship was lost to the assured, whether legal or altogether illegal and contrary to the law of nations. *Powell v. Hyde*, 25 Law J. Rep. (N.S.) Q.B. 65; 5 E. & B. 607.

There is no implied warranty of seaworthiness in any case of a time policy—*dissentiente Erle, J.* Declaration upon a time policy upon a ship. Pleas, first, that at the time when the policy was effected and down to the time of sending the ship to sea, she was an outward-bound ship lying in a British port, where the plaintiffs (the owners) resided; that the ship was chartered for a voyage, and that the plaintiffs sent her to sea in an unseaworthy state, and when she was not in a fit condition to go to sea, and that she was afterwards, while on the high seas in that condition, lost. Second plea in the same terms, except that it alleged that the plaintiffs knowingly, wilfully, wrongfully and improperly sent the ship

out to sea in an unseaworthy state, and when she was not in a fit condition safely to go to sea, and that while she was on the high seas in that condition she was lost. Third plea to the same effect, except that it alleged that the plaintiffs knowingly, wilfully, wrongfully and improperly sent the ship to sea in an unseaworthy state, and when she was not fitted for the voyage, and when she was not in a fit condition safely to go to sea, and at a time when it was dangerous for her to go to sea in the condition in which she then was, and that the plaintiffs wrongfully and improperly caused and permitted her to be on the high seas in the condition aforesaid, and without a master or proper crew to navigate her on her voyage, during which time, by reason of the premises, she was wrecked and lost:—Held, by *Lord Campbell, C.J.*, *Coleridge, J.* and *Wightman, J.*, that the first two pleas were not an answer to the action. That the third plea was an answer, upon the ground that the plaintiffs could not recover for a loss occasioned by their own wrongful act. *Per Erle, J.*, that all the pleas were an answer to the action, upon the ground that in a time policy there is, under the circumstances there stated, an implied warranty of seaworthiness. *Thompson v. Hopper*, 25 Law J. Rep. (N.S.) Q.B. 240; 6 E. & B. 172.

The rule of law that an implied warranty of seaworthiness does not attach to a time policy *bond fide* effected on a ship, applies equally whether the ship at the commencement of the risk be at sea on her voyage or be at the date of the policy in a port about to sail on a voyage, where there are means of making her seaworthy. But if the ship sail on her first voyage after the policy in an unseaworthy condition, the underwriter cannot be made liable for repairs rendered necessary, not by perils of the sea, but by the bad condition of the ship at the commencement of the risk. *Favcus v. Sarsfield*, 25 Law J. Rep. (N.S.) Q.B. 249; 6 E. & B. 192.

Declaration on a time policy on a ship from the 15th of April 1854 to the 15th of April 1855, alleging, first, a loss in respect of the expense of repairs after the 15th of April 1854 whilst on the high seas, rendered necessary by the perils insured against, and that afterwards and during the continuance of the risk insured against, the ship was by perils of the sea wrecked and became wholly lost to the plaintiff. Fourth plea to the first loss, that the ship sailed on her voyage in an unseaworthy state for the voyage; that neither at the time of her sailing nor at any time before the said plaintiff's loss was she tight, &c., or reasonably fit to withstand and safely encounter or bear the ordinary force of the winds and waves; that she did not meet with or encounter any storms, &c. or any greater violence of winds and waves than was usual and ordinary, &c., and that the necessity for the said repairs arose from the bad and defective condition of the ship and her exposure in such condition. Seventh plea to the whole declaration, that the policy was made in Liverpool, and that the ship when the said risk commenced was in the port of Liverpool, and remained there until she sailed on her voyage; that at the said port there were sufficient means of repairing the ship and making her seaworthy; that she sailed a few days after the said 15th of April on her voyage from L to R, being the voyage in the declaration mentioned, and upon which the said several losses occurred; and that the ship

was not at the time when she so sailed on the said voyage seaworthy for the said voyage:—Held, first, that the fourth plea was a good answer to the plaintiff's claim to recover in respect of the first loss. Secondly (*Erle, J. dissenting*), that the seventh plea was no answer to the plaintiff's claim to recover for the loss occasioned by the perils insured against. *Ibid.*

The plaintiff, who had purchased a cargo which was ready to be loaded at Quebec, effected an insurance in the usual form at and from New York to Quebec, during her stay there, and thence to a home port, "on profit on cargo," beginning the adventure on the goods from the loading thereof aboard the said ship. The ship, which was at the time of effecting the policy on the voyage from New York to Quebec, was lost before she reached that port:—Held, that no cargo having been loaded, the plaintiff could not recover. *Halhead v. Young*, 25 Law J. Rep. (n.s.) Q.B. 290; 6 E. & B. 312.

The declaration set out certain correspondence, shewing that the plaintiff intended to insure the loss of his profit by the ship being lost before arriving at Quebec, and alleged that the correspondence and the nature of the risk intended to be covered were explained to the defendants before they subscribed the policy, and that the premium was at a higher rate than would have been charged for an insurance from Quebec homewards, or on goods for the voyage:—Held, that these facts could not be looked at to alter the nature of the contract. *Ibid.*

On a policy of insurance on goods by sea, the goods were declared to be "2,688 bags of linseed, 1,600 $\frac{1}{2}$." 1,023 bags were totally destroyed by perils of the sea, the rest was safely brought to port. The policy contained the ordinary memorandum that "seed was warranted free from average, unless general, or the ship be stranded." The Court held, that the assured were not entitled to recover from the underwriters for the loss of the 1,023 bags; and laid down the rule, that where memorandum goods of the same species are shipped, whether in bulk or in packages not expressed by distinct valuation, or otherwise, in the policy to be separately insured, and there is no general average, and no stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, though consisting of one or more entire packages, and though such package or packages be entirely destroyed or otherwise lost by the specified perils. *Janson v. Ralli* (in error), 25 Law J. Rep. (n.s.) Q.B. 300; *nom. Ralli v. Janson*, 6 E. & B. 422.

Where the plaintiff declared on a policy of insurance on a ship "from the meridian of the day of sailing from S, to the meridian of the 20th of March 1853," for a loss by perils of the sea, and the defendant pleaded that the ship was not at the time of sailing from S, or at any time of the day of sailing from S, or afterwards during the risk, seaworthy,—Held, on demurrer, that the plea was bad, there being no implied warranty of seaworthiness such as was assumed by the plea, and the case being within the terms of the decision in *Gibson v. Small*. *Quære*—whether in the case of a time policy essentially connected with the commencement of a voyage, a warranty of seaworthiness at the commencement of the voyage might not be implied. *Michael v. Tredwin*, 25 Law J. Rep. (n.s.) C.P. 83; 17 Com. B. Rep. 551.

DIGEST, 1855—60.

Messrs. C & Co., the owners of a vessel, wrote to the plaintiffs, merchants, in the United States, requesting them to obtain a charter for the vessel, and adding, that if the plaintiffs accepted a charter for Great Britain, they preferred the captain drawing against freight, if not prejudicial to the vessel's interest. They also sent a letter to the captain, in which they advised him to put the vessel into the plaintiffs' hands. The captain having shewn this letter to the plaintiffs, and having asked them if they would draw on account of freight, they said they would. The vessel was loaded as a general ship for Liverpool, and was intended to be consigned to Messrs. M & Co. at Liverpool, and who were to do the ship's business in the usual course. The plaintiffs wrote to the owners, informing them that the vessel was being loaded as a general ship, stating that they would draw upon the freight to the amount of disbursements, as the owners had requested. The captain accordingly drew on M & Co., and requested them to charge the same to account of freight. M & Co. having refused to accept the bill, it was indorsed to G & Co., the plaintiffs' agents, who effected an insurance on the freight. The vessel having been lost on her voyage to this country, and the plaintiffs having brought an action on the policy,—Held, first, that the plaintiffs had an insurable interest; secondly, that such interest was correctly described as "advances on account of freight." *Wilson v. Martin*, 25 Law J. Rep. (n.s.) Exch. 217; 11 Exch. Rep. 684.

A mutual assurance company inserted in all its policies a condition that, when a loss occurred, the suffering member should give in his claim and prove his loss before a committee of members appointed to settle the amount; that if a difference thereon arose between the committee and the suffering member, the matter should be referred to arbitration, and that no action should be brought except on the award of the arbitrators:—Held, that this condition was not illegal as ousting the jurisdiction of the Courts. *Scott v. Avery* (House of Lords), 25 Law J. Rep. (n.s.) Exch. 308; 5 H.L. Cas. 811.

A sea policy of insurance declared to be "on profit on cotton, say 150 bales, said profits valued at \$50 $\frac{1}{2}$., and in case of loss or accident the said policy to be considered a sufficient proof of interest, and said policy warranted free from average and without benefit of salvage, that is, should the vessel from any cause whatever be unable to bring on her cargo, then a total loss is to be paid," is a policy on goods within the statute 19 Geo. 2. c. 37. s. 1, and is therefore void as containing terms prohibited by that act. *Smith v. Reynolds*, 25 Law J. Rep. (n.s.) Exch. 337; 1 Hurl. & N. 221.

In an action upon a time policy, alleging a loss of the ship by the perils of the sea, the defendant pleaded that, after the policy was effected, the plaintiffs knowingly, wilfully, wrongfully and improperly sent the ship to sea in an unseaworthy state, and when she was not fitted for the voyage or in a proper condition safely to go to sea, and at a time when it was dangerous for her to go to sea in the state and condition in which she then was, and that the plaintiffs wrongfully and improperly caused and permitted the said ship to be and remain on the high seas near to the sea-shore for a great length of time in the state and condition aforesaid, and without a master and a proper crew to manage her, during which time

she was, by reason of the premises, wrecked and lost. Issue was taken on the plea. The facts were, that the ship having been loaded in Sunderland Harbour, was sent, by the authority of the plaintiffs, out of the harbour and across the bar into an open roadstead, for the purpose of taking advantage of a spring-tide. At this time some of her shrouds, which had been removed for the purpose of loading her, were not replaced, and her rigging was in other respects incomplete. The plaintiffs were aware of the state in which the ship was when she left the harbour. In consequence of this she was obliged to be brought up in the roadstead, and riggers were sent out who completed her rigging and equipment there. After the defects had been repaired, but before the ship had left the roadstead, a sudden storm came on, which caused her to drag her anchor, and, being unable to slip the cable, she went on shore and was wrecked:—Held, that the jury ought, with reference to the issue and the evidence, to have been asked, not whether any of the wrongful acts or neglects of the plaintiffs alleged in the plea, were the direct and proximate cause of the loss, but whether they were the efficient cause without which the loss would not have happened. *Thompson v. Hopper*, 26 Law J. Rep. (N.S.) Q.B. 18; 6 E. & B. 937.

By a clause in a policy of insurance upon a ship valued at 3,000*l.*, it was agreed that if the said ship should by accident or negligence run down or damage any other ship, and the assured should thereby become liable to pay, and should pay any sum not exceeding the value of their ship and freight by or in pursuance of the judgment of any Court, the assured would bear such proportion of three-fourths of the sum so paid as the sum assured bore to the value of the ship and freight assured:—Held, that the assured were liable only in proportion to the sum actually paid by the assured, under a decree of the Court of Admiralty, to the owners of the injured ship, although their ship, which was valued in the policy at a greater sum, had been sold under the decree. *Thompson v. Reynolds*, 26 Law J. Rep. (N.S.) Q.B. 93; 7 E. & B. 172.

Extraordinary expenses occasioned by the fortuitous stranding of a ship cannot be made the subject of general average, unless incurred for the joint benefit of the ship and cargo. Where, therefore, a ship by perils of the sea ran ashore in a bay on the coast of Ireland, and in order to get her off the whole of the cargo was discharged, and considerable expense was incurred after the cargo was discharged, in floating her off and towing her to Liverpool for repairs:—Held, that the expenses incurred in floating the ship off, and towing her to Liverpool for repairs, could not be considered to have been for the benefit of the cargo, and therefore were not the subject of general average, but were (the ship being insured) a charge on the underwriters as a particular average on the ship alone. *Job v. Langton*, 26 Law J. Rep. (N.S.) Q.B. 97; 6 E. & B. 779.

A ship, being chartered out and in for a homeward cargo, but having some goods on board outwards, became stranded soon after sailing. The goods, together with material of the ship, were put on board lighters by the master and sent back to port and warehoused there. The ship, after some days, was got off and returned to port, and when she had been repaired the goods were re-shipped and carried for-

ward to their destination without any interference of the owner of them:—Held, that the landing of the goods was part of the continuous operation for getting the ship off and sending her back to port, there to be repaired, with a view to prosecute the original adventure, and that the goods and chartered freight must both contribute in general average with the ship to the expenses necessarily incurred in getting her off after the goods were landed.—*Job v. Langton* distinguished. *Moran v. Jones*, 26 Law J. Rep. (N.S.) Q.B. 187; 7 E. & B. 523.

Held, also, that if the goods had not remained liable, the freight must still have contributed to this general average with the ship. *Ibid.*

Where a policy of insurance on ship and cargo stated the adventure on cargo to begin "from the loading thereof aboard the said ship," and to terminate "when the same shall be safely landed," and afterwards contained a memorandum as follows: "With liberty to load, reload, exchange, sell or barter all or either goods or property on the coast of Africa and African islands, and with any vessel, boats, factories and canoes, and to transfer interest from this vessel to any other vessel, or from any other vessel to this vessel, in port or at sea, and at any ports or places she might call at or proceed to, without being deemed a deviation, upon any kinds of goods and merchandises":—Held, that such words did not protect goods lying at the plaintiffs' factory after they were landed from the ship, or any goods destined to be the cargo of the ship. *Harrison v. Ellis*, 26 Law J. Rep. (N.S.) Q.B. 239; 7 E. & B. 465.

A shipowner may insure freight on a time policy, though the freight is not earned till after the time expires. There is a total loss of freight insured till a given day, if before that day the goods are so damaged that they could not be put into such a condition as to be carried with safety to their destination, without an expenditure equal to their value on arriving at their destination. The test is, whether a prudent owner, uninsured, would have repaired the goods. *Michael v. Gillespy*, 26 Law J. Rep. (N.S.) C.P. 306; 2 Com. B. Rep. N.S. 627.

The plaintiff insured freight according to the rules of a mutual assurance association, from the 24th of January to the 1st of March 1852, and one of the rules was that the committee of the association, unless they received ten days' notice, or gave ten days' notice, should renew each policy:—*Scumble*—that this was to be taken as a continuing policy. *Ibid.*

Where articles essentially different in nature and kind are insured under a general description as "master's effects," warranted free from all average, the warranty is divisible, and means that the insurers are not to be liable for any partial loss, but are to be liable for a total loss, of any of the specific articles insured under that description. *Duff v. Mackenzie*, 26 Law J. Rep. (N.S.) C.P. 313; 8 Com. B. Rep. N.S. 16.

Therefore, where the master of a vessel which was lost, having effected such a policy, saved his chronometer and a few other articles, but the rest of his effects were totally lost:—Held, that he was entitled to recover against the underwriters the value of the articles lost. *Ibid.*

It being now well established, as a rule of law,

that on an insurance for a voyage either on ship, or goods, or freight, a warranty of seaworthiness, for the voyage, of the ship insured, or of the ship in which the goods are carried, is to be implied; but "seaworthiness" being a relative term, and the question of what it involves in each case being one of fact, there is no exception to the rule in the case of an insurance on salvage (that is, on ship and cargo, in respect of the lien of the insured for salvage service rendered), there being no exclusion of such a warranty. And words in the policy, reciting that the ship and cargo have been abandoned by the original crew, and taken into port by the salvor (the insured), in whose interest the insurance is effected, do not amount to an implied exclusion of it, it being merely explanatory of the interest insured. *Knill v. Hooper*, 26 Law J. Rep. (N.S.) Exch. 377; 2 Hurl. & N. 277.

The question to what extent the vessel, under such circumstances, is to be seaworthy, is for the jury, who will say whether the ship was, at the commencement of the voyage, in such a state as to be reasonably capable of performing it. *Ibid*.

A ship, being freighted by the owners, and insurances effected in the ordinary form on freight and ship, was stranded near her port of discharge, and notice of abandonment given to the underwriters on ship; part of the cargo was then brought by lighters to port and the ship brought to port with the remainder by and at the expense of the owners. The abandonment was subsequently accepted:—Held, as between the shipowners and the underwriters on ship, that nothing in the nature of freight for the whole voyage passed to the latter as abandonees of ship; but that they were entitled to compensation from the shipowners, as owners of the goods, for the carriage in the ship of the goods from the place of stranding to the port, calculated at the current rate of freight between those places. *Miller v. Woodfall*, 27 Law J. Rep. (N.S.) Q.B. 130; 8 E. & B. 493.

There appears to be no such custom at Lloyd's as that the premiums on policies, underwritten by a deceased underwriter, should not be payable by the brokers after his death to his representatives, till the risks created by the policies he had underwritten for the brokers should all be run off. *Semble*—that such a custom, or an express condition to that effect, would not be illegal. *Beckwith v. Bullen*, 27 Law J. Rep. (N.S.) Q.B. 162; 8 E. & B. 683.

By the 16 & 17 Vict. c. 107. ss. 170. and 172, before any clearing officer permits any ship, wholly or partly laden with timber, to clear out from any British port in North America or Honduras for any port in the United Kingdom, between the 1st of September and the 1st of May, he is to ascertain that the whole of the cargo is below deck, and to give a certificate to that effect to the master, and the master shall not sail without such certificate, or place or allow to be placed any part of the cargo on deck, under a penalty of 100*l*.:—Held, that this did not make the voyage of a ship sailing in contravention of the act absolutely illegal, and that a person, not a party to the master's acts, could recover on a policy of insurance effected on the cargo and freight. *Onward v. Hyde*, 27 Law J. Rep. (N.S.) Q.B. 408; E. & B. 670.

In an action upon a time policy, alleging the loss of the ship by the perils of the sea, the defendant

pleaded that, after the policy had been effected, the plaintiffs knowingly, wilfully, wrongfully and improperly sent the ship to sea in an unseaworthy state, and when she was not fitted for the voyage, or in a proper condition safely to go to sea, and at a time when it was dangerous for her to go to sea in the state and condition in which she then was, and that the plaintiffs wrongfully and improperly caused and permitted the said ship to be and remain on the high seas, near to the sea-shore, for a great length of time in the state and condition aforesaid, and without a master and a proper crew to manage her, during which time she was, by reason of the premises, wrecked and lost. Issue was taken on the plea. The facts were, that the ship having been loaded in Sunderland Harbour was sent, with her rigging incomplete, and therefore unseaworthy, by the plaintiffs, who knew of her state, out of the harbour into the open roadstead, for the purpose of taking advantage of a spring tide. While in the roadstead, riggers were sent to complete her rigging. Before the ship left the roadstead, a sudden storm came on, which caused her to drag her anchor; and being unable to slip the cable, she went on shore and was wrecked. The learned Judge who tried the cause left to the jury the question, whether the loss was occasioned by any unseaworthiness. The jury found it was not:—Held, by the Exchequer Chamber, (overruling the decision of the Court of Queen's Bench, and *dissentiente Crowder, J.*), that the direction was sufficient on the issue joined. *Thompson v. Hopper* (Ex. Ch.), 27 Law J. Rep. (N.S.) Q.B. 441; E. B. & E. 1038.

Where the plaintiff insured 240*l*. on any kind of goods aboard a ship against total loss, and afterwards put on board an emigrant's equipment, consisting of a variety of tools, materials, &c., in several separate packages, and all were lost, except three packages of small value,—Held, that he might recover for the total loss of the packages which were totally lost.—Confirming *Duff v. Macdonald*. *Williamson v. Hyde*, 27 Law J. Rep. (N.S.) C.P. 116; 3 Com. B. Rep. N.S. 30.

A policy of assurance was upon any kind of goods and merchandises in any ship or ships, to be valued on rice to be declared, warranted free of particular average, unless the vessel be stranded, sunk or burnt. The assured declared the insurance to be "500 bags of rice per *L* (the name of the vessel) at 8*s*. 3*d*. per bag, 206*l*. 5*s*.":—Held, that the policy did not contemplate a separate insurance on each bag, but one on the whole cargo, and that, therefore, the underwriters were not liable on the total loss of some of the bags. *Estivale v. Ellis*, 27 Law J. Rep. (N.S.) Exch. 105; 2 Hurl. & N. 549.

Semble—that even if it had been competent to the assured to bind the underwriters by inserting in the declaration of interest a clause that average was to be paid on each bag as a separate subject of insurance, the words of the declaration of interest had no such meaning. *Ibid*.

Declaration on a policy of insurance on a voyage from Macao to Havana, "warranted free from capture and seizure"; the perils insured against were "of the seas, men-of-war, enemies, pirates, rovers, thieves, letters of mark, surprisals, takings at sea, arrests, restraints and detentions of all kings, &c., barratry of the master and mariners, and all other

perils," &c.; and by a memorandum at the foot it was declared that the insurance was upon 7,800*l.* expended for provisions for the use of 850 Chinese emigrants and money advanced on freight. The declaration then alleged that the ship sailed from Macao with the 850 Chinese emigrants or Coolies on board, and while on her voyage and on the high seas the Coolies piratically and feloniously assaulted the captain and crew, and piratically and feloniously took, stole and carried away the ship and the provisions, &c. on board from the custody and possession of the captain and crew, by reason of which piracy and theft the assured suffered a total loss.—Held, that the taking of the vessel by the passengers under the circumstances alleged was within the exception in the warranty of "capture and seizure," and that the insurer was not liable. *Kleinwort v. Shepard*, 28 Law J. Rep. (N.S.) Q.B. 147; 1 E. & E. 447.

A policy of insurance was effected on goods on board a ship from London to Ambriz or Loanda, on the coast of Africa, the assured having chartered the ship from London and back; the perils insured against were, *inter alia*, "takings at sea, arrests, restraints and detentions of all kings, princes and people, of what nature, condition or quality soever." On the 21st of September 1854, the ship while on the voyage was seized, near Ambriz, by a Queen's ship, as engaged in the slave trade, and with the cargo sent to St. Helena, where the Vice-Admiralty Court, on the 20th of November, condemned the ship as forfeited, as being engaged in the slave trade, and condemned the owner of the goods in penalties of double their value, under the 5 Geo. 4. c. 113. s. 7, and ordered the goods to be detained until the penalties were paid. The ship and a portion of the goods, being perishable, were sold in December under the order of the Court, and the residue detained at St. Helena. As soon as the proceedings in St. Helena were known in England, formal notice of abandonment was given in due time on the 13th of December. An appeal to the Queen in Council was lodged on the 31st of January 1855, and pending the appeal possession of the goods could not be obtained until December 1856, and then only on the terms of giving security for the invoice cost without regard to deterioration; judgment was delivered by the Privy Council on the 3rd of February 1858, reversing the sentence of the Court below, on the ground that there was no evidence of the ship being engaged in the slave trade, and ordering restitution of the ship, the goods, and proceeds of the part sold. The goods unsold remained at the time of action brought (6th of July 1858) in specie at St. Helena, but deteriorated in value, and they could be forwarded to Loanda at a cost less than their value when delivered there.—Held (on a case in which the Court were to draw inferences), first, that the taking (being unlawful) of the ship with the goods on board was a loss by the perils insured against. Secondly, that on the seizure and notice of abandonment there was a total loss, and that, as the assured as a prudent man could not be reasonably expected to take possession of the goods at St. Helena at the time of action brought, he had a right to sue for a total loss. *Lozano v. Janson*, 28 Law J. Rep. (N.S.) Q.B. 337.

The plaintiffs, having purchased of K palm-oil to arrive at Bristol by a ship called the *James Daly*, then engaged in a trading voyage for K to and from

the west coast of Africa, effected an insurance with the defendant upon the ship and goods at and from Africa to Bristol against the ordinary perils, beginning the adventure upon the goods from the loading thereof; and by a memorandum indorsed on the policy it was declared to be "on profit on palm-oil valued at, &c., per *James Daly*." The ship, while on her voyage home with the palm-oil on board, was lost by perils insured against, but the oil was saved and sent home without damage by other ships, and was disposed of by K to persons other than the plaintiffs.—Held, on the authority of *M'Sweeney v. the Corporation of the Royal Exchange Assurance*, that the plaintiffs were not entitled to recover on this policy for the loss of profit which they would have made by the sale of the palm-oil if it had arrived by the *James Daly*. *Chope v. Reynolds*, 28 Law J. Rep. (N.S.) C.P. 194; 5 Com. B. Rep. N.S. 642.

The agents of the assured having, in accordance with the usage, adjusted the amount of the loss with the broker of the underwriter, and received from him a credit note for the amount, to be paid in a month, the broker having funds of the underwriter in his hands sufficient to meet the amount, but after it was due becoming insolvent,—Held, in an action on the policy of insurance, that the underwriter was not discharged. *Macfarlane v. Giannocopulo*, 28 Law J. Rep. (N.S.) Exch. 72; 3 Hurl. & N. 860.

Upon the construction of a policy of insurance on a ship for a voyage to the Mauritius, and for thirty days "after arrival" (the ship having been lost while waiting outside a harbour for freight), the Court held, that whether the vessel had arrived at the Mauritius was a question of fact dependent upon usage and custom with reference to the nature of the voyage, and that the vessel had so arrived when it had reached the place at which it was usual for vessels on such a voyage to anchor. *Lindsay v. Janson*, 28 Law J. Rep. (N.S.) Exch. 315; 4 Hurl. & N. 699.

By sections 170, 171, and 172. of the 16 & 17 Vict. c. 107, before any clearing officer permits any ship, wholly or in part laden with timber or wood goods, to clear out from any British port in North America or Honduras for any port in the United Kingdom, at any time after the 1st of September or before the 1st of May in any year, he shall ascertain that the whole of the cargo is below deck, and shall give the master a certificate to that effect, and no master of such ship shall sail without such certificate. And the master is forbidden to place upon the deck any part of the cargo after he has received such certificate, and if he does so, or if he sails without such certificate, he shall for every such offence forfeit and pay any sum not exceeding 100*l.* The plaintiffs, who were interested in the cargo of a ship coming within the above provisions, and about to sail from M to the United Kingdom, gave orders for the insurance of the said cargo after the 1st of September. They knew at the time of giving such orders that part of the cargo of the said ship was upon the deck, and they intended that she should sail after the 1st of September and before the 1st of May with such cargo on deck. The insurance was effected by the plaintiffs for the purpose of covering the said cargo and the freight thereof, including the portion above deck. The ship having been lost, an action was

brought upon the policy:—Held, that the whole voyage was illegal, and that the plaintiffs could not recover. *Cumard v. Hyde*, 29 Law J. Rep. (N.S.) Q.B. 6.

The plaintiff employed W, an insurance broker at Lloyd's Coffeehouse, to effect a policy on his vessel, and after the loss he gave W the ship's papers to enable him to adjust the loss with the underwriter. The policy had been made out in W's name, and remained with him from the time it had been made. The loss having been adjusted was settled by W with the underwriter by the latter setting off in account against it a debt for premiums due to him from W. This mode of settlement was in accordance with a usage prevailing at Lloyd's, which was found to be generally known to merchants. The plaintiff, however, was ignorant of this usage, and never intended W to receive the money on the policy, having left the policy with him for safe custody only:—Held, in an action on the policy against the underwriter, that such settlement with W, not being by way of cash payment, was not binding on the plaintiff, as he was not acquainted with the usage.—Confirming *Scott v. Irving*. *Semble*—that the plaintiff was estopped from denying that W had authority to receive payment on the policy. *Sweeting v. Pearce*, 29 Law J. Rep. (N.S.) C.P. 265; 7 Com. B. Rep. N.S. 449.

The plaintiff, through H & J his insurance brokers, effected a time policy of insurance on the ship B, then on her voyage from Newcastle to Genoa, from the 21st of January 1857 to the 20th of January 1858. The policy was subscribed by the defendant on the 19th of January for 3,000*l*. On the 15th the plaintiff had received a letter from the captain informing him that the vessel had been on shore on the coast of Spain on the 2nd of January, and had sprung a leak, and was forced to go into port for repairs. The plaintiff sent the letter to H & J, but they did not inform the defendant of the circumstance, and he first heard of it on the 22nd, from an entry in the Casualty Book at Lloyd's, made that day from particulars supplied by the plaintiff. The defendant immediately wrote the following letter to H & J:—"Understanding that the steamer B has been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired." H & J did not answer the letter or communicate it to the plaintiff. The ship was repaired, and fit for use on the 2nd of April. In October she was totally lost:—Held, first, that the fact of the vessel having been aground was material to the risk, and that its non-communication to the defendant avoided the policy; and, secondly, that the defendant's letter of the 22nd of January did not in law or fact create a fresh contract of assurance from the time the repairs were effected, for, at the utmost, the letter was a mere unaccepted proposal. *Quare*—assuming that the letter was a proposal, whether H & J could have accepted it and made a fresh contract, so as to bind the plaintiff without express authority from him? *Russell v. Thornton*, 29 Law J. Rep. (N.S.) Exch. 9; 4 Hurl. & N. 788.

A ship being chartered with grain from Galatz to Emden for orders, to discharge in a port of the United Kingdom, the owners effected an insurance on the cargo from Galatz to Emden, and thence to a port of discharge in the United Kingdom, with leave to call for orders and to naturalize the cargo,

to return 20*s*. per cent. if risk end at the port of naturalization. The cargo was sold afloat while on the voyage from Galatz to Emden by bought and sold notes for 60*s*. per quarter, "including freight and insurance to Emden." The bill of lading (which was in conformity with the charter-party) and the policy of assurance were delivered to the purchaser:—Held, that the purchaser was only entitled to the assurance to Emden, and, consequently, that he could not recover from the underwriter for a loss between Emden and the port of discharge in the United Kingdom. *Ionides v. Harford*, 29 Law J. Rep. (N.S.) Exch. 36.

A policy of assurance entered into with a mutual insurance association contained, amongst others, a regulation (the sixteenth) which provided, that if a ship insured in the association should be mortgaged for any debt, the owner, being a member of the association, should not have any claim by virtue of the policy; nor should any assignee of such policy have any claim for any loss, unless previously to such loss such member should have delivered to the secretary an undertaking in writing of the mortgagee or assignee to pay all sums which might thereafter become due from such member in respect of such ship. In an action upon the policy for a total loss, the defendant pleaded, that the ship was mortgaged, and that the plaintiff did not previously to the happening of the loss deliver to the secretary an undertaking of the mortgagee to pay all monies which might thereafter become due from the plaintiff in respect of the ship. The plaintiff replied, that the defendant had notice of the mortgage, and afterwards, without requiring the undertaking, from time to time demanded and received from the mortgagee all sums which became due from the plaintiff in respect of the ship, and the contributions for which the plaintiff as a member of the association became liable:—Held, that the replication was no answer to the plea,—the giving of the undertaking required by the sixteenth regulation being a condition precedent. *Hughes v. Tindall*, 18 Com. B. Rep. 98.

Several shipowners established an association for the insurance of ships. The association and insurances were each confined to a year, commencing on the 20th of February at noon, and ceasing on the 20th of February following at noon, in each year. It had been so continued for several years. The plaintiff was the owner of 16 64ths of the ship *Boyme*, and he insured his interest in the association for 500*l*. He was indebted to P, the owner of the remaining 48 64ths, in the sum of 432*l*. 10*s*., and the plaintiff, on P requiring other security for the debt than a promissory note, made an absolute assignment of his 16 64ths to P, who, though he gave no written undertaking, understood that the shares were to be retransferred to the plaintiff on payment of the debt. Neither the plaintiff nor P gave any notice of this transaction to the association. On the 27th of January 1856 the ship was lost; and upon a bill by the plaintiff to obtain payment of the insurance,—Held, that the claim was within the rules of the association; that he was the owner of the ship; that notwithstanding the assignment, his interest and the insurance continued; that he was liable for the debt though the ship was lost; that P never incurred any risk; that the ship was sailed at the plaintiff's risk, and that he was entitled to the insurance-money. *Hutchinson*

v. Wright, 27 Law J. Rep. (N.S.) Chanc. 884; 25 Beav. 444.

(C) BILL OF LADING.

By a charter-party the captain was to "deliver his cargo conformably to the signed bills of lading against payment of the freight," and it was added, that "the freight should be paid upon delivery of the cargo." The charterer loaded on board the ship a cargo of wheat. The bill of lading made the wheat deliverable "on paying freight for the said goods as per charter-party," and was indorsed to the defendants, who presented the bill of lading to the captain, ordered the vessel to London, and on her arrival sent lighters alongside to receive the cargo. After a portion of the wheat had been delivered into the lighters and removed by the defendants, the captain refused to deliver the residue, unless he was paid freight for the part already delivered, which the defendants declined to pay, and required the captain to deliver the whole cargo pursuant to the charter-party before they paid anything for freight. This he refused for some time to do, but the rest of the wheat was ultimately delivered under protest, and the freight paid by the defendants, but ten running days beyond those allowed by the charter-party were consumed before the cargo was delivered. Had the captain not refused to deliver the cargo, the whole might have been discharged within the allowed period. An action was brought, in substance, to recover from the defendants the demurrage for those ten days. The declaration alleged that, "in consideration that the plaintiff, at the defendants' request, would deliver the said wheat to the defendants in lighters provided by the defendants for that purpose, the defendants promised the plaintiff that within a reasonable time they would accept and receive the said wheat from the ship into lighters provided by the defendants for that purpose." Breach, that the defendants did not accept within a reasonable time.—Held (reversing the decision of the Queen's Bench, 24 Law J. Rep. (N.S.) Q.B. 217), that there was no evidence of a contract by the defendants to accept the wheat within a reasonable time, or to pay freight for the wheat; that no contract arises on the part of an indorsee of a bill of lading under a charter-party to pay freight for the cargo from the presenting the bill of lading and claiming the goods; that such a contract is not to be implied until the whole cargo has been delivered, unless after delivery of part the indorsee has waived his claim to the rest of the cargo. *Möller v. Young* (in error), 25 Law J. Rep. (N.S.) Q.B. 94; s.c. *non*. *Young v. Möller*, 5 E. & B. 755.

The plaintiffs, through G, a broker, agreed to sell, and the defendants, through the same broker, agreed to buy of the plaintiffs, 20 tons of best oil, to be shipped by the plaintiffs free on board, to be paid for, on delivery to the defendants of bills of lading, by bills of exchange, to be dated on the day of shipment. The plaintiffs, on the 7th of September, wrote to G, informing him that a certain vessel called the *Sophia* would bring 5 tons of oil for the defendants. On the 8th the plaintiffs shipped 5 tons of oil on board the *Sophia*, and took bills of lading, "to be delivered to their order or assigns." They the same day indorsed one of the bills of lading, specially, "Deliver to the order of Hare & Co.," and sent it

to G, with the invoices and bills of exchange, for the defendants' acceptance. G received the documents on the 10th, after business hours, and on the 11th he forwarded them to the defendants. The *Sophia* was run down at sea, and the oil totally lost, on the night of the 9th. G knew this when he forwarded the documents to the defendants. The defendants, hearing of the loss of the vessel, returned the documents to G in about two hours after they had received them, refusing to accept the bills of exchange, or to pay for the oil:—Held, that under these circumstances, if the plaintiffs shipped the oil on board the *Sophia*, with the intention of performing their contract, the property in the oil passed to the defendants on the shipment, and that the defendants were bound to pay for it, notwithstanding that the plaintiffs had taken the bills of lading, deliverable to their own order; but that if the plaintiffs had shipped the oil on board, and had taken the bills of lading in that form, with the intention of retaining their control over the oil contrary to their contract, the property in the oil did not pass, and the plaintiffs would have to bear the loss. *Brown v. Hare* (Ex. Ch.), 29 Law J. Rep. (N.S.) Exch. 6; 4 Hurl. & N. 823: affirming the judgment below, 27 Law J. Rep. (N.S.) Exch. 373; 3 Hurl. & N. 484.

The consignee of a bill of lading, which makes the goods deliverable to him or assigns, "paying for the said goods as per charter-party," does not, by taking the goods at the destination, make himself liable to pay for demurrage in the port of loading, according to the rate stipulated in the charter-party, though there be an express stipulation for a lien on the goods for such demurrage. So held in the Exchequer Chamber on appeal, affirming the judgment of the Queen's Bench. *Smith v. Sheehy* (in error), 5 E. & B. 589.

(D) CARGO.

Where in a cause of collision between two vessels, foreign owned, the value of the vessel that was found solely to blame and of her freight was not sufficient to satisfy the damages, the Court discharged the cargo from an arrest which had been made on the ground of the deficiency (even though the owner of the ship was also the owner of the cargo), with satisfaction for all loss caused by the detention. *The Victor*, 29 Law J. Rep. (N.S.) Prob. M. & A. 110.

The agent in Russia of an English merchant resident in England shipped in Russia a cargo of deals on board a Prussian vessel, owned by a Prussian and commanded by a Prussian captain, to be carried to Hull, consigned to the English merchant under an ordinary bill of lading. The vessel was wrecked on the coast of Norway, but the cargo was brought safe on shore there, and could have been re-shipped and sent on to England. By the law of Norway the captain of a vessel placed in the position above stated, though responsible to the owners if he sold improperly, had power to sell the cargo so as to convey a good title to a *bona fide* purchaser. The captain, in the exercise of his discretion, and without any absolute necessity, sold the cargo of deals to a *bona fide* purchaser, who re-sold them to the defendant, who sent them to England, where the plaintiff, representing the English merchant, the original owner, claimed them and brought an action of trover for

them:—Held (*dissentient* *Byles, J.*), that the action could not be maintained, on the ground that the property in the deals passed to the purchaser by the sale in Norway, according to the law of that country; that the Courts of this country will recognise the Norwegian law in that respect, and that the property could not be divested by the deals being afterwards brought to England. *Carmell v. Sewell* (Ex. Ch.), 29 Law J. Rep. (N.S.) Exch. 850; 5 Hurl. & N. 728; affirming the judgment below, 27 Law J. Rep. (N.S.) Exch. 447.

(E) OWNERS.

The defendant, a merchant resident at Liverpool, and the registered owner of a ship, entered into an invalid agreement for the sale of it, and gave partial possession of it to the purchaser in London, retaining, however, shipkeepers on board and doing to it, pursuant to the agreement, certain repairs. The purchaser appointed T as master, and notified his appointment to the defendant's shipping agent, and without the knowledge of the defendant or his agent got the appointment of T as master entered upon the register. T went on board, acted as master, and in that capacity, by the direction of the purchaser, but not mentioning his principal, ordered some substantial repairs to be done to the ship by the plaintiffs. At the commencement of the works the plaintiffs examined the register, and found that the defendant was registered as owner and T as master. The plaintiffs did the repairs, but till the work was all done never heard of the purchaser. The price for the vessel not being duly paid, the defendant afterwards rescinded the agreement, resumed entire possession of her, and authorized T to deliver out to the owner goods which had been put on board by arrangement with the purchaser, and employed the vessel afterwards for his own benefit. An action was brought by the plaintiffs to recover from the defendant the price of the repairs:—Held, that the action could not be sustained merely because the defendant was owner of the ship, nor because he was the registered owner, nor because the orders for the repairs were given by T, the registered master, nor because T acted as master with the defendant's privity and consent, and that the defendant could not be liable unless he actually authorized T to give the orders for the repairs, or knowingly allowed T to act as his master of the ship acting on his behalf, or held out and represented T to be his master acting on his behalf in the management and repair of the vessel. *Mitcheson v. Oliver* (in error), 25 Law J. Rep. (N.S.) Q.B. 39; 5 E. & B. 419.

Held, further, that proof that the defendant was the registered owner and T the registered master, that the defendant retained shipkeepers on board during the repairs and afterwards took entire possession of the vessel, that T acted as master and gave orders for the repairs as such, was *prima facie* evidence from which, if uncontradicted, the jury might have drawn an inference that T gave the orders by the authority of the defendant; but that on its being shewn by the defendant that T was appointed by the purchaser, and gave the order for the repairs by his authority and not by that of the defendant, and no proof being given that the defendant ever held T out as his master acting for him, and there being no direct evidence of authority, the jury, if they be-

lieved the defendant's witnesses, were bound to have found the verdict for the defendant. *Ibid.*

The fact of a person appearing upon the register as owner of a ship is not conclusive of his liability for acts done by the master within the scope of his general authority; but each case must depend upon the particular circumstances which determine whether the relation of principal and agent existed between the master and the person sought to be made liable. *Myers v. Willis*, 25 Law J. Rep. (N.S.) C.P. 89; 17 Com. B. Rep. 77; *s.p. Hackwood v. Lyall*, 25 Law J. Rep. (N.S.) C.P. 44, n.; 17 Com. B. Rep. 124.

A ship, being at the time at sea, was transferred by the owner to the defendant by absolute bill of sale, and the transfer was duly registered. The bill of sale was, in fact, intended only as a collateral security for a loan, and the defendant did not in any way interfere with the ship. The master having afterwards while abroad entered into contracts within his general authority with the plaintiff, both being ignorant of the state of ownership of the ship,—Held, that there was no evidence of authority, either actual or implied, from the defendant to the master to act as his agent; and that the defendant was not liable on the above contracts. *Ibid.*

A part-owner of a ship has no general authority to bind his co-owners for repairs. It is a question of fact whether a part-owner has given another part-owner authority, expressly or impliedly, to pledge his credit for repairs. A part-owner does not require to give express notice that he will not be liable for repairs ordered by another part-owner, in order to exonerate himself from liability. *Brodie v. Howard*, 25 Law J. Rep. (N.S.) C.P. 67; 17 Com. B. Rep. 109.

If a vessel chartered for a particular voyage becomes unseaworthy after the commencement of the voyage, it is the duty of the owner, as between himself and the freighter, either to repair, if he has the opportunity, or, at least, not to proceed on the voyage in an unseaworthy state. *Worms v. Storey*, 25 Law J. Rep. (N.S.) Exch. 1; 11 Exch. Rep. 427.

A declaration on a charter-party, whereby the defendant agreed that his vessel should load a cargo of coal for the plaintiff, and proceed on her voyage with the same from C to H, "the act of God, the Queen's enemies, and all and every other unavoidable hindrances, damages, and accidents of the seas, rivers, and navigation of whatever nature or kind excepted," alleged, as a breach, that, although after the commencement of the voyage the vessel was damaged by the dangers and accidents of the seas, and was unseaworthy, and was in a place where she could have been repaired, of all of which the defendant then had notice, yet the defendant did not cause her to be repaired, and carelessly and negligently caused the vessel to proceed on her voyage in an unseaworthy state, and by reason of the premises the vessel was unable to meet the perils of the seas, as she otherwise would have been, and a large quantity of the coal was obliged to be thrown overboard. Plea, that at the commencement of the voyage the vessel was tight, staunch and strong, and every way fitted for the same, and was seaworthy:—Held, on demurrer, that the breach alleged disclosed a good cause of action, to which the plea was no answer. *Ibid.*

W, being, in 1853, the registered owner of a vessel then in Australia, the master of which had been appointed by him in that year, appointed an agent for the vessel by power of attorney. On the 25th of January 1854, W, in England, transferred the vessel to the defendant. Between the 25th of January and the 7th of February the agent of W, at the request of the master, obtained advances of money from the plaintiffs in Australia on account of the ship without the knowledge of the defendant:—Held, that, under these circumstances, the defendant was not liable to the plaintiffs in respect of such advances. *Mackenzie v. Poolley*, 25 Law J. Rep. (N.S.) Exch. 124; 11 Exch. Rep. 638.

The plaintiffs purchased in their own names and paid for fifty tons of spelter, C having previously given them an order for that quantity, and, at C's request, they permitted the spelter to be put on board a ship, which was under charter, at a lump sum, from London to Calcutta, with a stipulation that the captain should sign bills of lading, as directed by the charterers; the master and crew being employed and paid by the owner. The charterers had put up the vessel as a general ship, through certain brokers, of whom C engaged tonnage room for the spelter. The spelter was put on board on the 17th of May by a lighterman employed by C, and, according to previous arrangement, he delivered to the plaintiffs the mate's receipt, which he received on loading. According to the usual course of dealing between the plaintiffs and C, they would keep the receipt until he redeemed it by paying the price of the spelter and the plaintiffs' commission, and they applied to him to do so several times before the ship sailed. C, soon after the spelter had been shipped, applied to the brokers to obtain signed bills of lading, and after some delay the master signed them and they were delivered to C. On the 3rd of June C indorsed the bills to a *bond fide* holder for value. The ship sailed on the 16th of June. C became bankrupt on the 26th of June, and on the 30th of June the plaintiffs wrote to the shipowner that they held the mate's receipt, and that they required the delivery of the spelter to them or their agents; and a similar notice was served on the master on his arrival at Calcutta. The shipowner wrote to the master, recommending him to store the spelter until the dispute should be settled among the different claimants, or, if the mate's receipt were presented, not to give up the spelter till he got the receipt and the bills of lading. The master, after the receipt of this letter and the notice from the plaintiffs, and after a demand of the spelter by the plaintiffs' agent, stored it at Calcutta, and delivered it to the holder of the bill of lading, on an indemnity by him. The plaintiffs having brought an action of trover for the spelter against the shipowner and master, at the trial, in addition to the above facts, evidence was given that the general and proper course, when goods are shipped from a lighter, is to give a mate's receipt, but not when shipped from the quay; and when there is a mate's receipt it ought to be produced and given up by the person applying for signed bills of lading: this application is generally made within two or three days of the loading. There was no direct evidence, whether the master and brokers did or did not know of the existence of the mate's receipt, but fifty tons of spelter would have been an unusual quantity to load from the quay:—

Held, that the property in the spelter remained in the plaintiffs. That there had been no laches on the part of the plaintiffs; and that there was satisfactory evidence to support the finding of the jury—that the master was not justified in signing and delivering bills of lading to C without the production of the mate's receipt. That the master was, therefore, liable for a conversion of the spelter; and that the shipowner had also made himself liable by his letter to the master. *Schuster v. McKellar*, 26 Law J. Rep. (N.S.) Q.B. 281; 7 E. & B. 704.

Semble—that, as the plaintiffs did not claim under a bill of lading signed by the master as agent of the charterers, the shipowner would have been liable, as owner, for the wrongful act of the master. *Ibid.*

A bill of lading describing the goods as "one box containing about 248 ounces of gold-dust," is not a declaration of the "true nature and value of such articles," within the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, s. 503), so as to render the shipowner liable, in the event of the loss of the gold by reason of any robbery, making away with, or secreting thereof, without his actual fault or privity. *Williams v. the African Steam-ship Co.*, 26 Law J. Rep. (N.S.) Exch. 69; 1 Hurl. & N. 300.

H, being sole owner of a vessel, contracted to sell one-half share in her to M & T, and agreed with them that they should have exclusive direction, management and control of the vessel, to be dealt with and managed by them as managing owners and ship's husbands, as they might think best, without let or hindrance from H. There was at the end of the contract a clause that M & T were to pay H 900*l.* as a charter for his half share of the vessel for the first six months from the date of the vessel being ready to receive her cargo. During those six months repairs became necessary to the vessel, and were ordered to be done by T:—Held, that H was liable as part-owner to pay for such repairs. *Preston v. Tompkins* (Ex. Ch.), 27 Law J. Rep. (N.S.) Exch. 192; 2 Hurl. & N. 684: affirming the judgment below, 26 Law J. Rep. (N.S.) Exch. 346; 2 Hurl. & N. 368.

Necessaries were furnished to a ship's husband (himself a part-owner) by whom alone the ship was managed:—Held, that the co-owners were liable, although part of the supplies had been paid for by bills drawn by the ship's husband upon the brokers of the ship, and, on the bankruptcy of the latter, the plaintiff had proved against their estate for the balance. *Whitwell v. Perrin*, 4 Com. B. Rep. 412.

One of several co-owners of a ship, who acts as ship's husband, is only entitled to charge the cost price of supplies to the ship furnished by him in the course of his business. *Ritchie v. Couper*, 28 Beav. 344.

(F) MASTER.

The rule that "freight is the mother of wages," does not apply to the case of the master of a ship; and therefore where a master, engaged for a voyage at 10*l.* per month, continued to act as master from the time when the ship sailed until she was lost with all hands, his representatives were entitled to recover against the owners his wages up to the time of the loss. *Hawkins v. Twissell*, 25 Law J. Rep. (N.S.) Q.B. 160; 5 E. & B. 883.

The captain of a ship chartered to load at a foreign

port and to proceed to a coal port or to a good and safe port in the Frith of Forth, or to London, or to a good and safe port on the east coast of England, as ordered on signing bills of lading, or with L and F at Elsinore, downwards, signed a bill of lading, in which it was stated that the ship was bound for orders to Elsinore. The captain waited a reasonable time for orders, but none coming from the charterers, he proceeded to the port of Leith:—Held, in an action by the charterers against the captain, that the captain having waited a reasonable time for orders at Elsinore, had performed his duty under the charter-party; that he was not bound to communicate with the charterers and ask for orders; and that as no orders were given him, he was entitled to elect to which of the ports specified in the charter-party he would take the ship. *Steeking v. Maas* (in error), 25 Law J. Rep. (n.s.) Q.B. 358; 6 E. & B. 670: affirming the judgment below, 25 Law J. Rep. (n.s.) Q.B. 275; 6 E. & B. 670.

In actions of contract, where, supposing the data to be admitted or established, and to be unaffected by any evidence introducing other legitimate elements of consideration, the damages may be more or less matter of calculation, although, *prima facie*, the plaintiff may be entitled to the full measure of damages, yet, where the actual amount of damage has been in any degree affected by the conduct of the plaintiff or his agents, that is a legitimate element of consideration, and the jury are at liberty to diminish the damages on that account. But if they do so unreasonably and arbitrarily, the Court can grant a new trial, as for a verdict against evidence. *Wilson v. Hicks*, 26 Law J. Rep. (n.s.) Exch. 342.

In an action on a charter-party for not loading a cargo, the loading ports being Rangoon or Bassein, and the captain having been to Rangoon, and there received orders to go to Bassein (three days' sail), where no cargo could be obtained, and he was requested to go back to Rangoon or elsewhere, in hopes of obtaining a cargo, which he declined to do, and remained inactive at Rangoon until the time for loading had elapsed, the Judge having told the jury that they were not bound to give the plaintiff the full amount of freight (2,750*l.*), but that if they deemed the master's conduct unreasonable they might diminish the damages on that account, and left it to them to say whether the plaintiff should recover the full amount, or any other amount they might deem reasonable, and they having found for the plaintiff, damages 500*l.*, the Court held, that there had been no misdirection, but granted a new trial on the ground that the verdict was against the evidence, and the amount of damages considerably too low, making it however a condition that the plaintiff should relinquish the costs of the first trial. *Ibid.*

The *Oriente*, a vessel from the Chincha Islands, having on board a cargo of guano, chartered to the plaintiffs in London, put into Valparaiso in a disabled state, and discharged the cargo into a hulk, and it became necessary to tranship and forward the cargo to its destination by another vessel; and the captain, on behalf of the owners of the cargo, accordingly entered into a charter-party with the master of the defendants' ship "to take on board from the said bulk the cargo put on board of her, forming the cargo brought to Valparaiso by the said *Oriente*, being 470 tons of guano, more or less," and proceed with

the same to its destination, agreeing to pay 5*l.* 2*s.* 6*d.* freight for every ton delivered. A dispute arose as to the quantity of guano put on board, the defendants' master alleging it was much less than 470 tons, and the captain of the disabled ship saying it was that quantity. Ultimately, the latter signed a bill of lading, describing the guano shipped as part of the original cargo, the consignees "paying freight for the said guano on 470 tons as per charter-party." It turned out that only 344 tons of guano had been shipped:—Held, that the captain had no authority to bind the owners of the cargo to pay freight for more than the quantity of guano actually shipped, and consequently that the plaintiffs, as indorsees of the bill of lading, were entitled to have the cargo delivered on payment of the freight for 344 tons. Held, also, that the terms of the charter-party did not amount to a warranty that the cargo consisted of 470 tons, so as to give the defendants a right of action by reason of the loading of their vessel with a less quantity. *Gibbs v. Gray or Grey, Gray or Grey v. Gibbs*, 26 Law J. Rep. (n.s.) Exch. 286; 2 Hurl. & N. 22.

Semble—that even if the charter-party had contained such warranty, it would not have bound the plaintiffs. *Ibid.*

The defendant, captain of a vessel, signed a sailor's advance-note, by which he promised that he would, ten days after the vessel had sailed from the port of L, pay 6*l.* to any person who should advance 6*l.* to R H, provided the said R H should sail in the vessel from the said port. The plaintiff advanced R H on this note 8*l.* 5*s.* in cash and 2*l.* 15*s.* worth of wearing apparel; but if the plaintiff had advanced the whole amount in cash he would have charged the said R H a discount of 1*s.* 6*d.* in the pound. The said R H sailed in the vessel from the port of L:—Held (*Wilkes, J. dissentiente*), that the condition of advancing 6*l.* on the note had been fulfilled, and that, therefore, after the ten days had expired the plaintiff was entitled to recover the 6*l.* from the defendant. *M'Kune v. Joynson*, 28 Law J. Rep. (n.s.) C.P. 133; 5 Com. B. Rep. N.S. 218.

Where goods are sent to be laden on board a general ship, the master is not liable to the owner of the goods for damage done to them by the negligent stowage of a stevedore appointed by the charterer; the stevedore not being an agent or servant of the master. Nor is the master liable in such case for the acts of the stevedore, though the charter-party stipulate that the stevedore shall be paid by and act under his orders, except the acts of the stevedore be done in pursuance and in the execution of the master's orders. *Blakie v. Stembridge*, 28 Law J. Rep. (n.s.) C.P. 329; 6 Com. B. Rep. N.S. 894.

When goods are sent to be laden on board a ship employed by the charterer as a general ship, the master is not liable to the shipper of the goods for damage done to them by the negligent stowage of the stevedore, the latter being, pursuant to the charter-party, appointed by the charterer, though paid and to act under the master's orders; nor is the master liable, except for breach of a contract made by him, or for some act done by him or the crew. *Blakie v. Stembridge* (Ex. Ch.), 29 Law J. Rep. (n.s.) C.P. 212.

Proceedings taken in a foreign court against the master of a ship personally, the liability of the ship

being brought only incidentally in question, *e. g.* where the ship is proceeded against as a security for the judgment against the master, are proceedings *in personam*, and may be examined into by a Court in this country. Therefore, the sale of A's ship, in execution for B's debt, under the process of a foreign Court, not proceeding *in rem*, is not binding on A in this country, it not appearing that the law of the foreign country differs in this respect from the law of this country; nor does A, by bidding at such sale, ratify the sale, it being adversely to him and not in his name; and he is not estopped from recovering the ship in trover from the purchaser, if it does not appear that the latter knew of, or was misled by, the fact that A was a bidder. *Castrique v. Imrie*, 29 Law J. Rep. (N.S.) C.P. 321; 8 Com. B. Rep. N.S. 1: judgment reversed, 30 Law J. Rep. (N.S.) C.P. 177; 8 Com. B. Rep. N.S. 405.

Semble—that a merchant sending goods to be loaded on board a general ship is not entitled to assume, without inquiry, that they are to be shipped and stowed by the master, rather than by a stevedore, and so, without any contract with the master, or wrong done by him or the crew, to insist upon holding the master liable for damage done to the goods in the loading thereof. *Blakie v. Stenbridge*, 5 Com. B. Rep. N.S. 894.

A shipowner, in his written instructions to the captain, directed him in case of emergency to apply to certain firms abroad, "who would give him any assistance required":—Held, that this did not authorize the captain to do anything not included in his general power and authority as captain. *Lyall v. Hicks*, 27 Beav. 616.

To authorize a captain to hypothecate the ship or freight for repairs, the necessity for such hypothecation must exist. If, therefore, the agent of the shipowner in a foreign port has sufficient funds in his hands for the repairs, the captain cannot hypothecate. *Ibid*.

(G) PILOT.

The 352nd section of the Merchant Shipping Act, 1854, which enacts that every pilot, when required by the pilotage authority who appointed him, shall produce or deliver up his licence, is absolute and unqualified, and upon the pilot refusing so to produce or deliver up his licence, he is liable to conviction. *Henry v. the Trinity House of Newcastle*, 27 Law J. Rep. (N.S.) M.C. 57; 8 E. & B. 723.

Section 379. of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), does not limit the exemptions contained in section 59. of the 6 Geo. 4. c. 125. and continued by section 358. of the 17 & 18 Vict. c. 104. Where, therefore, the master of a ship carrying passengers was convicted, under section 376. of the 17 & 18 Vict. c. 104, for refusing the services of a duly-qualified pilot at Gravesend on a voyage outward to the Baltic,—Held, that the conviction was wrong, the ship being exempt from compulsory pilotage by section 353. *Stanton v. Banks*, 27 Law J. Rep. (N.S.) M.C. 105.

The exemption given by stat. 6 Geo. 4. c. 125. s. 59. from the necessity of employing licensed pilots, to masters piloting their own ships on the voyages there specified, without the aid of an unlicensed pilot, is continued by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 353; and this exemp-

tion applies as well to ships carrying, as to ships not carrying, passengers, and is not affected by the exemption given in section 379. of the same act to ships on particular voyages not carrying passengers. *Regina v. Stanton*, 8 E. & B. 445.

(H) BROKER.

Where a contract which requires notice of shipment of goods to be given by the vendor to the purchaser is made at Liverpool by one broker acting for both parties, by the usage of trade there it is sufficient if notice of the shipment is given by the vendor to the broker:—Held, that this usage of trade was binding on a London merchant who employed a broker at Liverpool to make a contract for him there. *Graves v. Legg* (Ex. Ch.), 26 Law J. Rep. (N.S.) Exch. 816; 2 Hurl. & N. 210.

(I) SHIPPER AND SHIPPING DOCUMENTS.

The first count of the declaration alleged that the defendants, knowing that chloride of lime is a dangerous article, giving forth fumes injurious to other goods with which it comes in contact, and requiring to be packed carefully in packages not likely to be corroded, packed and caused to be packed a quantity of an article consisting in a great degree of chloride of lime in casks, for the purpose of being carried in the plaintiffs' general ship, and caused the said casks to be delivered to the master of the said ship, who received them as sixty casks of bleaching powder, to be carried in the said ship. That when the master so received the said casks, he, and all persons employed by the plaintiffs in the said ship, were ignorant that bleaching powder contained chloride of lime, or any article of a corrosive nature, and that the said casks, when delivered to the master, appeared outwardly to him to be sufficient to keep in the contents, and the master had not, nor had the plaintiffs or their servants, knowledge that the said casks were not so sufficient or the contents thereof not sufficiently packed. Breach, that the said casks, when delivered by the defendants on board ship, were insufficient to keep in their contents, and the bleaching powder and chloride of lime were carelessly and insufficiently packed, and by reason thereof the bleaching powder and chloride of lime corroded the casks and injured other goods carried on board the plaintiffs' ship, and that the plaintiffs had been obliged to make good to the owners of such goods the damage so done:—Held (by Lord Campbell, C.J. and Wightman, J.), that this count disclosed a breach of duty arising out of the undertaking by the shipper of goods in a general ship, that he will not deliver, to be carried on a voyage, goods of a dangerous nature, which those employed by the shipowner may not, on inspection, be reasonably expected to know to be of such a nature, without giving notice that they are of a dangerous nature. *Brass v. Maitland*, 26 Law J. Rep. (N.S.) Q.B. 49; 6 E. & B. 470.

Third plea, to the first count, as to the insufficiency of the casks, that the defendants did not personally, by themselves or their servants, pack the said casks, but ordered them of B & Co., to be supplied and packed by them for the purpose of being sent to Calcutta, and that they were so supplied and packed by B & Co., and by the defendants delivered on board the plaintiffs' ship, and that the defendants and B & Co. did not know or believe, nor had reason to

know or believe, that the casks were not sufficient:—Held, (by *Lord Campbell, C.J.* and *Wightman, J.*) that this plea was no answer to the action. *Semble, per Crompton, J.*, that, on the first count alone, or taken together with the third plea, the defendants were entitled to judgment. *Ibid.*

Fourth plea, to the first count, that the master knew that the said casks contained bleaching powder, and knew, or had the means of knowing, and reasonably ought to have known, that bleaching powder contained chloride of lime; and that the master and persons employed by the plaintiff, knew and had the means of judging of or knowing the condition and sufficiency of the casks, and of the packing of their contents:—Held, to be a good answer to the count, as shewing that there was no duty on the part of the defendants to give notice of the nature of the goods shipped. *Ibid.*

The second count alleged that the defendants shipped on board the plaintiffs' general ship casks containing an article of a corrosive and dangerous nature, and which they knew to be of such a nature, without giving notice to the master of the ship, or to the persons employed therein of the dangerous and corrosive nature of the said article, so that it might be stowed in such part of the ship as not to damage other goods; that the master and other persons concerned in stowing the ship, not knowing the nature of the said article, stowed the casks among other goods in a place unfit for such dangerous goods, and that during the voyage the contents of the casks escaped and injured other goods for which the plaintiffs were responsible. Tenth plea, to the second count, that the article contained in the casks was bleaching powder, as the master well knew, and that he knew or had the means of knowing, and reasonably ought to have known, the nature of such bleaching powder. It being admitted that the second count shewed a good cause of action,—Held, (by *Lord Campbell, C.J.* and *Wightman, J.*, *dissentiente Crompton, J.*), that the tenth plea afforded an answer to it. *Ibid.*

To a declaration against the defendants, as ship-owners, for negligently stowing certain salt-cake shipped on board their ship by the plaintiffs, whereby such cake was injured, the defendants pleaded that the damage arose from the cake being delivered in bulk, and not in casks, and, consequently, stowed in bulk amongst other goods; and that the said cake was stowed in bulk, and in the manner in which it was actually stowed, with the knowledge and by the direction and licence of the plaintiffs to the defendants, given before and during such stowage:—Held, that the plea did not amount to an authority by the plaintiffs to the stowing of the cake in a negligent manner, and was, therefore, no answer to the action. *Hutchinson v. Guion*, 28 Law J. Rep. (n.s.) C.P. 63; 5 Com. B. Rep. N.S. 149.

The defendants also pleaded that the salt-cake was a corrosive and destructive substance, rotting casks, cask-hoops, and other substances in contact with it, which the plaintiffs knew, but which the defendants did not know, and could not reasonably be expected to know; and that the plaintiffs did not inform the defendants of the destructive nature of such cake, and negligently delivered the same to the defendants in bulk, and thereby induced the defendants to believe that the same might be placed in

contact with casks, cask-hoops, and other substances safely, and they, in consequence, stowed the cake amongst casks of salt provisions, whereby the injury complained of was caused. To this plea there was a replication, that salt-cake was an article of merchandise well known in trade and commerce, and that its nature and properties were well known to persons carrying on the business of carriers in ships; and that at the time of the shipment of the said cake, the defendants knew that it was salt-cake:—Held, that this last plea was a good plea, and that the replication was no answer to it. *Ibid.*

N, a timber-dealer in Sweden, had transactions with D, a factor in London, who sold timber on his account on a *del credere* commission. D had sold for him three cargoes of timber. N, on the 29th of September 1853, wrote to D a letter, in which he expressed a hope to be able in a few days to send the shipping documents of all the cargoes. Two only of those cargoes arrived. On the 6th of October 1853, N wrote to D inclosing invoices of timber shipped on board three vessels, and made out an account in which N appeared to be a creditor for 1,312*l.*, and he drew a bill to that amount on D. On the same day N wrote to H & Co., stating the value of the cargoes, and asking for three acceptances to the amount of 1,300*l.* He inclosed his letter to D, and the bill and the shipping documents, with directions to H & Co. to deliver these last to D, on condition that D accepted the bill for 1,312*l.*, acknowledged the correctness of the account current, and admitted that the cargoes agreed for had been forwarded. These conditions were communicated by H & Co. to D, who called the whole affair a regular swindle. D, after some hesitation, accepted the bill, but he obtained possession of the shipping documents by a statement that he wanted them to compare with the invoices, and would return them if from any cause he did not accept the bill. On this H & Co. accepted N's three bills for 1,300*l.* D did accept the bill for 1,312*l.*, but refused to return the shipping documents, and utterly disregarded the other conditions on which they were to be delivered to him:—Held, that though he might have a prior equitable claim to these shipping documents, he had not properly insisted on it, and that he had thereby misled H & Co., who had a legal right to recover them from him. *Hoare v. Dresser*, 28 Law J. Rep. (n.s.) Chanc. 611; 7 H.L. Cas. 290; reversing 26 Law J. Rep. (n.s.) Chanc. 51.

(K) SEAMEN.

A ship, being on a voyage from L to P and back, when in port at P became so short-handed that it was dangerous to life to proceed with only the reduced crew; the captain, being unable to procure additional hands, voluntarily promised the remaining seamen, who were under articles for the whole voyage, an additional sum if they would assist in taking the ship to her next port:—Held, that the seamen were not bound to proceed on the voyage as it involved risk of life, and that the promise was therefore binding on the captain. *Hartley v. Ponsonby*, 26 Law J. Rep. (n.s.) Q.B. 322; 7 E. & B. 872.

By an agreement, under the Merchant Shipping Act (13 & 14 Vict. c. 93. s. 46), the plaintiff agreed to serve as steward on board the defendants' ship C

on a voyage described, or for a term not to exceed three years; and it was stipulated that the crew should, if required, be transferred to any other ship in the same employ, and were not to trade on their own account. During the term, the captain of the C transferred the plaintiff and himself to the D, a vessel of the defendants in the same employ, and by a second agreement undertook to give the plaintiff 4*l.* a month. The defendants refused to pay the plaintiff at the rate of 4*l.* per month for his service in the D, but were always willing and offered to pay him 3*l.* a month:—Held, first, that the first agreement was not bad, under the statute, for uncertainty, as being in the alternative as to the period of service, since it might be construed as limiting the time of service, even on such a voyage as described, to three years. Secondly, that the provision for the transfer of the crew was not contrary to the statute. Thirdly, that under that provision any member of the crew might be transferred without all the crew being transferred. Fourthly, that the first agreement being good, and the plaintiff therefore obliged under it to serve in the D, there was no consideration for the captain's promise to pay the plaintiff 4*l.* a month instead of 3*l.* Fifthly, that the plaintiff, having refused to accept the wages due to him at the rate of 3*l.* a month, was not entitled to double pay under the 17 & 18 Vict. c. 104. s. 187, on the ground that the defendants had refused to pay his wages without sufficient cause. *Frazer v. Hutton*, 26 Law J. Rep. (N.S.) C.P. 227; 2 Com. B. Rep. N.S. 512.

Plaintiff shipped under articles to serve as seaman on a voyage to Bombay. When the ship arrived at Suez the owner sold the ship in England to the defendant, and the defendant sent an agent to Suez, upon whose arrival there the plaintiff became aware of the change of ownership, and thereupon refused to go on with the ship to Bombay, unless his wages in arrear were paid. These were not paid, and the new master sent by the defendant to take the command of the vessel insisted on the plaintiff being bound to complete the voyage to Bombay, but he ultimately consented to the plaintiff's leaving the vessel. The plaintiff then left, but he had, with the sanction of the defendant's agents, worked at the vessel up to the time of his so leaving:—Held, that, as the articles under which the plaintiff shipped had been determined, there was evidence from which a jury might imply a contract by the defendant to pay the plaintiff for his work *pro rata* from the time the plaintiff had knowledge of the change of ownership up to the time of his leaving the vessel. *Quere*—whether in the case of the change of ownership in this country of a vessel when out at sea, or at a foreign port, the new owner is not to be presumed to adopt the master or person in command as his agent until there has been an opportunity of appointing another in his place. *Robins v. Power*, 27 Law J. Rep. (N.S.) C.P. 257; 4 Com. B. Rep. N.S. 778.

(L) DESERTER.

The sections of the "Merchant Shipping Act, 1854" (17 & 18 Vict. c. 104), arranged under the head of "Discipline," have reference to British ships only. In order, therefore, to convict under one of these sections (the 257th) of knowingly harbouring a seaman who has deserted, the ship must be shewn

to be British; and as, by section 19, no ship shall, unless registered, be recognized as British, it is essential to a conviction that the fact of the ship having been registered be duly proved by the original register, or by an examined or certified copy, under section 107. *Leary v. Lloyd*, 29 Law J. Rep. (N.S.) M.C. 194.

(M) PASSENGER ACT.

Persons, who are in every respect cabin passengers within section 3, of the 18 & 19 Vict. c. 119, except that they have not been furnished with contract tickets according to the Form (K), are not to be counted as passengers so as to make a ship a passenger ship which would not otherwise be a passenger ship within the meaning of the act; and the provision in that section as to tickets must be taken to apply only in the case of a passenger ship. *Ellis v. Pearce*, 27 Law J. Rep. (N.S.) M.C. 257; E. B. & E. 481.

(N) REGISTER.

By section 50. of the Merchant Shipping Act, 1854, any person who has the possession of the certificate of registry of a ship, is bound to deliver it up, on request, to any person who shall be entitled to the custody thereof for the time being, under a penalty upon conviction before a Justice of the Peace, unless it be proved that there was reasonable ground for such refusal. The respondent was ship's husband and managing owner of, and was also the holder of the majority of shares in the ship of which the appellant was master and part owner. On the 29th of October, while the ship was in harbour, and before she had discharged, and while the appellant was still master, the respondent demanded the certificate of registry without giving any reason for doing so, and without intimating his intention of appointing another master. The appellant, having refused to deliver it up, was summoned before two Justices and convicted under section 50:—Held, upon a case stated for the consideration of the Court, that such conviction was improper, as there was reasonable ground for refusing to deliver up the certificate. *Arkle v. Hensell*, 27 Law J. Rep. (N.S.) M.C. 110; 8 E. & B. 828.

The owner of an unfinished ship mortgaged it, and on completion of the vessel caused it to be registered in his name as owner under the Merchant Shipping Act, 1854. On the following day the mortgagee registered the mortgage. The owner having subsequently become bankrupt,—Held, that although there was no mortgage subsequent to the registration by the owner, the possession of the vessel was not in the assignees, but in the mortgagee. *Bell v. the Bank of London*, 28 Law J. Rep. (N.S.) Exch. 116; 3 Hurl. & N. 780.

The name of the vessel was the "City of Bruxelles," and was so described in the mortgage. It was registered by the owner and by the mortgagee as the "City of Brussels,"—Held, that the misdescription did not vitiate or affect the validity of the registration. *Ibid.*

The 50th section of "The Merchant Shipping Act, 1854," makes any pledge of the certificate of registry of a ship illegal and void. A having a *bona fide* demand against the plaintiff, who was captain and sole owner of a ship about to sail, threatened to

arrest him, upon which the plaintiff deposited with the defendants, A's attorneys, the certificate of the ship's registry, as a security against his sailing before a given day, on which day it was to be returned. Before the day the plaintiff demanded the certificate in order to sail, but the defendants detained it till the day agreed on:—Held, that, the plaintiff being entitled to the certificate, and the pledge, although for a good consideration, being illegal and null, by reason of the above section, the detainer, after demand of it by the plaintiff for the purposes of navigation, and the damage arising to him from the detainer, constituted a good cause of action against the defendants. *Wiley v. Crawford*, 29 Law J. Rep. (N.S.) Q.B. 244.

(O) BOTTOMRY.

General average cannot be the subject of a bottomry bond. Where the holders of a bond (foreigners) had acted solely under a misapprehension of English law, the Court pronounced against the bond, but without costs. *The North Star*, 29 Law J. Rep. (N.S.) Prob. M. & A. 78.

Where a vessel sailed from Liverpool to Sydney, and discharged her cargo there, and the master not having sufficient funds to meet the necessary disbursements of the ship, before continuing his voyage gave a bottomry bond for money advanced to cover, amongst other items, certain charges relating exclusively to the cargo with which the vessel sailed from Liverpool, these items were disallowed, as not properly the subject for such security, even though the debts were just debts, and the master was under charter to proceed on a further voyage. *The Edmund*, 29 Law J. Rep. (N.S.) Prob. M. & A. 76.

Where there were claimants upon the proceeds of the sale of a ship, all being for necessities supplied, the Court decreed for them in the following order:—1. A creditor for payment of seamen's wages; 2. A holder of a bottomry bond; 3. A creditor who had obtained the decree upon which the vessel had been sold; 4. The other creditors to divide the remainder *pro rata*, without reference to date. *The William F. Safford*, 29 Law J. Rep. (N.S.) Prob. M. & A. 109.

(P) SALE AND TRANSFER.

A re-transfer of a ship to vendor, absolute in terms, but intended as a security for the payment of the purchase-money, the ship then being on a voyage, and the transfer not mentioning freight, does not pass the freight to the transferee until, at all events, he has claimed it, and done some act tantamount to taking possession. Therefore, where the purchaser and registered owner of a ship having sent her out on a seeking voyage; and their captain had chartered her in June for a voyage, on which the freight was received in October, and remitted by him by bill of exchange to the defendants; they having after the charter, but before the freight was earned, re-transferred the ship by an instrument absolute in terms, but intended as a security for the unpaid purchase-money, and not mentioning freight, and they having received the proceeds of the bill,—Held, that an action for the money was not maintainable by the transferee against them, he not having claimed the freight until they had received it. *Seemle*—that the defence arose under the general issue. *Gardner v.*

Cazenove, 26 Law J. Rep. (N.S.) Exch. 17; 1 Hurl. & N. 423.

The registration of a bill of sale of a ship does not confer an absolute title at law, unless the bill of sale itself not only appears to be, but is actually valid. *Orr v. Dickinson*, 28 Law J. Rep. (N.S.) Chanc. 516; 1 Johns. 1.

Where a valid title has been acquired at law, *quære*, whether a Court of equity has jurisdiction to deal with the equitable interests. *Ibid.*

(Q) FREIGHT.

[*Moller v. Young*, 5 E. & B. 7; 6 Law J. Dig. 671.]

The charter-party of a ship as a general ship stipulated that the affreighters would pay for the hire of the ship a lump sum in full, to be ascertained before the sailing of the ship, payment to be made by the captain receiving such freight, not exceeding half, as the charterers might have payable abroad as per bills of lading or by the charterers' order payable at the port of discharge, and the balance to be paid by the acceptance of the charterers, at three months, payable in London, or in bills or cash, at charterers' option. It also stipulated that the charterers should have the option of naming the lumpsums and stevedores, but they were to be under the direction of the master, and the owners of the ship were to be responsible for improper stowage; that only such goods should be received on board as the charterers might direct; that the master should, at the charterers' request, sign bills of lading in the usual manner at any freight the charterers might choose, without prejudice to the charter; that the charterers should have the option of putting a full cargo in the fore cabin, and if used for passengers, the space to be allowed off the chartered freight, and that the ship should be kept by the owners during the voyage tight and staunch, and well provided with men, &c. The charterers elected to pay a lump sum, part to be paid abroad out of the freights reserved by the bill of lading, and the balance in England, as agreed in the charter-party. The bills of lading signed by the captain stipulated that freight was to be paid here one month after sailing, with average accustomed:—Held, under the terms of the charter-party, that the contracts made by the signing of the bills of lading were to be considered as made by the captain as agent for the charterers and not for the shipowner, and that the charterers and not the shipowner were entitled to claim the freight payable under the bills of lading. *Marquand v. Banner*, 25 Law J. Rep. (N.S.) Q.B. 313; 6 E. & B. 232.

To an action for freight by the assignee of a ship and charter-party, brought in the name of the assignor, the defendant pleaded pleas of discharge by the plaintiff, and also payment:—Held, that the facts of the discharge having been given and payment having been made with the view of defrauding the assignee, and after notice to the defendant of the assignment, were good answers to the above pleas, and might be replied "on equitable grounds" under the 85th section of the Common Law Procedure Act, 1854. *De Polhonier v. De Mattos*, 27 Law J. Rep. (N.S.) Q.B. 260; E. B. & E. 461.

The stipulation in a charter-party, that freight shall be paid "subject to insurance" means merely,

that freight is to be paid subject to deduction for premiums on insurance, but not that insurance by the owner is a condition precedent to his recovery of freight. *Jackson v. Isaacson or Isaac*, 27 Law J. Rep. (N.S.) Exch. 393; 3 Hurl. & N. 405.

When, on the abandonment of a ship on the voyage, the cargo is taken to its destination in another vessel hired by the captain, the underwriters of the ship are not entitled to the freight due on the delivery of the cargo. *Hickie v. Rodocanachi*, 28 Law J. Rep. (N.S.) Exch. 273; 4 Hurl. & N. 455.

By a charter-party, from Madras to London, freight was payable at 3*l.* 15*s.* per ton; the captain to sign bills of lading for his cargo for any rate of freight required, without prejudice to the charter-party. The captain signed bills of lading for sugar, at a freight of 1*l.* per ton. To an action, by the indorsees of the bill of lading against the owner for non-delivery of sugar at that rate of freight, the defendant pleaded that the shippers at Madras acted as the agents of the charterer in signing the bills of lading, and by his directions drew bills for the cost price of the sugars on E, in London, and indorsed them to bankers with the bills of lading; that before the bills became due E and the charterer respectively stopped payment, and the bills being dishonoured, were paid by the plaintiffs to the bank, who indorsed them, with the bills of lading, to the plaintiffs, who constituted the same firm as the shippers at Madras:—Held, that the plea was no answer to the action, and that the defendant could not retain the sugar for payment of the freight stipulated for by the charter-party, the case being, in the absence of fraud, governed by *Foster v. Colby*. *Shand v. Sanderson*, 28 Law J. Rep. (N.S.) Exch. 278; 4 Hurl. & N. 381.

As between the owners of a vessel and the assignees of the freight, the wages of the captain and seamen and the expenses are proper deductions to be made from the gross freight. *Lindsay v. Gibbs*, 28 Law J. Rep. (N.S.) Chanc. 692; 3 De Gex & J. 690; 22 Beav. 522.

Where part owners of a vessel authorize co-owners to insure the whole vessel, and afterwards assign their interest in the freight, and the assignees do not give express notice of the assignment, the co-owners are entitled to insure the vessel and deduct the costs of insurance from the freight. *Ibid.*

A, the master of a vessel, at the Mauritius, in April 1856, entered into a charter-party, under seal, therein describing himself as commander and owner, with the commissariat officer there, for the conveyance of troops to Gravesend, and paid certain monies and incurred liabilities for fitting up the vessel for the purpose. In the following month A entered into another charter-party, not under seal, at the Cape of Good Hope, for the conveyance of other troops, and, thereupon, paid further sums and incurred further liabilities to enable him to perform the contract. In October, T, the owner, became bankrupt, having previously mortgaged the vessel to R & F, who, upon its arrival in the Thames, seized it. The bills drawn by A upon T, the owner, were dishonoured, and A filed a bill against T's assignees and R & F, praying a declaration that he was entitled to be repaid and indemnified out of the fund due from the Admiralty on account of the freight, and the Com-

missioners of the Admiralty paid the amount into court:—Held, by Wood, V.C., that A was entitled to be reimbursed out of the fund; but, upon appeal to the Lord Chancellor, this decision was reversed. *Bristow v. Whitmore*, 28 Law J. Rep. (N.S.) Chanc. 801; 4 De Gex & Jo. 325; 4 Kay & J. 743; Johns. 96.

The Court has no jurisdiction to declare an equitable right on behalf of the legal owner of property, without something on which the Court can act. *Ibid.*

S & Co., an American firm, and the captain of an American ship were joint owners of the same, S & Co. being ship's husbands. They assigned the freight to be earned by the ship on her voyage to England to a firm at Liverpool, to secure advances. The captain on arrival at Liverpool, proceeded to get in the amount due for freight, whereupon the Liverpool firm filed a bill for and obtained an injunction *ex parte* from one of the Vice Chancellors, which, upon motion, his Honour refused to dissolve. On appeal, the Lords Justices, being of opinion that the legal right to receive the freight was in the captain, and there being no sufficient allegation in the bill of any intention on his part to misapply the same, and he having given an undertaking not to apply the freight otherwise than in the employment of the ship in its due and ordinary course, dissolved the injunction. *Guison v. Trash*, 27 Law J. Rep. (N.S.) Chanc. 337; 1 De Gex, F. & J. 373.

The managing owner of a ship is competent to appoint himself to act as broker to the ship in collecting and distributing the freight, there being no incompatibility between those services (as, *semble*, there would be between the services of ship's chandler or ship's carpenter), and his fiduciary character as managing owner. But before allowing him a commission in respect of the services in question, the Court directed an inquiry whether, according to the custom of shipowners or otherwise, he being managing owner was entitled to any and what commission in respect of duties performed by him, and which duties are ordinarily performed by shipbrokers. *Smith v. Lay*, 3 Kay & J. 105.

A & B were co-owners of a ship which had been chartered for a voyage. A assigned his share of the freight to C, who gave no notice of it to B, and both the ship and freight were afterwards insured by the shipbroker, according to the ordinary course of dealing between A & B:—Held, that C must bear his share of the wages of the crew, and the expenses of the insurance of the ship and freight. *Lindsay v. Gibbs* (No. 2), 26 Beav. 51.

A shipowner, on the 20th of March 1857, chartered his ship to A for a voyage to Hong Kong. The freight was payable "by approved bills on London at three months' date or cash under discount, following the delivery of a certificate to the charterers, signed by the assignees," of the delivery of the cargo. On the 24th of March the shipowner assigned the freight to C, who gave no notice to A until November following. It turned out that, on the 23rd of March, A had sub-chartered the ship to B, whose agent at Hong Kong had paid the freight to the agent there of the shipowner:—Held, that A was still liable to C for the freight, and that C's laches in giving notice had not deprived him of his rights. *Young v. Lindsay*, 27 Beav. 405.

(R) DEMURRAGE.

Semble, per Pollock, C.B., and Martin, B.—hassitante Bramocell, B.,—that the master of a vessel chartered has a right to settle a claim, arising at a foreign port, for demurrage by detention beyond the period for which the rate of demurrage is stipulated, such a claim being in the nature of an unliquidated demand, which it is for the owner's benefit to have promptly settled abroad, without leaving it for dispute or litigation at home. But if the master become part owner of the ship after the charter and during the voyage, that will raise a presumption of law that he was interested in the charter, and would confer an authority *prima facie* to make a settlement of such a claim. And as the presumption of law is, that where parties are partners they are partners in equal moieties, and that where they are part owners they are owners with equal rights, the presumption where they are part owners of a ship is, that they are both interested in any charter upon it made before they became such owners of it. Therefore, where it appeared that one A B had purchased the ship during the voyage, and that the master had also become a part owner, although there was no evidence that either of them had purchased directly from the former owner with whom the charter was entered into, and who was the nominal plaintiff,—Held, evidence of an authority in the master to settle for the demurrage claimed, and make an accord, which was pleaded to have been made with the plaintiff, who sued for the benefit of the owners at the time the claim arose. *Alexander v. Dowie*, 25 Law J. Rep. (n.s.) Exch. 281; 1 Hurl. & N. 152.

The defendants chartered a vessel of the plaintiffs; thirty-five running days were to be allowed for landing and discharging, and ten days more on demurrage, at 5*l.* a day. The defendants' factors abroad, under a contract, put a cargo on board, and the master signed bills of lading, making the goods deliverable to order or assigns, he or they paying freight as per charter-party. The defendants refused to accept a bill of exchange for the price of the goods, on the ground that the goods were not according to contract, and the factors' agents, in consequence, retained the bill of lading. When the vessel arrived, eight lay days remained for the discharge. The defendants informed the master of the dispute respecting the cargo, and stated that, to prevent delay of the ship, they were ready to receive the cargo for whom it might concern. The factors' agent gave the master notice not to deliver the cargo, except on the production of the bill of lading, stating that it would not be produced until they received advices from abroad, and suggested the discharging the cargo at some respectable house other than the defendants'. On the last of the demurrage days, the factors' agents produced the bill of lading, and received the cargo, which took seven days to deliver.—Held, by the Exchequer Chamber, overruling the judgment of the Court of Exchequer (27 Law J. Rep. (n.s.) Exch. 472; 3 Hurl. & N. 601), that the plaintiffs were entitled to recover from the defendants for the detention of the ship during the demurrage days, and for the few days beyond them that it took to unload. *Erichsen v. Bankworth* (Ex. Ch.), 28 Law J. Rep. (n.s.) Exch. 95; 3 Hurl. & N. 894.

A charter-party, by which it was agreed that a

ship should receive on board a cargo of coals, and proceed with them to Constantinople (and or) Odessa, contained these words: "the vessel to be loaded in Liverpool in fourteen days, and to be discharged, weather permitting, at not less than 25 tons per working day (holidays excepted), the days to commence on the ship's being in turn, and ready to deliver; all days above the said days to be paid demurrage at the rate of 5*l.* sterling per day":—Held, that the words "holidays excepted" did not apply to the fourteen days within which the vessel was to be loaded; and therefore that, although two Sundays occurred within the fourteen days, still there was the period of fourteen days only within which she was to be loaded. *Niemann v. Moss*, 29 Law J. Rep. (n.s.) Q.B. 206.

The plaintiff, the charterer of a ship, contracted with the defendants to carry some engines to Barcelona. Both parties knew that it was doubtful whether the engines could be got on board, without making some slight alterations in the ship, and they entered into an agreement in writing, containing conditions to the following effect:—First, that the plaintiff should lay the ship on the berth in L; secondly, that she should not be required to lay on her berth longer than ten days; thirdly, that she should make the voyage to Barcelona for the lump sum of 650*l.*,—charterers to pay all damages; fourthly, that the defendants should load in the ship two engines and tenders complete for 24*0l.*, freight to be paid there on delivery of bills of lading, without any deduction for interest or insurance; fifthly, that such of the above goods as weighed above 20 cwt. should be put in the steamer, stowed, taken out and landed at the shipper's risk and expense; sixthly, the said goods to be taken out of the steamer, as soon as the captain was ready to deliver them, in five days, Sunday excepted, and 20*l.* sterling demurrage to be paid by the shipper or receiver of the above-named goods, for every day she was detained over and above five days; seventhly, that she should be entered in the joint names of the plaintiff and of the defendants, so that the latter might assist to get cargo; eighthly, that any surplus of freight above 650*l.* should be divided between them, and also any loss which might result; ninthly, that the said steamer should guarantee to carry 480 tons dead weight, besides forty tons of coal in the bunkers; tenthly, the bills of lading for the whole cargo of the said steamer to be signed at the office of the plaintiff; eleventhly, the steamer to be consigned at Barcelona to the friend of the defendants, paying commission on the above freight. The steamer was put on the berth at L, and, by the consent of her owner, the hatchways were removed at the joint expense of the plaintiff and the defendants, but, notwithstanding, the engines, which exceeded 20 cwt. in weight, could not be put down the hatchways. The owner of the ship consented that the hatchways should be widened sufficiently, on condition that before she sailed she should be made fit to the satisfaction of Lloyd's surveyor. The result was, that she was detained beyond the ten days stipulated for. In an action for demurrage, it was held, by *Wightman, J., Crompton, J. and Blackburn, J.*, that upon the second clause of the agreement the defendants were liable for keeping the ship on her berth more than ten days; although to some extent a partnership as to freight might have been formed between the par-

ties. Held, also, by *Wightman, J., Hill, J. and Blackburn, J.*, that the Judge did not misdirect the jury in telling them that the defendants were liable for any delay of the ship caused during the alteration needful to take the engines on board. *Blech v. Balleras*, 29 Law J. Rep. (n.s.) Q.B. 261.

(S) LIEN AND MORTGAGE.

[*Parr v. Applebee*, 7 Law J. Dig. 673; 7 De Gex, M. & G. 585.]

A ship being at the time at sea on a seeking voyage, was transferred by the owner to the defendant by absolute bill of sale, and the transfer was duly registered. The bill of sale was, in fact, intended only as a collateral security for a loan, and the defendant did not in any way interfere with the ship. The master having afterwards borrowed money from the plaintiff for the necessary expenses of the ship, both being unaware of the state of the ownership of the ship,—Held, that there was no evidence of authority, either actual or implied, from the defendant to the master to act as his agent, and that the defendant was not liable on the above contract. *Myers v. Willis*, 25 Law J. Rep. (n.s.) C.P. 255; 18 Com. B. Rep. 886.

By a charter-party, a vessel was to go to Singapore with a cargo for the charterers, and unload there, and return thence to England, or first go thence to China and then come to England with a cargo. The outward cargo to be freight free, and a lump sum to be paid for the homeward cargo for the round; a bill at three months to be given by charterers for 900*l.* before his vessel should sail from England; the master to sign bills of lading at such freights as might be required by the agents of charterers, without prejudice to the charter, and the owners to have an absolute lien on the cargo for the recovery of all freight. Before the vessel arrived at Singapore the bill for 900*l.* became due, and was dishonoured; and no homeward cargo was provided. The master had signed bills of lading for part of the cargo consigned by the charterers to their agents at Singapore, in respect of which 196*l.* freight was payable, as appeared by the bills of lading. He refused to deliver up the goods to the agents at Singapore until payment of the 900*l.* for which he claimed a lien:—Held, that, under the charter-party, the owners would have been entitled to a lien for the 900*l.* had not the master, their agent, signed the bills of lading specifying a smaller sum due for the freight, by which they were bound. Held, also, that they were entitled to a lien for the smaller amount on the bills of lading. *Gilkison v. Middleton*, 26 Law J. Rep. (n.s.) C.P. 209; 2 Com. B. Rep. N.S. 134.

Goods were shipped by S from Glasgow to Lima under a bill of lading, by which freight was to be paid by the shipper one month after sailing, ship lost or not lost. The bill of lading was handed by S to the defendants for value; S having made default in paying the freight, the master, under instructions from home, refused to give up the goods to the defendants' agents at Lima without payment of the freight, claiming a lien upon them:—Held, that the shipowner had a lien for the bill of lading freight as against the defendants; for that—on the authority of *Gilkison v. Middleton*—the terms of the bill of lading were not such as to waive his right to it.

Neish v. Graham, 27 Law J. Rep. (n.s.) Q.B. 15; 8 E. & B. 505.

Where a party claims to detain goods upon two causes of lien, in such a way as to dispense with tender of either, he is guilty of a conversion unless he can sustain both. *Kerford v. Mondel*, 28 Law J. Rep. (n.s.) Exch. 303.

In an action of trover by freighter against shipowner to recover the goods, the charter-party giving a lien for dead freight, but the master to sign bills of lading, which bound the goods "for freight as agreed," the freighter having when he demanded the goods been prepared to pay the freight for carriage, and the shipowner having refused to deliver the goods except on payment of the dead freight,—Held, that freight for carriage alone was due, that the refusal was an implied dispensation of tender of it, and that trover could be maintained. *Ibid.*

By charter-party of a vessel to and from Calcutta freight was to be paid in a lump sum, part at certain times specified and the remainder in cash two months from the vessel's report inwards at London, and after right delivery of the cargo or under discount at 5*l.* per cent., at freighter's option. The master to sign the bills of lading at any rate of freight required, without prejudice to the charter-party. The owners of the ship to have an absolute lien on the cargo for all freight, dead freight and demurrage. The charterers' agents at Calcutta procured the homeward cargo, consisting partly of linseed, which was purchased by them on account of the charterers, but with the agents' money, and they drew a bill of exchange for the amount of the linseed on the charterers. After the linseed was on board, the agents obtained the master's signature to bills of lading, by which the linseed was made deliverable to their order, on payment of freight at the nominal rate of 5*s.* per ton, the current rate which was inserted in the invoice sent to the charterers being 5*l.* 5*s.* The agents then indorsed the bill of exchange to bankers at Calcutta, for value, and delivered to them as security the bills of lading and a letter of hypothecation of the linseed. The charterers having become bankrupt,—Held, that the master, who was also part owner of the vessel, had no lien for freight on the linseed as against the plaintiffs, the indorsees of the bill, beyond the freight payable by the bill of lading. *Foster v. Colby*, 28 Law J. Rep. (n.s.) Exch. 81; 3 Hurl. & N. 705.

Semble—that no lien attached to the freight, the terms of the charter-party requiring delivery before payment. *Ibid.*

The owner of a ship, by power of attorney, authorized his agent to sign any bottomry bond or instrument of hypothecation on the ship or her cargo, and to sell and dispose of, either absolutely or by way of mortgage, or otherwise, as he should think proper, the ship or any share thereof, and to execute all instruments and to do all acts which should be requisite and necessary for completing such sales, transfers, mortgages, or any of them, and generally to do all acts about the business and affairs aforesaid which the owners, if present, could have done. Under this power the agent by deed, reciting a mortgage of the ship, and the necessity for further advance to enable her to set sail, and the advance of 4,000*l.* for that purpose by the plaintiffs, assigned to them all the freight, hire and passage-money and earnings of the

ship in her intended voyage. After the ship sailed the agent received bills in payment of passage-money by the passengers, the proceeds of which the owner received before the ship completed her voyage:—Held, that the power of attorney authorized the assignment of this passage-money; and that the assignment gave the plaintiffs an immediate right to the passage-money before taking possession of the ship, and that they were entitled to recover it back from the owner. *Willis v. Palmer*, 29 Law J. Rep. (n.s.) C.P. 194; 7 Com. B. Rep. N.S. 340.

A mere mortgage of the ship does not give the mortgagee a right to the earnings of the ship received by the mortgagor after the execution of the mortgage, but before the mortgagee takes possession. *Ibid.*

The owners of a British ship mortgaged her in England, and afterwards sent her on a voyage to New Orleans, where she was attached by creditors who took proceedings in the courts there for the purpose of making her available for their demands. The English mortgagees intervened in these proceedings for the purpose of asserting their rights, but their claim was wholly disregarded, the law of New Orleans not recognising a mortgage of chattels; and, under an order of the Court, the ship was sold to a British subject. The ship having afterwards arrived in England with a cargo, the mortgagees filed a bill to enforce their claim:—Held, upon demurrer, first, that the judgment of the Court of New Orleans was a proceeding *in personam* and not *in rem*, and was therefore not binding upon persons not parties to the litigation. Secondly, that the intervention of the mortgagees in the foreign proceedings was not sufficient to deprive them of their right to sue in this country, they not having initiated the proceedings, nor having invoked the aid of the foreign Court in any way. Thirdly, that the judgment of the Court of New Orleans, having proceeded in utter disregard of the *lex loci contractus*, was not conclusively binding upon the Courts of this country. *Simpson v. Fogo*, 29 Law J. Rep. (n.s.) Chanc. 657; 1 Jo. & H. 18.

A mortgage of a ship must be accompanied with the formalities required by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and a Court of equity can, therefore, give no effect to an unregistered contract to assign a ship as a security for money due. *The Liverpool Borough Bank v. Turner*, 29 Law J. Rep. (n.s.) Chanc. 827; 1 Jo. & H. 159.

A mortgagee of a ship has power under the 70th section of the Merchant Shipping Act, 1854, to use, as well as sell the ship—semble. *The European and Australian Royal Mail Banking Co. (Limited) v. the Royal Mail Steam Banking Co.*, 1 Kay & J. 676.

Where a mortgagee claimed under a special contract, which did not contemplate a sale by him until two months had elapsed after a demand for payment,—Held, upon the construction of the agreement, and especially having regard to the circumstance that the ship would otherwise remain useless in that interval, that he was at liberty to use the ship. *Ibid.*

In such a case the circumstance of the mortgagee being registered as absolute owner is not conclusive as to the rights of the parties. *Ibid.*

Further observations as to the power of the Court, under the Merchant Shipping Act, 1854, to recognise

equitable rights in a ship as distinguished from those of the registered owner. *Ibid.*

(T) COLLISION AND DAMAGE.

[*Metcalf v. Heithington*, 11 Exch. Rep. 257; 7 Law J. Dig. 674.]

The observance or non-observance of any statutable or other nautical regulation as to steering or sailing, though it is not conclusive as to the liability for a collision, may be material, incidentally, as bearing on the question of negligence. Thus, if a steamer has not observed the provisions of the Merchant Shipping Act, 17 & 18 Vict. c. 104. s. 296, as to keeping on the starboard side of the mid-channel, though not conclusive as to her liability for a collision, it may be material, as she might not be expected to be out of her proper position; and, on the other hand, if a sailing vessel which has come into collision with her has not ported her helm, according to the provisions in the same act (section 297), and the steamer, adhering to the rule to keep to the starboard, has done so, this, although the latter rule is not qualified as the other is by any reservation of due regard to the dangers of navigation, still leaves the general question of negligence on either side open to the jury. *Smith v. Foss*, 26 Law J. Rep. (n.s.) Exch. 233; 2 Hurl. & N. 97.

The provision in the act (section 296.), as to steamers keeping to the starboard side of the mid-channel, means that they are to keep *inside* the mid-channel, and the mid-channel means the whole navigable breadth of the river, unless so far as it is narrowed by tiers of vessels moored on each side, or other causes; and though this may raise a question for the jury, yet they ought to find the whole breadth of the stream which is ordinarily navigable, to be "mid-channel." *Ibid.*

Where, in a case of collision, between two British vessels in the river Hooghly, it had been held that one of the vessels, which was in charge of a duly licensed pilot, was solely to blame; upon the question whether the presence of such pilot exempted the owners from responsibility, the Court inquired, first, whether it had a local jurisdiction over the *locus in quo*; and, secondly, whether sufficient evidence had been given that the pilotage regulations, under which such exemption was claimed, were then and there in force. *The Peerless*, 29 Law J. Rep. (n.s.) Prob. M. & A. 49.

A sailing vessel sailing on the starboard tack very near the wind, met a steamer. The vessel did not put her helm to port, and a collision ensued. In an action by the owners of the vessel against the owners of the steamer, evidence was given of negligence on the part of the crew of the steamer; it was contended that the plaintiffs could not recover, as, by the Merchant Shipping Act, 1854, section 296, their vessel should have put her helm to port. The Judge left it to the jury to say whether the vessel was close-hauled on the starboard tack, and whether she would have lost command by putting her helm to port; intimating his own opinion as to the facts to be that a vessel may be close-hauled, though not quite so near the wind as she could lie; and that a vessel going about was not under command. The verdict was for the plaintiff:—Held, on a rule for a new trial on the ground of misdirection, that the

direction was unexceptionable. *Chadwick v. the City of Dublin Steam Packet Co.*, 6 E. & B. 771.

Under the 504th section of the Merchant Shipping Act, 1854, the value of a ship is in ordinary cases to be taken to be the price which she would have fetched if sold immediately before her loss. *The African Steamship Co. v. Swanzy and Kennedy*, 25 Law J. Rep. (N.S.) Chanc. 870; 2 Kay & J. 684.

The costs of a suit instituted, under the 514th section of the act, for determining and distributing the amount of a shipowner's liability, and for stopping actions at law in relation to the same subject-matter, must be borne by the plaintiff, as must also the costs of the actions so stopped. *Ibid.*

In such a suit the Court has no power to give interest upon money ordered to be paid into court. *Ibid.*

A judgment having been obtained in an action commenced in the Admiralty Court, condemning the owners of the ship F in damages and costs in respect of the loss of a vessel run down by her, the F was arrested by process of the Admiralty Court, and liable to be sold. Upon a bill filed by the owners of the F, under the 514th section of the Merchant Shipping Act, 1854, for the purpose of having their liability ascertained and proceedings in the action stayed,—Held, that the action was still such a suit pending as the Court had jurisdiction to stop. *Leycester v. Logan*, 26 Law J. Rep. (N.S.) Chanc. 306; 3 Kay & J. 446.

The liability of shipowners under the 504th section of the act is not *ultra* the remedy against the ship itself; and, therefore, though the Court cannot interfere to prevent a sale under a decree in the Admiralty Court, it will superintend the distribution of the proceeds of the sale rateably among the several claimants. *Ibid.*

A collision took place on the high seas between two foreign ships, by which one was sunk. The owner of the sunken ship recovered judgment in the Admiralty Court, whereupon the owners of the other ship filed a bill praying an injunction, and to have the value of their ship and her cargo ascertained. To this bill a demurrer was put in, and Vice Chancellor Wood, in allowing the demurrer, decided as follows:—That in construing an act of parliament the Court is bound by the verbal construction of the section in question, if plain and simple; but if there is any doubt upon that, it is entitled to look, first, at the circumstances attending the passing of the act, next, to the preamble, and, lastly, to the whole purport and scope of the act, beyond the section immediately under consideration; that, *prima facie*, the acts of each independent legislature must be supposed to deal with those matters only which are within its own jurisdiction; that Part IX. of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), limiting the liability of shipowners, in case of loss or damage to any other ship, has no application where one of such ships is a foreign vessel, and, therefore, none where both are foreign; and that the *lex fori* applies only to the form of procedure, and not to the substance of the proceeding itself:—Held, on appeal, by the Lords Justices, affirming the decision of his Honour, that, excepting when foreign ships are expressly mentioned, the Merchant Shipping Act, Part IX., applies only to British ships. *Cope*

v. Doherty, 27 Law J. Rep. (N.S.) Chanc. 600; 2 De Gex & J. 614; 4 Kay & J. 267.

The IXth Part of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), is applicable to the case of damage done to a foreign ship by collision with a British ship within Her Majesty's dominions, and for this purpose Her Majesty's dominions must be taken to extend three miles from the coast. *The General Iron Screw Collier Co. v. Schurmanns*, 29 Law J. Rep. (N.S.) Chanc. 877; 1 Jo. & H. 180.

The value of a ship within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104. s. 504), is, what she would have fetched if sold immediately before the collision, without deduction in respect of costs of sale. *Leycester v. Logan*, 4 Kay & J. 725.

Therefore, where a ship had run down another, and was afterwards sold, and her owners claimed the benefit of the act,—Held, that they were accountable for the gross proceeds of the sale without deduction in respect of disbursements and fees retained by the Admiralty Commissioners. *Ibid.*

(U) SALVAGE.

Timber which has been moored in a river (some miles above a harbour) opposite to the owner's premises, and has drifted therefrom to the sea in consequence of an accidental loosening of the fastenings,—Held, not "wreck" within the meaning of the Merchant Shipping Act (17 & 18 Vict. c. 104. s. 458), entitling the Justices to make an award for salvage; and the salvors, obligees of a bond given by the owner to abide this award, held not entitled to sue on such bond. *Palmer v. Rouse*, 27 Law J. Rep. (N.S.) Exch. 437; 3 Hurl. & N. 505.

SIMONY.

To an action for dilapidations of a rectory by an incumbent against his predecessor, the defendant pleaded that the plaintiff and himself agreed to exchange livings in their then state and condition, and that the plaintiff should not call upon the defendant to pay for the repairs in the declaration mentioned; that the exchange was afterwards effected on these terms:—Held, that the plea was good, as it did not necessarily or reasonably shew that the bargain was simoniacal, since, under many circumstances, an agreement not to claim dilapidations might be legal. *Goldham v. Edwards* (in error), 25 Law J. Rep. (N.S.) C.P. 223; 18 Com. B. Rep. 389.

SLANDER.

- (A) DEFAMATORY WORDS.
- (B) PRIVILEGED COMMUNICATIONS.
- (C) SPECIAL DAMAGE.

(A) DEFAMATORY WORDS.

In an action for slander, in the use of the word "blackleg," *insuendo* that the plaintiff was a fraudulent gambler,—Held, that (proof of special damage failing) the question had been rightly left to the jury,

whether the word was used as a mere term of abuse, or whether it conveyed the imputation complained of, and implied that the plaintiff cheated at cards, and gambled in such a way as to render himself amenable to criminal prosecution; and the Court were agreed as to the general rule, that where the words used were those ordinarily employed, it was for the Court to say what was their natural meaning; and if that was not defamatory, for the jury to say whether they were used in that meaning or in any other on the particular occasion; and that where the words were of a cant or slang character, and not in their natural and apparent meaning defamatory, it would be a question of fact whether they had acquired by use any peculiar sense which was defamatory. But the Court were equally divided as to whether the particular term "blackleg" was, when simply spoken, *per se*, defamatory or not; and whether it had a known defamatory sense in the English language, which it was for the Court to define; or whether it was a piece of cant or slang, the meaning of which must be proved as a matter of fact. *Barnett v. Allen*, 27 Law J. Rep. (N.S.) Exch. 412; 3 Hurl. & N. 376.

(B) PRIVILEGED COMMUNICATIONS.

Where a master discharged A and B, his servants, and they asked him his reason for doing so, and he told A, in the absence of B, that he charged him with robbing him along with B, and told B, in the absence of A, that he charged her with robbing him along with A,—Held, that these were privileged communications as respected the absent parties, as well as those to whom they were respectively made. *Manby v. Witt*, and *Eastmead v. Witt*, 25 Law J. Rep. (N.S.) C.P. 294; 18 Com. B. Rep. 544.

The defendant, a tradesman, having reason to suspect that the plaintiff, a servant in the employ of M, who was a customer of the defendant's, had, when sent to the defendant's premises by M, abstracted property belonging to the defendant, went and communicated to M the reasons he had for believing that the plaintiff had taken such property:—Held, that the communication was privileged, if made without actual malice and in the *bona fide* belief of its truth. *Amann v. Damm*, 29 Law J. Rep. (N.S.) C.P. 813; 8 Com. B. Rep. N.S. 597.

Where the occasion of making a communication, otherwise slanderous, is such that the communication might be privileged if fairly arising out of the occasion, it is a question for the jury, whether it is so or not; as, for instance, whether it is relevant to a privileged inquiry, and, in such a case, if the inquiry be such as that the communication might be relevant to it, it may be a proper question for the jury, whether the defendant really believed it was so. *Beaton v. Skene*, 29 Law J. Rep. (N.S.) Exch. 480; 5 Hurl. & N. 838.

A new trial cannot be granted on the ground that documents have been improperly held protected from production, if it appear that they were irrelevant to the issues, or not admissible in evidence. *Ibid*.

Where a Minister of State, *subpoenaed* to produce public documents on a trial between private parties, appears, and objects to their production on the ground that it would be injurious to the public interests,—Held (*dissentiente Martin, B.*), that it is

for the Judge to rule that the documents need not be produced. *Ibid*.

The plaintiff had been dismissed from the command of a corps, some of the officers of which were discontented at his dismissal, and the general of the division to which he was attached had ordered an inquiry into the condition of the corps, and all the causes of any want of discipline that might appear in it; and the defendant, who had been Civil Commissioner attached to it, was directed to give any information in his power to the officer deputed to make the inquiry. He did so; and afterwards in conversation with that officer, made a statement (derived from hearsay) to the effect that the plaintiff had been, at the time of his dismissal, acting so as almost to incite his officers to mutiny:—Held, that the Judge rightly left it to the jury, whether the defendant, in making this statement, believed that it was within the scope of his duty, and made it *bona fide* and without malice; and that if so, it was privileged. Held, also, the only issue being on not guilty, that letters addressed by the plaintiff to the Secretary of State, and the minutes of inquiry on the subject, were not relevant or admissible, and therefore need not be produced by him; but even had they been admissible,—*semble*, that the Secretary of State, appearing on his *subpoena*, and declaring that their production would be injurious to the public service, the production of them could not be enforced—*dissentiente Martin, B.* *Ibid*.

(C) SPECIAL DAMAGE.

In an action for slander for words spoken of the plaintiff in his trade or business, with a general allegation of loss of business, it is competent to the plaintiff to prove, and the jury to assess damages for a general loss or decrease of trade, although the declaration alleges the loss of particular customers as special damage, which is not proved. *Evans v. Harries*, 26 Law J. Rep. (N.S.) Exch. 31; 1 Hurl. & N. 251.

The fact that defamatory words, not actionable in themselves, have occasioned illness, does not constitute special damage so as to give a right of action, either to the person defamed or (if a married woman) to her husband, illness not being the natural or immediate result of words spoken. *Allop v. Allop*, 29 Law J. Rep. (N.S.) Exch. 315; 5 Hurl. & N. 584.

A declaration by husband and wife alleged that the defendant falsely and maliciously spoke certain words of the wife imputing incontinence to her, whereby she lost the society of her neighbours, and became ill and unable to attend to her necessary affairs and business, and her husband incurred expense in curing her, and lost the society and assistance of his wife in his domestic affairs:—Held, that the declaration disclosed no cause of action. *Ibid*.

SLAVE TRADE.

The Consolidation Slave Trade Act (5 Geo. 4. c. 113.) was not, previously to the 6 & 7 Vict. c. 98, confined in its operation to acts done within the British dominions, notwithstanding the latter statute enacts, that from its coming into operation the 5 Geo. 4. c. 113. "shall be deemed to apply to Bri-

tish subjects, whosoever reading or being." Therefore, the purchase of slaves by British subjects within the Brazilian dominions, after the passing of 5 Geo. 4. c. 113, was illegal before the 6 & 7 Vict. c. 98; and, consequently, a contract for the sale of such slaves and their offspring to a foreigner in Brazil, made after the passing of the former statute, is illegal, and incapable of being the subject of an action in England. *Santos v. Illidge*, 28 Law J. Rep. (N.S.) C.P. 317; 6 Com. B. Rep. N.S. 841.

SOLDIERS AND SAILORS.

[The better Defence of the Coasts of the Realm, and the more ready Manning of the Navy provided for, by 19 & 20 Vict. c. 83.—The Charge of the Pay, Clothing, and contingent and other Expenses of the Disembodied Militia in Great Britain and Ireland defrayed; Allowances in certain Cases to Subaltern Officers, Adjutants, Paymasters, Quartermasters, Surgeons, Assistant Surgeons, and Surgeons' Mates of the Militia granted; and the employment of the Non-commissioned Officers authorized, by 19 & 20 Vict. c. 90.]

SPECIFIC PERFORMANCE.

- (A) WHEN DECREED.
- (B) WHEN REFUSED.
- (C) PRACTICE IN SUIT FOR.

(A) WHEN DECREED.

An agreement to lease two seams of coal, "known as the two-feet coal and the three-feet coal, lying under land to be hereafter defined, in the Bank-End estate," is not so indefinite as to prevent its being enforced. *Haywood v. Cope*, 27 Law J. Rep. (N.S.) Chanc. 468; 25 Beav. 140.

In the absence of fraud or misrepresentation, this Court will decree the specific performance of a speculative agreement, and it will exercise no discretion upon the probable value of the undertaking. *Ibid.*

A lessor of mines, by delivering the draft of a lease in accordance with an agreement dated in 1855, and not insisting on the execution of the lease until 1857, after the mines had been tried and abandoned, as of no value, does not, by the lapse of time, lose his right to require a specific performance of the agreement. The taking possession of the mine, however, is not an acceptance of the title. *Ibid.*

A B agreed to transfer to C D certain shares in a railway company, upon which no deposit or other sums had been paid, and C D agreed to accept the same, and to do all acts necessary to relieve A B from liability in respect of the shares. A B filed a bill for specific performance of the agreement. C D demurred for want of equity:—Held, reversing the decision of the Master of the Rolls, who had allowed the demurrer, that the demurrer must be overruled. *Cheale v. Kenward*, 27 Law J. Rep. (N.S.) Chanc. 784; 3 De Gex & J. 27.

An agreement for letting a farm for ten years, though void at law, under the 8 & 9 Vict. c. 106, as a lease, was held to be valid as an agreement, and specific performance of it was decreed. The inser-

tion of " &c." in some of the terms of the agreement did not produce such uncertainty as to render the agreement incapable of specific performance, where the property, the rent, and the other material points in the lease were sufficiently described and ascertained. *Parker v. Tansell*, 27 Law J. Rep. (N.S.) Chanc. 812; 2 De Gex & J. 559.

W, the lessee of the Opera House, assigned his lease, which contained a covenant for renewal, to a purchaser, reserving box No. 124 during the term mentioned in the lease, and the successive terms to be granted under the covenant for renewal, for himself, his executors, administrators and assigns, or his or their nominees. The assignee, at the expiration of the lease, took a renewal under the covenant from the landlord, which, like the original lease, contained a condition prohibiting the lessee from leasing any boxes, except certain specified boxes to the number of forty-one, not including box No. 124, for a longer term than from year to year. The specified forty-one boxes the lessee was allowed to deal with without restriction. W's interest in box No. 124 afterwards became vested in H, for the benefit of W's creditors. H, having filed his bill in this court for a declaration that he was entitled to the possession of box No. 124, as against the assignee of the lease, or to compensation in money for the same, one of the Vice Chancellors decided that the plaintiff was entitled to such declaration; and that it was no defence to the bill to say that, inasmuch as the assignee of the lease had disposed of the forty-one boxes specified in the renewed lease, a decree in the terms of the prayer of the bill would, in effect, compel him to dispose of more than such forty-one specified boxes, and therefore render him liable to a forfeiture of the lease; and, on appeal,—Held, affirming that decision, that the defendant refusing to make compensation in money or otherwise, the plaintiff was entitled to the relief sought. *Helling v. Lumley*, 28 Law J. Rep. (N.S.) Chanc. 249; 3 De Gex & J. 498.

When a defendant resists specific performance of a contract on the ground that he would thereby incur a forfeiture, the Court will look at the circumstance which gave rise to the danger of forfeiture, and if it arise out of the defendant's own acts subsequent to the contract, it will decree specific performance, and leave the defendant open to the consequences of his acts. *Ibid.*

An agreement for a farming lease was entered into in October 1855, for twelve years. In February 1859 the landlord gave notice to quit, on the ground of the lands not having been farmed according to the agreement. In November 1859 the tenant paid the balance of rent up to the previous Michaelmas, the receipt expressing that it was without prejudice to any question. In December 1859, an action of ejectment was commenced, and thereupon the tenant filed a bill for specific performance of the agreement, and to restrain the action. The evidence as to the tenant's farming was conflicting. A decree was made by one of the Vice Chancellors for specific performance of the agreement; the lease to be dated in October 1855, and the tenant to admit, in any action for breach of covenant, that the lease was executed at that date; and an injunction to restrain the action was granted; and, on appeal, this decree was affirmed. *Rankin v. Lay*, 29 Law J. Rep. (N.S.) Chanc. 734; 2 De Gex, F. & J. 65.

The owner of a plot of ground agreed to grant a lease of it to A B as soon as the latter had erected a villa thereon. But it was stipulated that if A B should not perform the agreement on his part, the agreement for a lease was to be void and that the owner might re-enter. A B was to insure in a particular way, and he was to have the option of purchasing the fee within two years. A B erected the villa, but insured in the wrong office and in the wrong name.—Held, that the contract for a lease was independent of the option to purchase, and that, notwithstanding the forfeiture of the first, the latter still subsisted, and a specific performance of the contract for sale was decreed. *Green v. Low*, 22 Beav. 625.

A agreed to sell an estate to B for 3,000L, "and the further sum of 20l. per cent. on any sum the property might realize above that sum at the sale by auction advertised to take place" the next day. A withdrew the estate from the sale.—Held, that the contract was sufficiently certain, and might be enforced. *Langstaff v. Nicholson*, 25 Beav. 160.

The defendant agreed to purchase a property at a valuation to be made by A B. The Court, though it considered A B's valuation very high "and perhaps exorbitant," decreed specific performance, there appearing neither "fraud, mistake or miscarriage." *Collier v. Mason*, 25 Beav. 200.

After an offer had been made by the plaintiff to take a lease of a farm from the defendants, a draft was prepared by the defendants' solicitor, and approved of by the plaintiff with some alterations, and was afterwards altered by the defendant himself and left by him with his solicitors for the purpose of its being ascertained whether the plaintiff would agree to the alterations. On their submitting it to him he agreed to the alterations, but no agreement was signed. A part of the terms was that the plaintiff should execute certain repairs before the lease was granted. The plaintiff was put into possession by the direction of the defendants' solicitors and executed some repairs.—Held, that although the plaintiff might have been let into possession without authority from the defendant, there was a concluded agreement for a lease on the part of the defendant, and a sufficient part performance to take the case out of the Statute of Frauds, and a specific performance was decreed. *Shillibeer v. Jarvis*, 8 De Gex, M. & G. 79.

It was part of an agreement to purchase a farm that the vendor should for twelve years from the completion be at liberty to require, at his own expense, and the purchaser agreed to grant him a lease of the farm, at a rent to be estimated at a specified percentage on the outlay in making the purchase, &c. The vendor just before the completion wrote a letter to the purchaser, agreeing to pay the percentage on the amount of the purchase-money (which had been already paid), but stating that the letter was a temporary thing until the completion of the purchase and the execution of an agreement already prepared and intended to be executed. The agreement referred to had been engrossed, and provided for the payment of a rent calculated on the aggregate amount of the purchase-money and expenses of the purchase and of repairs, but left the amount in blank. It was never signed, but the vendor remained in possession and paid rent on the aggregate amount.—Held, first,

that there was a sufficient part-performance to exclude a defence founded on the Statute of Frauds to a bill for specific performance of the agreement to take a lease. Secondly, that the option had been exercised by the vendor to take a lease. Thirdly, that the agreement was sufficiently definite to be specifically performed. Respondent may be ordered to pay costs of appeal. *Powell v. Lovegrove*, 8 De Gex, M. & G. 357.

The defendant being the owner of a public house, wrote to the plaintiffs, who were a firm of brewers, and offered it to them on lease, at a certain rent, and begged to be informed at their earliest convenience if the offer suited them, "as I am giving all the brewers who have left cards the offer in rotation." Subsequently a clerk of the firm met the defendant on the premises and discussed the terms of the lease; and afterwards one of the plaintiffs wrote to the defendant—"I have viewed the premises, having had my clerk's report, and we are willing to take them of you."—Held, first, that such letters constituted a valid agreement for a lease. Secondly, that *prima facie* the terms on which the lease was to be granted must be taken to be those expressed in the first letter. Thirdly, that the defendant was at liberty to resist a suit for specific performance of such agreement, by proving that he had made a mistake in stating the terms for the lease in the first letter. Fourthly, that such mistake was well proved in this case by shewing that the defendant had, previously to writing this letter to the plaintiffs, offered the premises to other brewers, upon terms which included the stipulation which he stated had been omitted in such letter by mistake; because such previous offer must be taken to be "the offer" which he stated in such letter that he was giving to the applicants in rotation. *Wood v. Scarth*, 2 Kay & J. 33.

Held, also, that want of memory and inaccuracy on the part of the defendant only affected the credibility of his evidence, and did not prejudice his right to relief, as the mistake was clearly proved by other evidence. *Ibid*.

There being two proprietors of an estate, where one of them without any express authority from the other agrees to sell the whole on behalf of both, and (without express authority) signs a contract for sale on behalf of both, and the other never expressly assents or signs the contract, but after knowledge of the contract does not within a reasonable time disavow it or express absolute dissent, a presumption of his assent arises, which is strengthened in proportion to the length of time during which he lies by; and unless the presumption is rebutted by circumstances of evidence sufficiently strong, he will be held bound. In such a case it is a conclusive circumstance (unless explained by evidence) that with knowledge of the contract, he tacitly and knowingly enjoys a benefit from the contract, to which but for the contract he would not be entitled. *Bigg v. Strong*, 3 Sm. & G. 592.

Specific performance of an agreement to take a lease decreed where the defendant, knowing that the premises were greatly out of repair, stipulated for certain specific repairs, which were done accordingly, but took possession after being warned that much more extensive repairs were required, and it turned out on examination after he had taken possession that it was necessary to take down and rebuild a wall at great expense. *Cook v. Waugh*, 2 Giff. 201.

Plaintiff agreed to grant a lease to defendant when and so soon as he, defendant, should have built a new house on the land; and the defendant agreed to accept such lease when required, and by a certain day to pull down an old house then standing on the land and build a new one on the site:—Held, on demurrer, to a bill praying specific performance and damages, that the act of 1858 applied, and that the plaintiff was entitled to damages for the non-building of the house, and to specific performance of the contract to accept the lease. *Soames v. Edge*, Johns. 669.

(B) WHEN REFUSED.

An iron company, the owners of a private railway, being desirous of connecting their line with other railways by means of a branch line, applied to various landowners, and, among the rest, to J C O and his mortgagees, for wayleaves through their lands; and an offer in writing was made to them, in March 1843, by J C O and his mortgagees, of a wayleave through their lands, by a lease for sixty years, by the payment of triple damages yearly. There was no express acceptance by the company of the offer. The iron company assigned all their interest to a railway company who were to construct the line. In October 1843 the proposed line was staked out over the lands of J C O; and in July 1844 (all the other landholders being settled with) the works were commenced; and in 1845 the line was opened for traffic. In June 1844 the mortgagees of J C O, under their power of sale, sold and conveyed the property, including the land on which part of the line was formed, to B, who sold to S. From 1844 to 1847 unsuccessful negotiations had been pending between the parties for settling the quantum of the yearly rent; and in 1847 S brought ejectment against the company. The company then filed their bill to stay proceedings at law and for specific performance, alleging acceptance of the offer of March 1843, by the acts of the company, in staking out and making their line in accordance with the offer, and praying that the Court would determine the quantum of rent to be paid:—Held, upon appeal, affirming the decree below, that the acts of the company did not amount to an acceptance of the offer so as to make it a contract binding the land, and the bill was dismissed. *Meynell v. Surtees*, 25 Law J. Rep. (N.S.) Chanc. 267.

After a suit was instituted by a railway company for specific performance, the company obtained legislative powers to retain possession of the land in question:—Held, that the cause must be decided as if the act had not passed. *Ibid.*

An offer to sell land, to be binding upon the person making it, must be accepted within a reasonable time. If the person making the offer die, become bankrupt, or sell, before acceptance of the offer, the land is not bound. *Ibid.*

Semble—an agreement to grant a wayleave for the purpose of a mineral railway simply, will not justify the construction of a railway for the purposes of general traffic. *Ibid.*

The scope of the bill being for specific performance of an alleged contract,—Held, that the plaintiffs were not entitled to relief on the principle of quieting possession. *Ibid.*

The Court will not entertain a bill for specific per-

formance of an agreement, which contains terms that cannot be enforced against the plaintiff, where the effect of a decree would be that, on the plaintiff refusing to perform his part of the contract, the defendants could not be restored to their former position. *Stocker v. Wedderburn*, 26 Law J. Rep. (N.S.) Chanc. 713; 3 Kay & J. 893.

The ground upon which the Court goes, in enforcing, by injunction, a negative term in an agreement, the positive terms in which cannot be enforced by decree for specific performance is, that the injunction is dependent upon the plaintiff's performing his part of the contract, and will be dissolved upon his failing to do so. *Ibid.*

The defendants entered into an agreement with the plaintiff to form a joint-stock company for the purpose of working the plaintiff's patent, and by the same agreement the plaintiff agreed to devote his whole time to the interests of the company and the improvement of the patent. Upon demurrer to a bill for specific performance:—Held, that the bill could not be sustained, the remedy being incomplete and the mischief of a decree for specific performance irremediable. If the agreement had been simply for the execution of a deed embodying the provisions of the contract, *semble*, specific performance would be decreed. *Ibid.*

By an agreement, in writing, A agreed to demise to B certain premises which were then in lease to C, and B undertook to procure a surrender of the existing lease from C, and to accept the new lease. C having afterwards refused to surrender, A filed a bill against B for specific performance, with a modification:—Held, upon demurrer, that the bill could not be sustained. *Beaton v. Stutely*, 27 Law J. Rep. (N.S.) Chanc. 156.

An agreement to build a house of a given value and according to a plan to be agreed upon, cannot be carried into effect in this court when neither plan nor specifications have been under the consideration of the parties. *Brace v. Wehnert*, 27 Law J. Rep. (N.S.) Chanc. 572; 25 Beav. 348.

An offer by letter to sell or buy a business cannot be carried into effect unless from the whole letter taken together an inference can be drawn from which the material terms of the contract can be ascertained. In the absence of that, it amounts but to an offer to treat, as nothing can be supplied by conjecture. *Cooper v. Hood*, 28 Law J. Rep. (N.S.) Chanc. 212; 26 Beav. 293.

What may be considered as fair inferences in such cases. *Ibid.*

A purchaser raised certain valid objections to his vendor's title, which the vendor refused to satisfy. The vendor gave notice, that if the purchaser refused to complete within five days, he should re-sell and charge the purchaser with the expenses. The purchaser thereupon gave the vendor notice, that he should bring an action for the deposit, if the requisitions were not complied with within a week. The action was commenced, and the vendor some time subsequently agreed to satisfy the requisitions at the purchaser's expense. Upon the purchaser's refusal, a bill was filed by the vendor for specific performance. The Court held, that the notice by the vendor of an intention to re-sell, was equivalent to a declaration that he would not seek specific performance of the contract, and that the purchaser's action

to rescind was effectual, and the bill was dismissed, with costs. *Royou v. Paul*, 28 Law J. Rep. (N.S.) Chanc. 555.

Power of the Court to order the return of the deposit where the vendor's bill is dismissed, he having given an undertaking. *Ibid*.

A company contracted to purchase the interest of leaseholders in a piece of land for a given sum, and for the conveyance in fee of a piece of the land which they were to take under the compulsory powers of their act of parliament. The agreement contained a clause that the company were to be consulted on any buildings to be erected in the line of street, and that differences should be settled by two parties named, or their umpire. The company held the contract suspended, and after their compulsory powers expired they refused to complete the contract. Upon a bill for specific performance,—Held, that the agreement respecting the buildings was vague, and that the Court could not decree a specific performance of the contract. *Tillett v. the Charing Cross Bridge Co.*, 28 Law J. Rep. (N.S.) Chanc. 863; 26 Beav. 419.

Held, also, that as the agreement was uncertain, no compensation could be awarded; but as there was a concluded agreement, the Court dismissed the bill, without costs. *Ibid*.

A Court of equity will entertain a bill for specific performance of a contract for sale of a valuable chattel where adequate compensation cannot be obtained at law; but in a case where it was proved that the price was greatly inadequate, and the purchaser knew it to be so, the Court, under the circumstances, refused to decree specific performance, and dismissed the bill, although it would not have given relief to a vendor seeking to set aside the contract. *Falcke v. Gray*, 29 Law J. Rep. (N.S.) Chanc. 28; 4 Drew. 651.

The Court will not decree specific performance of a building contract which provides that a party-wall shall be pulled down and rebuilt, after the adjoining owner has had the matter referred to arbitration under the clauses of the Metropolitan Building Act, and an award has been made declaring that it is not necessary to take down such party-wall. *Seawell v. Webster*, 29 Law J. Rep. (N.S.) Chanc. 71.

The plaintiff being a trustee for sale of certain property, held under a lease from Dulwich College, contracted to sell the same to the defendant. The lease contained the ordinary covenants, including one for keeping the premises insured from fire, with the usual proviso for forfeiture and re-entry on breach of any of the covenants. By the conditions of sale it was stipulated that the purchase should be completed on the 20th of July, all outgoing to that day being paid by the vendor. The purchaser accepted the title previously to the day appointed for completion, but owing to circumstances for which neither party was to blame, the conveyance was not ready to be signed until the 26th of August. It then appeared that the vendor, finding the insurance of the premises would expire on the 24th of June, had renewed the policy for one month only, and it had consequently dropped before the 26th of August. The defendant thereupon refused to complete unless a waiver of the forfeiture was obtained from the lessors (the trustees of Dulwich College). The vendor declined, but afterwards, having obtained the

waiver and renewed the insurance, required the purchaser to complete, which he declined to do:—Held, upon bill filed by the vendor for specific performance, that from the date of the contract the vendor became a trustee for the purchaser conditionally upon the completion of the contract; that it was the duty of the vendor, as such trustee, to perform the covenants so as to prevent a forfeiture up to the period fixed for completion—the 20th of July. From that day, although it could not be laid down as a general rule that the omission of the vendor to inform the purchaser of the dropping of the insurance, followed by a forfeiture, was sufficient ground for avoiding a contract, yet, under the peculiar circumstances in this case, of the vendor having renewed the insurance for one month, and having declined to obtain a waiver of the forfeiture from the lessors, there was so much blame attached to the vendor that the Court would not enforce the contract, but dismissed the bill, but without costs. *Dowson v. Solomon*, 29 Law J. Rep. (N.S.) Chanc. 129; 1 Dr. & Sm. 1.

An agreement to borrow a sum of money is not such a contract as this Court can compel the specific performance of. *Rogers v. Challis*, 29 Law J. Rep. (N.S.) Chanc. 240; 27 Beav. 175.

The Court, notwithstanding the 21 & 22 Vict. c. 27, has no jurisdiction to award compensation or damages against a person who has refused to accept a loan of money for which he had contracted. *Ibid*.

Questions of compensation for damages under the 21 & 22 Vict. c. 27. can be entertained only in suits in which the Court has undoubted jurisdiction. *Ibid*.

If a party agrees to let an estate, and files a bill for the specific performance of the agreement, it will be dismissed, with costs, if, in the course of the suit, it should appear that the intended lessor had a defective title; even though the objections, on which the refusal to take the lease was grounded, were frivolous and untenable. *Bastcomb v. Phillips*, 29 Law J. Rep. (N.S.) Chanc. 380.

H and B were clients of the same solicitor, M, to whom B gave an authority in writing to sell certain property. Acting on this authority, M entered into an agreement with H to sell the property to him:—Held, that this was a transaction in which there was a necessity for the utmost openness of dealing; and the Court, not being satisfied that this existed in the case before it, refused specific performance of the agreement entered into. *Hesse v. Briant*, 6 De Gex, M. & G. 623.

An agreement to take a lease of a house if put into thorough repair, and the drawing-rooms "handsomely decorated according to the present style":—Held, too uncertain for the Court to enforce. *Taylor v. Portington*, 7 De Gex, M. & G. 328.

One of two executors, erroneously believing that he was acting with the authority of the other, contracted to sell a leasehold house, part of the testator's estate:—Held, that the purchaser could not enforce a specific performance of the contract. Whether he could have done so if the executor had been under no misapprehension—*quære*. *Sneesby v. Thorne*, 7 De Gex, M. & G. 399.

Bill for specific performance dismissed, although an issue had been tried and had resulted in a verdict for the plaintiff, the Court being of opinion that the agreement was one of which specific performance

could not be decreed, and that the issue ought not to have been directed. *Morrison v. Barrow*, 1 De Gex, F. & J. 633.

An agreement for sale of leasehold premises, and the goodwill of a trade and certain fixtures, to be taken at a valuation to be made by two gaugers, to be named, or their umpire:—Held, that the Court could not decree specific performance of an agreement, one part of which was left to be determined by arbitration. *Darbey v. Whitaker*, 4 Drew. 134.

Delay and laches, on the part of the plaintiff, are a good defence to a suit for specific performance; but they are inapplicable where the contract, though incomplete, has continued to be acted on; as where, under a contract for a lease, possession is taken and rent paid for a series of two years. *Sharp v. Milligan*, 22 Beav. 606.

The plaintiff agreed to take a lease of a public-house from the defendant (a brewer); but the written contract said nothing as to the restrictive covenants of a brewer's lease. The plaintiff instituted a suit to obtain an unrestricted lease. The restricted parol agreement being established by extrinsic evidence,—Held, that the bill must be dismissed. The plaintiff having then elected to take a brewer's lease, a decree was made, the plaintiff paying the costs of the suit. *Barnard v. Cave*, 26 Beav. 253.

In June 1846 A agreed to sell his share in a mine to B, and four months afterwards he agreed to sell it to C, who paid part of the purchase-money. In the month following, A having given notice to B that he repudiated the first contract, conveyed to C. No steps were taken by B for ten years and a half, when a suit was instituted against C alone, to have a declaration that C was a trustee, and for a conveyance:—Held, that the right was barred by lapse of time and laches. Held, also, that the result would have been the same if the subject had been ordinary instead of mining property. *Alloway v. Braine*, 26 Beav. 575.

A specific performance will not be decreed after a delay of ten years, when nothing has been done in the mean time. *Ibid*.

Specific performance of a contract for sale of lands held under an Inclosure Act refused, it appearing upon the context that the right of the lord to the minerals in the allotted land had not been affected by the Act. *Pretty v. Solly*, 26 Beav. 606.

In March 1850 the defendant agreed to grant the plaintiff a lease of a coal-mine. Three months after, the defendant gave notice to the plaintiff that, unless he commenced working in a month, he should consider the agreement abandoned. Two years after the plaintiff entered and commenced working, but was resisted by the defendant; the working, however, proceeded, but was abandoned in February 1853. Five years afterwards the plaintiff attempted to resume the work, and filed a bill for specific performance. It was dismissed with costs on the ground of delay. *Sharp v. Wright*, 28 Beav. 150.

(C) PRACTICE IN SUIT FOR.

A contract was entered into for the sale of certain property; and it was stipulated that the purchaser should pay 10l. per cent. deposit on the purchase-money, and the purchase was to be completed on the 11th of October, when the rest of the purchase-money was to be paid, and the purchaser was to be

entitled to the rents from that day; and if from any cause whatsoever the purchase should not then be completed, the purchaser was to pay interest at the rate of 5l. per cent. per annum from that period, until the purchase should be completed. The conveyance was ready for signature, when the vendor died two days before the time fixed for the completion of the contract. The vendor, by will, left the property to an infant; and a suit for specific performance was thereby rendered necessary. The purchaser paid the purchase-money into court:—Held, that interest upon the purchase-money must be paid by the purchaser from the time fixed for completing the contract. *Bannerman v. Clarke*, 26 Law J. Rep. (N.S.) Chanc. 77; 3 Drew. 632.

When a contract is entered into in one country and is sought to be enforced by the Courts of justice of another country, the question is, not only whether it is a valid contract according to the law of the country where it was entered into, but whether it is or is not in accordance with the laws of the country in which it is sought to be enforced. *Hope v. Hope*, 26 Law J. Rep. (N.S.) Chanc. 417; 22 Beav. 351.

A bill by a vendor for specific performance of a contract to sell, stating or shewing by reasonable inference that the vendor cannot give a valid conveyance, is demurrable; *otherwise* where the allegations only disclose difficulties in the mode of conveyance. *Duke of Beaufort v. Glynn*, 3 Sm. & G. 213.

Whether the Court, in the absence of express stipulation or of conduct waiving the objection, will decree specific performance of a contract, where the execution by a necessary party can only be obtained under a power of attorney—*quære*. *Ibid*.

It is not the course of the Court, when it entertains jurisdiction in specific performance, to permit an action at law to proceed for the same subject-matter. *Ibid*.

A defendant to a bill for specific performance of a clear contract for a specific sum cannot resist it by way of set-off on the ground that, on an account between them in respect of antecedent transactions affecting the subject-matter, there would be a balance due to the defendant. *Phipps v. Child*, 3 Drew. 709.

The defendant, a purchaser, ordered to pay all the costs, though a good title was not shewn until after the institution of the suit, by the production of a declaration which was not the cause of dispute, and had not been previously required. *Bridges v. Longman*, 24 Beav. 27.

A vendor filed a claim for specific performance, and gave notice of motion for a decree. The defendant did not appear, and a decree was made against him directing a specific performance without any reference as to title. Subsequently, on the motion of the defendant, the Court allowed a reference as to title to be inserted in the decree, upon his paying all the costs of the application. *Hughes v. Jones*, 26 Beav. 24.

SPRING GUNS.

The plaintiff entered the defendant's garden at night, and without his permission, to search for a stray fowl, and, whilst looking closely into some bushes, he came in contact with a wire, which caused something to explode with a loud noise, knocking

him down and slightly injuring his face and eyes:—Held, that the defendant was not liable for this injury at common law, nor, in the absence of evidence that it was caused by a spring-gun or other engine "calculated to inflict grievous bodily harm," under the statute 7 & 8 Geo. 4. c. 18. s. 1. *Wootton v. Donkins*, 2 Com. B. Rep. N.S. 412.

STAMP.

[The Stamp Duties on certain Instruments of Proxy reduced; the Laws relating to the stamping of Articles of Clerkship to Attornies and others amended; and Admissions to the Freedom of the City of London by Redemption exempted from Stamp Duty, by 19 & 20 Vict. c. 81.—The Stamp Duties payable on Matriculation and Degrees in the University of Cambridge repealed by 21 Vict. c. 11. —A Stamp Duty on certain Drafts or Orders for the Payment of Money granted by 21 Vict. c. 20.—Certain Duties of Stamps granted by 23 Vict. c. 15. —An Act for granting to Her Majesty certain Duties of Stamps, and to amend the Laws relating to the Stamp Duties, 23 & 24 Vict. c. 111.]

- (A) AGREEMENTS.
- (B) CONVEYANCES.
- (C) MORTGAGES.
- (D) AFFIDAVITS.
- (E) PRESUMPTION IN FAVOUR OF.

(A) AGREEMENTS.

H being tenant to E, G signed the following document: "August 2nd, according to Mr. H's request, the land at B, under Mr. E, I will be bound for until next Lady-day, rent 48l. (Signed) J G." The document being tendered in evidence in an action by G against H for money paid to the landlord,—Held, that it required an agreement stamp. *Glover v. Hackett or Halkett*, 26 Law J. Rep. (N.S.) Exch. 416; 2 Hurl. & N. 487.

Quare—whether under the statute 19 & 20 Vict. c. 97, the document by itself was one which would satisfy the Statute of Frauds. *Ibid*.

(B) CONVEYANCES.

Stamp duty is payable on conveyances executed in this country of land situate abroad. *Wright v. the Commissioners of Inland Revenue*, 25 Law J. Rep. (N.S.) Exch. 49: *nom. In re Wright*, 11 Exch. Rep. 458.

(C) MORTGAGES.

A document, stating goods to have been deposited as a security for the repayment of money lent, and containing, in default of payment, a power of sale, does not require a mortgage stamp within the 13 & 14 Vict. c. 97. *Attenborough v. the Commissioners of Inland Revenue*, 25 Law J. Rep. (N.S.) Exch. 22: *nom. In re Wright*, 11 Exch. Rep. 461.

(D) AFFIDAVITS.

The Court will take no notice of an affidavit, if it is not duly stamped, or if it contains an interlineation in the jurat. *Hyatt v. Hyatt*; *Manton v. Manton*, 28 Law J. Rep. (N.S.) Prob. & M. 32.

DIGEST, 1855—60.

(E) PRESUMPTION IN FAVOUR OF.

It lies upon the party objecting to secondary evidence of the contents of a lost document on the ground of the want of a stamp, to shew that it was not stamped. If it be shewn that at one time it was unstamped, that fact by itself will raise the presumption that it continued without a stamp. But where it appeared that a charter-party, at the time of its execution, was unstamped, and within the fourteen days allowed by the 5 & 6 Vict. c. 79. s. 21. for stamping such instruments, it was taken to the district stamp office at C, and the duty and postage paid, in order that it might be sent to London to be stamped, and the clerk to whom it was delivered proved that he sent to London all documents left with him for that purpose; the clerks in London said they were unable to say whether such a document was or was not returned, but if it was, it would be returned, in the usual course, to the district office in the country; and the clerk there could not say whether it was returned or not, but, on search being made for it, no trace of it could be discovered:—Held, that the evidence left it altogether uncertain whether the document was stamped or not; that the presumption of its being unstamped was done away with; and that the contrary evidence was admissible. *Closmadenc v. Carrel*, 25 Law J. Rep. (N.S.) C.P. 216; 18 Com. B. Rep. 86.

STATUTE.

[Certain Statutes not in use repealed by 19 & 20 Vict. c. 64.]

CONSTRUCTION AND OPERATION OF.

Where the legislature has vested special powers in a particular body for certain special purposes, a general act subsequently passed will not override those special powers. *The London and Blackwall Rail. Co. v. the Board of Works for the Limehouse District*, 26 Law J. Rep. (N.S.) Chanc. 164; 8 Kay & J. 123.

By a clause in the L and B Railway Act, after reciting that plans and sections of the widenings, enlargements and other works proposed to be made, describing the lands intended to be taken or used for the purposes of such widenings and enlargements and for the stations, works and conveniences to be connected therewith, and also books of reference had been deposited with the clerks of the peace, the company were empowered to "widen, alter, enlarge and complete their railway and other works in, upon or over the lands delineated on the plans and described in the books of reference, and to enter upon, take and use such of the lands described upon the said plans and in the said books of reference, as might be necessary for such purposes, and to purchase and acquire any easement, right or limited interest upon, over, through or in any of the said lands":—Held, that this authorized the building of a station upon part of the lands described, and not only such works as were necessary for the mere widening of the railway, the station being necessary for the public convenience. *Ibid*.

The possessor of lands, encroachments on the Forest of Dean, devised the same to his wife for

life, with remainder to his sons. The statute 20 Car. 2. c. 3. had enacted that all titles obtained by encroachment after the passing of the act should be void. The statute 1 & 2 Vict. c. 42. enabled "holders" of certain encroachments so made to acquire the fee. The wife obtained a conveyance of the fee in such encroachments:—Held (affirming a decree of one of the Vice Chancellors), that she had acquired the fee, not for her own benefit only, but for the benefit of all parties interested under her husband's will. *Yem v. Edwards*, 27 Law J. Rep. (N.S.) Chanc. 23; 1 De Gex & J. 598; 3 Kay & J. 584; 26 Law J. Rep. (N.S.) Chanc. 590.

The Brecon Market Act empowered the corporation to purchase lands for enlarging the borough market, &c., and it directed them, within seven years after the passing of the act, to sell so much of the lands as were not required, the proceeds to be applied for the purposes of the act. They were also empowered to borrow money on debentures, and one holder was to have no priority over another. Power was also given to borrow money on mortgage, or by sale of the corporate property. The corporation was directed to apply all money received under the act, and the rents of the estates, and the tolls, &c. of the market, after paying various charges, in payment of the money borrowed. The act also contained a clause restraining the corporation, without the consent of the Lords of the Treasury, from taking, appropriating, using, selling, demising, mortgaging or alienating for the purposes of the act any messuages which they could not have taken, &c. before the act passed. Upon a bill by a debenture holder,—Held, that a mortgage of lands made to a debenture holder, as a further security for money advanced on debentures, could not be supported; that such mortgage gave no priority or preference to the mortgagee; and that the lands comprised in the mortgage (being part of those purchased under the act) must be sold, and the money applied in discharge of the debts as directed by the act. *De Winton v. the Mayor, &c. of Brecon*, 28 Law J. Rep. (N.S.) Chanc. 600; 26 Beav. 533.

The clauses of the Waterworks Clauses Act, 1847, are applicable to "lands and streams in the same manner as those of the Lands Clauses Consolidation Act" are applicable to lands; and in the mode of compensation the same distinction is taken between "lands and streams taken and used" and "lands and streams injuriously affected." *Ferrand v. the Corporation of Bradford*, 21 Beav. 412.

The diversion of a stream is a "taking and using it" within the meaning of the 85th section of the Lands Clauses Consolidation Act, which is incorporated in the Waterworks Clauses Act; and before such diversion can be made the value of the stream must be ascertained and secured to the owners of the land through which it passes. *Ibid.*

Whether by diverting a stream the river into which it used to flow is "injuriously affected" or "taken and used"—*quære*. *Ibid.*

Rules of construing statutes where a general enactment in it would override a particular one and where two parts of it are contradictory. *Pretty v. Solly*, 26 Beav. 606.

The word "soil" in an Inclosure Act, held to mean "surface." *Ibid.*

STOCK.

[Provision as to stock and dividends unclaimed in Ireland made by 23 & 24 Vict. c. 71.]

Unclaimed Dividends.

Where stock, which had been standing in the names of two persons, had been transferred to the Commissioners for the Reduction of the National Debt, in consequence of the dividends not having been claimed for ten years, the Court, upon the petition of the administrator of the survivor of the two persons to have the stock transferred to him, directed a reference to inquire who was entitled to the stock. *In re Bishton and Crockett*, 27 Law J. Rep. (N.S.) Chanc. 168.

Re-transfer of stock which had been transferred to the Commissioners for the Reduction of the National Debt, under the provisions of the statute 56 Geo. 3. c. 60, ordered upon a clear title to the legal interest, but a *prima facie* title only to the beneficial interest, being shewn to be in the petitioner. *Ex parte Bouds*, 28 Law J. Rep. (N.S.) Chanc. 648.

Joint Tenancy or Tenancy in Common.

Where stock has been purchased, in the joint names of two, out of money standing to their joint account in the bank, it is not necessarily to be considered in equity as held in joint tenancy, but the origin of the money and the acts and intentions of the parties may be looked to, and a conclusion in favour of a tenancy in common drawn from the circumstances. *Robinson v. Preston*, 27 Law J. Rep. (N.S.) Chanc. 395; 4 Kay & J. 505.

The distinction taken in equity between a purchase by two advancing equal shares of the purchase-money in their joint names, and a mortgage to them under the same circumstances, the first being considered to create a joint tenancy, and the other a tenancy in common, disapproved of. *Ibid.*

Two sisters being tenants in common of real estates had money arising from the rents standing to their joint account in the bank. Part of the money was from time to time invested in the purchase of stock in the joint names, and part on mortgage, the mortgaged premises being conveyed to them as tenants in common. Each sister, by will, affected to dispose of her share of the stock:—Held, that they were entitled to the stock as tenants in common, and not as joint tenants. *Ibid.*

Two sisters carried on business as farmers. They had a joint account at their bankers, and an establishment and purse in common. They invested part of their money in the purchase of consols in their joint names, and they had a balance due to them on their banking account, besides a sum due to them from their bankers on deposit notes:—Held, on the death of one, that the two sisters were joint tenants of the consols and tenants in common of the balance, and of the deposit notes. *Bons v. Pollard*, 24 Beav. 283.

SUITORS' FEE FUND.

[*Trevor v. Blucks*, 7 Law J. Dig. 689; overruled 6 De Gex, M. & G. 170.]

SUPERANNUATION.

[The 27th section of the Superannuation Act, 1834, repealed by 20 & 21 Vict. c. 37.]

SURGEON AND APOTHECARY.

[See *PHYSIC*—*The Queen v. the Pharmaceutical Society* (in error), 5 E. & B. 138; 6 Law J. Dig. 689.]

SURVEY.

[The act for the Survey of Great Britain, Berwick-upon-Tweed, and the Isle of Man, continued by 19 & 20 Vict. c. 61.]

TENANT FOR LIFE.

Tenant for life of devised estates paid off certain bond debts of the testator, and cancelled the bonds; after a considerable lapse of years, he filed his bill to have the amount of the bond debts raised out of the settled estates for his own benefit:—Held, that the principle of a Court of equity, that a tenant for life paying off an incumbrance upon the settled estates, intends, *prima facie*, to keep alive the charge against the inheritance for his own benefit, does not apply, or in a very remote degree, to the case of a tenant for life paying off the bond debts of the settlor: and, supposing the intention to be established by the tenant for life taking an assignment of the bond debts to a trustee for himself, yet the claim cannot be made available against the inheritance, if the tenant for life has allowed such a time to elapse as that the bond creditor, if suing himself, would have had no right against the estate. *Morley v. Morley; Harland v. Morley*, 25 Law J. Rep. (n.s.) Chanc. 1.

Where the trustees of a settlement, having power to raise a sum of given amount out of the rents and profits, or by assignment or other disposition of the settled estates, as a provision for the fines and expenses payable on the renewal of leases comprised in the settlement, exercised that power by mortgage, and also paid further sums for renewals out of the rents of the settled estates, it was held, that the tenant for life under the settlement was bound to keep down, out of the rents and profits, the interest only of the sum raised by mortgage; but that the further sums paid for renewals must be apportioned between the tenant for life and the remaindermen, according to the ordinary rule of the Court in such cases. *Plumtre v. Oxenden*, 25 Law J. Rep. (n.s.) Chanc. 19.

The assignee of a tenant for life, "without impeachment of or for any manner of waste except spoil or destruction, or voluntary or permissive waste, or suffering buildings to go out of repair," may cut all timber not planted or left for ornament, which an owner in fee, who regarded his own interest and the permanent advantage of the estate, would probably cut. *Vincent v. Spicer*, 25 Law J. Rep. (n.s.) Chanc. 589; 22 Beav. 380.

A tenant for life of funds to arise from the realization of a reversionary interest is entitled to an equivalent for the dividends which would have been received if the reversion had been realized and the

money invested in the funds. *Wilkinson v. Duncan*, 26 Law J. Rep. (n.s.) Chanc. 495; 23 Beav. 469.

The principle upon which such equivalent is to be ascertained. *Ibid.*

25,000*l.*, part of the produce of a sale under the Incumbered Estates Act, having been set aside by the Commissioners, and invested in consols to satisfy portions of that amount, which were payable out of the estate upon the death of the tenant for life,—Held, that the tenant for life was entitled as against the portioners to the dividends in the mean time. *Wellesley v. the Earl of Mornington*, 27 Law J. Rep. (n.s.) Chanc. 150.

An agreement for letting a farm having been sanctioned by the Court, the tenant for life was allowed the expense of permanent repairs done to the house and buildings out of a sum of stock settled upon the same trusts. *Macnolty v. Fitzherbert*, 27 Law J. Rep. (n.s.) Chanc. 272.

A testator directed that his trustees should, during the life of the tenants for life, out of the rents and profits of his estate, keep the mansion house and all other the buildings and messuages in good repair; rebuilding, if necessary, any farm buildings that might from time to time require it. The buildings were very dilapidated at the testator's death:—Held, that the repairs were to be effected out of the annual rents; that the rebuilding applied only to the farm houses and farm buildings, and not to the mansion house; and that only such repairs were to be effected as a surveyor should consider indispensable in order to make the buildings serviceable for the tenants, and no ornamental or unnecessary improvements to be included. *Cooks v. Cholmondeley*, 27 Law J. Rep. (n.s.) Chanc. 826; 4 Drew. 326.

A copyhold estate was devised to trustees for a tenant for life, with gifts over to other persons in remainder. Upon the admission of new trustees to the copyhold estate,—Held, that the fines and fees must be borne by the tenant for life and those in remainder in proportion to the value of their respective interests. *Carter v. Sebright*, 28 Law J. Rep. (n.s.) Chanc. 411; 26 Beav. 374.

A testator left the whole of his personality to his son absolutely, and his real estate to his son for life, with remainder to his grandson. His debts were to be paid out of his personality, and then out of his realty in aid of the personality. The debts consisted principally of money borrowed in order to make advances to his son, who was a banker. The son kept down the interest upon the debts out of the income of his life estate in the realty for eleven years, and then the bank failed. A dividend was subsequently paid, which was sufficient to satisfy a large portion of the debts:—Held, that the tenant for life was not entitled to be recouped out of the real estate for any sums which he had paid in keeping down the interest upon the debts. *Shore v. Shore*, 28 Law J. Rep. (n.s.) Chanc. 940; 4 Drew. 501.

A receiver having been appointed, both of the real and personal estate, it was held, that the expenses of such receiver must be borne by the tenant for life. *Ibid.*

If a tenant for life without impeachment of waste sells, for value, "all and singular the timber and timber-like trees then growing or being, or which should thereafter grow or be upon settled estates," to trustees, for the benefit of those in remainder, he

will be restrained from either cutting or thinning the timber. *Gordon v. Woodford*, 29 Law J. Rep. (N.S.) Chanc. 222; 27 Beav. 608.

A testator devised and bequeathed the whole of his property, comprising freeholds, leaseholds and personality, to trustees, upon trust for the payment of certain annuities, and, subject thereto, for certain persons for life, with remainder to others, their heirs, executors, administrators or assigns. The leasehold property belonging to the testator was considerable, and was held for short terms. The Court decided that, there being no indication upon the face of the will of any intention on the part of the testator that the leaseholds should not be converted, the general principle must be applied, and there must be a conversion. *Craig v. Wheeler*, 29 Law J. Rep. (N.S.) Chanc. 374.

Where timber, ripe for cutting, is cut by a tenant for life impeachable for waste, he is entitled to the income of the fund produced by the sale thereof; and the first person taking an estate unimpeachable for waste will, on coming into possession, be entitled to the capital. Where the timber so cut is not ripe for cutting, *semble*, the produce belongs immediately to the first person having an estate of inheritance, passing over all the intermediate life estates, whether impeachable for waste or not. But whether it belongs to him or to the first tenant for life, unimpeachable for waste, the cutting being a tort, the remedy is by action at law, and not in this court. Therefore, under no circumstances can a tenant for life unimpeachable for waste be entitled, on coming into possession, to back interest on the produce of timber, whether properly or improperly cut by a previous tenant for life impeachable for waste. *Gent v. Harrison*, 29 Law J. Rep. (N.S.) Chanc. 68; Johns. 517.

The Court will not interfere in cases of permissive waste by tenant for life. *Warren v. Radall*, 29 Law J. Rep. (N.S.) Chanc. 543; 1 Jo. & H. 1.

Rule as to the interference of the Court to secure title-deeds during tenancy for life. *Ibid*.

A tenant for life in possession, having power to charge the inheritance with 20,000*l.* and interest for his own benefit, executed the power, and assigned the charge as part security for a mortgage of a greater sum. The rents received from the estate were insufficient to pay the interest, and the tenant for life paid to the assignees of the charge this interest out of other money of his own; but did so without giving any notice whatever to the remainderman of his intention to make the deficiency a charge on the inheritance. After the death of the tenant for life the remainderman claimed to redeem, and the assignees of the charge sought, as against the inheritance, to charge it with the amount of the deficiencies:—Held, that they were not entitled to do so. *Lord Kensington v. Bouverie*, 29 Law J. Rep. (N.S.) Chanc. 537; 7 H.L. Cas. 557; 24 Law J. Rep. (N.S.) Chanc. 269, 442; 19 Beav. 39.

A testatrix gave shares in a bank to trustees, to pay the annual proceeds to her daughter for life, and the capital she gave in trust for her grandchildren:—Held, that bonuses declared upon the bank shares out of the half-yearly profits were to be considered as income, and to belong to the tenant for life; it would have been otherwise if the bonuses had been paid out of an accumulation of profits, running over

several years. *Plumbe v. Nield*, 29 Law J. Rep. (N.S.) Chanc. 618.

If trustees postpone the sale of land which is unproductive, with a view to obtain an increased price, it will not entitle a tenant for life to receive interest upon the purchase-money from the death of the testator. *Yates v. Yates*, 29 Law J. Rep. (N.S.) Chanc. 872; 28 Beav. 637.

Where the devisee for life of leaseholds for lives, in the erroneous belief that he was bound to renew, insured the life of the younger *cestui que vie* in the names of himself and the executors, and paid the premiums and died leaving the executors him surviving,—Held, that the insurance monies were subject to a resulting trust in favour of the devisees under the will, but that the estate of the tenant for life was entitled to the bonuses, but not to be recouped the amount of the premium. *Browne v. Browne*, 2 Giff. 304.

The legal tenant for life is entitled to the custody of the title-deeds, and they will not be ordered to be deposited in court merely because the tenant for life is heir-at-law and claims the immediate reversion against the residuary devisee. *Garner v. Hannyngton*, 22 Beav. 627.

The Master of the Rolls has no jurisdiction under the 6 Ann. c. 18. *Meyrick v. Lawes*, 23 Beav. 449.

Tenant for life of a residue, held upon the terms of the will, entitled to enjoy long annuities *in specie*. *Skirving v. Williams*, 24 Beav. 275.

By partnership articles the testator's capital was to remain in the concern for eighteen months after his death. The tenant for life of the residue was held, upon the words of the will, entitled to the profits made during that period. *Ibid*.

A testator gave 16,000*l.* in legacies payable within six months, and the residue to his widow for life, with remainder over. He died possessed of a large sum in the consols. The widow, who was executrix, received the first half-yearly dividends on the stock, and then sold sufficient to pay the legacies:—Held, that she was not entitled as tenant for life to the dividends on the stock producing the 16,000*l.*, but that it formed *corpus*. *Holgate v. Jennings*, 24 Beav. 623.

A testator gave the residue of his estate and effects in trust to pay "the annual proceeds to his wife" for life, and after her death to divide "his said residuary estate and effects" between his nephews and nieces; and he directed that his nephews in the division should take such parts of the joint property as he held with them. Part of the joint property was leaseholds:—Held, that the tenant for life was entitled to enjoy the whole perishable property *in specie*. *Ibid*.

Where a tenant for life is entitled to enjoy *in specie*, the mode is that investments may remain, but debts, as turnpike bonds, must be realized. *Ibid*.

When the title of a remainderman is clear, the Court will, at his instance, compel the tenant for life to produce the title-deeds; but if his title be not clear, the Court will not incidentally decide in favour of the remainderman's title to the estate in a suit merely for the production of the title-deeds. *Pennell v. the Earl of Dysart*, 27 Beav. 542.

A testator authorized his executors to enter into a partnership with his brother upon such terms as they should think fit, and leave his capital therein. The

executors did so, and the articles of partnership stipulated that interest at 5l. per cent. should be paid on the testator's capital, and that part of the executor's profits should be left in the concern as "additional capital":—Held, that the tenant for life was entitled to the interest, but that the share of the profits retained as additional capital must, as between the tenant for life and remainderman, be considered as capital and not income. *Stand v. Gwyer*, 28 Beav. 130.

Trustees without authority lent monies at interest at 5l. per cent.:—Held, that the tenant for life was entitled to the whole interest, and that the remainderman had no right to insist that the excess of the interest beyond the dividend which would have been produced if the money had been invested in consols formed capital. *Ibid*.

Leaseholds bequeathed to one for life, with remainder over, were taken by a railway company, and the purchase-money was invested in consols. The tenant for life only received the dividends:—Held, on her death (her representatives assenting to take it), that her estate was entitled out of the consols to the difference between the dividends received and the aggregate amount of the rental which would have accrued during her life if the premises had not been taken. *Jeffreys v. Conner*, 28 Beav. 328.

A testator bequeathed to his widow "the interest, dividends or income of all monies or stock," and "of all the property whatsoever yielding income at his decease" for her life, the principal to remain untouched, and at her death to be divided amongst his children:—Held, that the widow was entitled to enjoy the residue *in specie*. *Boys v. Boys*, 28 Beav. 436.

TENANTS IN COMMON.

The secret removal of entire chattels by one tenant in common, without the consent or knowledge of the other, and for the purpose of selling them and applying the proceeds to his own use, does not amount to a conversion, nor is it an unlawful act for which the co-tenant can maintain an action at law, even although the removal has created a lien on the chattels by a third party. *Jones v. Brown*, 25 Law J. Rep. (N.S.) Exch. 345.

The plaintiff and defendant were owners of adjoining premises. The defendant erected a building against the wall which divided their premises, and carried up a chimney upon the wall. On the trial of an action for this, as an obstruction to the plaintiff's wall, the Judge told the jury to find for the defendant if they thought the plaintiff and defendant were tenants in common of the wall. The jury found for the defendant on this ground:—Held, a misdirection, as there was evidence of ouster, which, if found by the jury, would have entitled the plaintiff to a verdict against the defendant, though his co-tenant. *Siedman v. Smith*, 26 Law J. Rep. (N.S.) Q.B. 314; 8 E. & B. 1.

TENDER.

[Of part of an entire sum and set-off to residue, see SET-OFF.]

To a declaration containing the common indebitatus counts the defendants pleaded, *inter alia*, as to 10l. parcel, tender before suit. Replication, that the said sum of 10l. brought into court was not sufficient to satisfy the claim of the plaintiff, in respect of the matter to which the said plea was pleaded:—Held, on demurrer to the replication, that the plea was good, and the replication bad. *Smith v. Manners*, 28 Law J. Rep. (N.S.) C.P. 220; 5 Com. B. Rep. N.S. 632.

THELLUSSON ACT.

[*Tench v. Cheese*, 7 Law J. Dig. 691; 6 De Gex, M. & G. 453.]

A trust to accumulate the income of real and personal estate to belong to the person first entitled in expectancy, gives to such person the immediate income after the trust for accumulation is determined by the 39 & 40 Geo. 3. c. 98, though his interest in the real and personal estate has not vested. *Westcar v. Westcar*, 25 Law J. Rep. (N.S.) Chanc. 866; 21 Beav. 328.

A testator bequeathed personal estate to trustees for the eldest son of H W who should be living at H W's decease, or who should then have attained twenty-one, with a similar gift over to other parties. The testator then directed the income of the trust-moneys and of all additions to be accumulated as long as could be lawfully done, to be held, with all resulting income, upon the trusts declared of the principal and income of the same, and to "belong to the person for the time being entitled in immediate expectancy to the principal." The testator also devised real estate to his trustees to accumulate the rents and add them to his personal estate, to be held on the trusts declared of his residuary personal estate, and when any person should become entitled to a vested interest in the residuary personal estate, then upon trust to convey the real estate to him and his heirs. The income of the personal estate and the rents of the real estate were accumulated for twenty-one years after the decease of the testator, at which time the son of H W was under age; but upon a bill filed by him,—Held, as he was the person for the time being entitled in immediate expectancy to the real and personal estates, that he was also entitled to the income of the personal estate and the rents of the real estate, as they accrued, from the end of the twenty-one years from the testator's death. *Ibid*.

A testator gave the income of all his property to his mother for life, and after her death he gave an annuity of 100l. to each of his two sisters, the longer liver to have 200l. After the decease of his two sisters, he gave two legacies of 500l. each. The testator then left the whole of his property, real and personal, to trustees, to be placed out on such securities as they should think most advisable, for the benefit of his heirs; and after the decease of his mother and two sisters, the amount of the same to be invested in landed property in Scotland, which was to be strictly entailed on his nephew and his heirs lawfully begotten:—Held, that the gift for the benefit of the heirs of the testator was a gift of the *corpus* of the property, as it existed at his death, for the benefit of all those who were entitled to any of

his property real or personal; that the directions in the will rendered accumulations of income necessary, which could not be done for more than twenty-one years after the death of the testator, by reason of the Thellusson Act; and that the direction to invest accumulations on land in Scotland did not prevent the operation of the Thellusson Act. *Macpherson v. Stewart*, 28 Law J. Rep. (N.S.) Chanc. 177.

A testator devised real estates in trust for his son G during the joint lives of himself and T, and after the decease of either of them upon trust to invest and accumulate the rents, &c., until 3,000*l.* sterling should have been invested, and subject thereto upon trust for G for life, with remainder to his first and other sons in tail, with successive remainders over; and he directed that the stock to be purchased and the accumulations thereof should be in trust for the children of G, and for default of such issue upon such trusts as G should by will appoint, and in default of appointment, for his next-of-kin. G and T survived the testator seventeen years, when G died without issue, having by will appointed the 3,000*l.* to F D, a stranger, and the trustees invested and accumulated the rents for a period of ten years from that time, when 3,000*l.* had been invested:—Held, first, that the direction to accumulate was void, except for the period of twenty-one years from the death of the testator, the 3,000*l.* not being in the event which happened, viz., the death of G without issue, a portion for his children, nor under the power of appointment a portion for G himself; secondly, that F D was entitled to so much of the stock as was purchased with the accumulations that took place within the twenty-one years from the death of the testator, and to the interest thereon; and, thirdly, that, subject thereto, the income directed to be accumulated, with the accumulations thereon, belonged to the persons from time to time entitled to the rents and profits under the limitations in the testator's will. *In re Oulow's Trusts*, 28 Law J. Rep. (N.S.) Chanc. 696.

A testator gave four shares in a newspaper to his wife, and also two leasehold houses, with the furniture, &c., and said, "my advice is to sell the one I reside in," and take with her into the adjoining house such furniture as she requires, and sell the remainder. She was to receive the rent of the house, if let, and the interest of the purchase-money, if sold. Should the shares be sold, the money was to be invested, and the interest paid to her for life. Should she not sell the shares, whatever sum might annually accrue from them above 200*l.* was to be reserved as a fund to protect the shares. At her decease, the whole of the property arising from the shares, or their sale, as also from both houses, or their sale, he gave to other persons. The testator appointed trustees to carry into effect his will. He died on the 9th of September 1828. His widow survived him, and was still living. Twenty-one years from the testator's death expired on the 9th of September 1849. The surviving trustee had in his name a large sum arising from the investment of the surplus annual income of the shares. Upon a bill filed by him to determine the rights of the parties,—Held, by the Master of the Rolls, that the wife had the power to sell the shares; that the proceeds must be invested; that the accumulations, though exceeding twenty-one years from the tes-

tator's death, were within the exception in section 2. of the 39 & 40 Geo. 3. c. 98; that they formed a part of the testator's estate; that they must cease in the event of the shares being sold; and that the widow was entitled to the dividends for life; and this decision was affirmed upon appeal. *Varlo v. Faden*, 29 Law J. Rep. (N.S.) Chanc. 230; 1 De Gex, F. & J. 211; 27 Beav. 255.

A testator gave a sum of stock producing 180*l.* per annum, in trust to pay life annuities of 20*l.* each to seven persons, and at the decease of any to accumulate his annuity; and after the death of the last annuitant, to divide the stock and accumulations amongst the surviving children of the annuitants:—Held, that this was not within the exceptions of the Thellusson Act of "portions" for "children" of persons taking an interest under the will, and that the trust for accumulation beyond twenty-one years after the testator's death was void. *Drevett v. Pollard*, 27 Beav. 196.

TITHES.

[An Act to amend and further extend the Acts for the Commutation of Tithes in England and Wales, 23 & 24 Vict. c. 93.]

Modus.

An agreement was entered into for a lease of certain premises in the city of London to A B, for a term of years, in consideration of a yearly reserved rent of 102*l.* 10*s.*, and of a covenant to expend 2,000*l.* in building a house upon the premises. The house was built in pursuance of the covenant, and the lease granted at the rent agreed. The improved annual value, after the erection of the house, was 250*l.* In a suit by the rector for tithes against the lessee and occupier, under the 37 Hen. 8. c. 12,—Held, upon appeal, affirming the decree of the Court below, that tithes, at the rate of 2*s.* 9*d.* in the pound, were to be computed, not merely on the rent reserved by the lease, but on the full annual value of the premises to let, as improved by the expenditure of 2,000*l.* *Vivian v. Cochrane*, 25 Law J. Rep. (N.S.) Chanc. 553.

Bill by the rector of the parish of Whitechapel against certain householders claiming payment in respect of their houses either as tithes or in lieu of tithes, or as rate-tithes. The plaintiff did not by his bill specifically state whether he claimed in respect of a *modus* proper or of a special custom, affecting all houses in the parish, or in respect of prescriptive rights affecting the particular houses, but at the bar contended that there was a custom. With reference to the claim on the ground of *modus* proper, the evidence shewed that the plaintiff claimed a distinct annual sum as payable by the occupier of each house in the parish; and he claimed also an additional annual payment in respect of every additional building which might be erected on the site of any building already liable. With reference to the ground of prescription, the evidence shewed that, as to three of the defendants, their houses had been erected within memory; as to the fourth the date of the erection of his house was not known, and a payment for 120 years was proved; but it appeared that the amount paid had varied: down to 1811

it was 8s. per year, and it was then increased to 14s. With reference to the ground of custom affecting all the houses in the parish whenever built, the custom alleged was that, as to new houses, the annual amount payable was such as should be agreed upon, and if no agreement could be come to, then to be ascertained by reference, and the amounts paid for other buildings of a like nature. There was no personal evidence of the custom, and the account-books, though they shewed payments, did not shew on what certain principle the custom was founded:—Held, that the claim could not be supported as a prescriptive right; and that, as grounded on a custom, first, the custom, if well alleged, was too uncertain; secondly, that it was not alleged with sufficient distinctness, and the bill was dismissed. *Champneys v. Buchan*, 4 Drew. 104.

Commutation.

[See LANDLORD AND TENANT (H).]

By a local statute, by which the tithes in certain townships were commuted for a fixed corn rent, the Court of Quarter Sessions were required, once in every ten years, at the requisition of the landowners in any township, "to appoint a fit and proper person, not interested in the tithes or dues," to make a new valuation of all the tenements in the township, and to assess afresh the proportion of the corn rent with which each tenement should be chargeable:—Held, that the validity of an assessment, made by a person so appointed by the Quarter Sessions, was not affected by the fact that he was "interested." *Semble*—that "interested in the tithes" means interested as tithe-owner, and not as owner of land subject to the tithes. *The Lancashire and Carlisle Rail. Co. v. Heaton*, 27 Law J. Rep. (N.S.) Q.B. 195; 8 E. & B. 952.

By a private Inclosure Act (5 Geo. 4. c. xiv.) all tithes in respect of old inclosed lands were extinguished, and in lieu thereof yearly rents were charged, which were to be paid to the rector for the time being at the rectory-house. The rector, in addition to all present powers for the recovering of tithes, was to have the same powers for recovering the yearly rents, when in arrear, as by common law or statute are given to landlords for the recovering of rack-rent when in arrear. To prevent difficulties to the rector, in case of division of the lands so charged, it was provided that a Commissioner should make a schedule of the several lands, and apportion the rent to be charged on each part, and upon any division (except by demise at rack-rent) the lands so divided were thenceforth to be exclusively liable to the payment of so much of the yearly rent as should be specified in the schedule, and such apportioned part might be recovered from the lands charged therewith, or from the owners thereof, in the same manner as the whole of the yearly rents were thereby made recoverable:—Held, *per totam Curiam*, first, that this act did not empower the rector to maintain an action against the owners of inclosed lands in his parish, to recover the amount of the rentcharge thereby created. Secondly, that a distress by the rector for a joint sum, being the amount of rentcharge imposed upon lands acquired before the act, plus the amount imposed upon other lands acquired since the act, was illegal. Thirdly (by *Williams*,

J., Crowder, J. and Willes, J., dissentiente Cockburn, C.J.), that, in the case of lands occupied by different occupiers, but belonging to the same owner, the rentcharge due in respect of all might be levied upon the occupier of any one. *Bedford v. the Warden and Society of Sutton Coldfield*; and *Silvester v. Bedford*, 27 Law J. Rep. (N.S.) C.P. 105; 3 Com. B. Rep. N.S. 449.

TOWNS IMPROVEMENT CLAUSES ACT.

Section 87. of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), which requires the Commissioners under the special act to cause "all the dust, ashes and rubbish to be carried away from the houses and tenements of the inhabitants of the town or district within the limits of the special act," does not extend to dust or ashes the exclusive produce of manufactories. *Lyndon v. Standbridge*, 26 Law J. Rep. (N.S.) Exch. 386; 2 Hurl. & N. 45.

The word "theretofore," in section 53. of 10 & 11 Vict. c. 34, is to be construed in its ordinary grammatical sense, and refers to streets which have at any time been well and sufficiently paved and flagged, or otherwise made good to the satisfaction of the Commissioners, and not to the state of such streets at the time of the passing of the special act, incorporated with the general act. Therefore, where a street, which was a public highway, had once been put in good repair, but which, at the time of the passing of the special act, was out of repair,—Held, that the Commissioners had no power, under section 53. of the general act, to do the necessary repairs, and charge the expenses on the adjoining occupiers. *The Queen v. the Great Western Rail. Co.*, 28 Law J. Rep. (N.S.) Q.B. 247.

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TRADE AND COMMERCE.

Rules and regulations as to trade and commerce may be framed under 19 & 20 Vict. c. 97. s. 15. for the purposes of the act.

TRESPASS.

[See TENANTS IN COMMON—WAY.]

A possessory right, sufficient to sustain trespass, may be resorted to, even after it has appeared that the plaintiff has in fact no legal title, and when the

locus in quo is the soil of a street, and the only actual possession he sets up is by his recent commencement of a building upon the *locus in quo*, the pulling down of the incomplete walls of which was the trespass complained of, and which were pulled down on the suggestion that they constituted a nuisance to a highway. Thus, where the plaintiffs in trespass, the owners of a street of houses, failed to shew that the deed under which they claimed conveyed the soil of the street, and the trespass complained of was in pulling down the wall of a house they were building across one end of it, which had been commenced a short time before, and the defendants, Highway Commissioners, pleaded not possessed, and justified in abatement of a nuisance on a highway, but did not justify under the owner of the soil; it was held, that the plaintiffs had a possessory right sufficient to sustain the action, and were entitled to resort to it upon the issue on not possessed; and on such evidence, unrebutted, and the *locus in quo* not being proved to be part of the highway, the plaintiffs ultimately recovered. *Every v. Smith*, 26 Law J. Rep. (N.S.) Exch. 344.

The receiver of an estate, in which the plaintiff had an equitable interest, under a settlement vesting it in trustees, let the defendant into possession of the premises under an agreement with himself, in writing, in which he described himself as agreeing, "on behalf of the estate," to let for a term of years. The plaintiff declining to sanction any other than a yearly letting, a correspondence ensued between him and the defendant, in which the latter intimated that, as he could not get a lease, he should leave as soon as he could, and he did leave before he had been six months in possession:—Held, that he was not liable to the plaintiff, either in trespass or use and occupation; and, *semble*, that he was not liable at all. *Sloper v. Saunders*, 29 Law J. Rep. (N.S.) Exch. 275.

TROVER.

[See CONTRACT—INSOLVENT—TENANTS IN COMMON.]

- (A) WHEN MAINTAINABLE.
- (B) CONVERSION.
- (C) PRACTICE.

(A) WHEN MAINTAINABLE.

Mere possession of goods is sufficient to maintain an action of trover against a wrong-doer, and the latter cannot set up the *jus tertii*. An absolute sale of ten railway waggons by C to the plaintiff was made in March 1854, but C continued in possession of the waggons, and used them as his own until the end of the year. On the 28th of December 1854 C committed an act of bankruptcy, and on the 5th of January 1856, but before the issuing of the fiat in bankruptcy, he executed a *bond fide* assignment of the waggons to the defendants, they having no notice of the act of bankruptcy. Early in January 1856 the plaintiff obtained possession of the waggons, and used them as his own until March following, when they were taken possession of and detained by the defendants under the assignment by C to them:

—Held, in an action of trover, in which there was a plea denying that the waggons were the goods of the plaintiff, that the defendants could not set up the right of the assignees in bankruptcy to the waggons; and that, as against the defendants, who were wrong-doers, the possession of the plaintiff was sufficient to support the action. *Jeffries v. the Great Western Rail. Co.*, 25 Law J. Rep. (N.S.) Q.B. 107; 5 E. & B. 802.

In March 1854, J agreed with the plaintiff to build him a screw steamer, according to the specifications by H, for 16,000*l.*, payable by instalments, as follows:—Four sums of 1,000*l.* each on days named, in March, April, May and June; 3,000*l.* on the 10th of August 1854, provided the vessel is plated and decks laid; 3,000*l.* on the 10th of October, provided the vessel is ready for trial; 3,000*l.* on the 10th of January 1855, provided the vessel is according to contract and properly completed; and 3,000*l.* on the 10th of March 1855, or by bill of exchange dated the 10th of January. The building commenced in March and continued till December 1854, when J became bankrupt. At that time the ship was on the slip in frame, not decked, and about two-thirds plated. The instalments contracted for were paid to J by the plaintiff in advance. The building of the ship was carried on under the superintendence of H, on behalf of the plaintiff, who examined and rejected the materials when necessary, and caused others to be substituted. Soon after the building began the plaintiff named the ship the *Britannia*, and she was thenceforth known by that name by J and his workmen. In October the plaintiff's name was punched on the keel by J's assent, for the purpose of securing the ship to the plaintiff. In November J was pressed to assign the *Britannia* and her engines and fittings to the plaintiff; but he declined, on the ground that he would thus be signing himself and his creditors out of all he possessed, though during the discussion he admitted that she was the property of the plaintiff. The steam-engines were designed on a peculiar plan, and the engine-room was adapted to them, and the engine-work was carried on by J at the same time as the vessel, the parts of the engine being made and marked so as to fit together, and no other engines were made by J during the same period. Iron plates and angle-irons were made for the *Britannia*, and pre-arranged for different parts of her, and marked accordingly, but not rivetted to her. A large quantity of plankings prepared and intended for the vessel, but not fastened to her, were on J's wharf at the date of the bankruptcy:—Held, that the property in the ship passed to the plaintiff as she advanced in her progress towards completion; that such of the materials on the wharf as had been formed into shape for the ship and had been fitted into the ship, and approved as suitable for the ship, passed with the ship, though detached after having been fitted, and lying detached at the time of the bankruptcy; but that such of the materials as had not been so fitted in and approved as parts of the ship did not vest in the plaintiff, although they had been worked up into shape for the use of the vessel and were intended to be fitted into and to form part of her. *Wood v. Bell* (in error), 25 Law J. Rep. (N.S.) Q.B. 321; 6 E. & B. 355; see a.c. 25 Law J. Rep. (N.S.) Q.B. 148.

In 1852 L & Co. agreed to make advances to C, who contemplated making shipments to Calcutta, to be repaid by remittances, to be made either in bills of exchange or produce. C accordingly made shipments to Calcutta in pursuance of this agreement, and in 1853 made a shipment by the *Scandia*, such shipments being consigned to M & Co., C's agents. When the *Scandia* sailed, L & Co. had advanced to C £5,000, by accepting bills, all of which were paid by L & Co.; but they made no further advance on that shipment, and shortly afterwards gave notice to C that they did not intend to make any further advances. C thereupon wrote to M & Co., desiring them to draw upon him, C, for 1,000*l.* every mail in favour of L & Co., and to remit to him the proceeds of sales to meet those drafts. Before M & Co. received this letter they had written to L & Co. that they should hold the proceeds per *Scandia* subject to L & Co., and inclosing a draft on C, in their favour, for 1,200*l.* They also wrote to C in November 1853, referring to L & Co.'s request to have their account closed, and in December 1853, they wrote to C, inclosing a letter unsealed to L & Co., containing a draft for 2,000*l.*, drawn by M & Co. on C, in favour of L & Co. This draft was accepted and paid by C. Subsequently, M & Co., in the same manner, inclosed to C a draft for 1,000*l.* and 1,500*l.*, drawn by them on C in favour of L & Co., against the shipment per *Scandia*. C received these drafts, but did not accept or forward them to L & Co., nor were L & Co. aware of their arrival. At that time C was so circumstanced that he had no anticipation of being able to meet these bills. L & Co. also wrote to M & Co., claiming to have the whole proceeds of the shipment per *Scandia* remitted to them till their claims were covered; but no part of such proceeds had been sent to them. C afterwards refused to give up the drafts to L & Co., who thereupon sued him for their conversion:—Held, that the bills having been sent to C under the new arrangement between him and M & Co., made in September 1853, no property in them passed to L & Co., who were not parties to that arrangement, and who, under the original arrangement of 1852, had a right to the proceeds of the shipment per *Scandia* to cover their advances. *De Lizardi v. Pennell*, 25 Law J. Rep. (N.S.) Q.B. 387; 6 E. & B. 742.

The plaintiff, by bought and sold notes, contracted to sell to the defendant oil at a certain price, "to be free delivered and paid for in fourteen days by cash, less 2*l.* 10*s.* per cent. discount." Having at the time oil at a wharf, he gave an order to the wharfinger to transfer some of that to the defendant. The wharfinger transferred it in his books to the defendant's name, and signed a notice of the transfer directed to the defendant, which the plaintiff's clerk on the same day took to the defendant and demanded a cheque in payment. The defendant refused to give the cheque, but retained the notice and got possession of the oil against the will of the plaintiff, who, as the jury found, never intended to part with the notice or the oil, except on condition that a cheque was given:—Held, that as the sale was of no specific oil, and as the defendant refused to comply with the condition, no property passed to him by the transfer in the wharfinger's books, and that the plaintiff could maintain trover. *Semble*—that by the contract the delivery and payment were to be concurrent acts

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within the fourteen days. *Quære*—whether parol evidence was admissible to explain the bought and sold notes. *Godts v. Rose*, 25 Law J. Rep. (N.S.) C.P. 61; 17 Com. B. Rep. 229.

By an agreement in writing, A agreed to build a ship for B within a certain period, B paying instalments of the price from time to time; and it was provided that if A should fail to complete the ship as stipulated, it should be lawful for B to enter upon and take possession of the ship (which from the payment of the first instalment, was to be the property of B), and to cause the works to be completed by any persons he should employ, "using such of the materials of A as shall be applicable to the purpose," &c. A failed to complete, and B took possession of the ship; A committed an act of bankruptcy, and, after that, B proceeded to finish the ship, using applicable materials which were in the yard at the time of the act of bankruptcy, but were not then incorporated with the ship, nor had been specifically appropriated by A for the ship. Some of the materials had been selected by B before the bankruptcy, and some were piled within the ship, and the rest in a shed adjoining, but none had been actually used before the bankruptcy:—Held, that B was not entitled to the materials under the agreement, as they had never been used; and therefore that the property in them passed to the assignees of A. *Baker v. Gray*, 25 Law J. Rep. (N.S.) C.P. 161; 17 Com. B. Rep. 462.

Where a vendee, who has made a false and fraudulent misrepresentation, obtains by means of it possession of a chattel from a vendor, who intended to transfer both the property and the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and therefore, if before the disaffirmance the fraudulent vendee has assigned or transferred the chattel to an innocent transferee, the title of such transferee is good against the vendor. A, fraudulently representing himself to be the agent of V, purchased, through the medium of a broker, from E, who held the delivery order, a quantity of tartaric acid, the property of the plaintiff, and, for the alleged purpose of inspecting it, obtained the delivery order for the acid from the broker. A then went to the plaintiff, and stating that he had purchased on his own account, instead of for V, obtained a transfer order into his own name of the acid then lying on the Custom-House Quay, and on the same day borrowed money on its security from the defendant, a drug-broker, who advanced the money without notice of the fraud:—Held, that the plaintiffs could not maintain trover against the defendant for the acid. *Kingsford v. Merry*, 25 Law J. Rep. (N.S.) Exch. 166; 11 Exch. Rep. 577.

Where the owner of goods suffers another to have possession of them, or of the documents which are the evidence of property therein, on a sale to him, obtained by means of fraudulent representation, and avoidable at the option of the owner, a sale or pledge by such party, before the owner has exercised his option, and without notice to the subsequent purchaser, is binding; but this is not so when a party has merely obtained the goods by means of false pretences, without any contract of sale to himself; as when he falsely and fraudulently represents that another person has authorized him to purchase the goods. And in such case, the original owner can

recover the goods from a party to whom they have been sold or pledged by the person who fraudulently obtained them, before any notice of the fraud, or any disaffirmance of the transaction by the real owner. *Higgins v. Burton*, 26 Law J. Rep. (N.S.) Exch. 342.

The plaintiff had contracted with a farmer for all his next crop of oil of peppermint, at a certain price; and the farmer had made a quantity of oil of peppermint, and put it into plaintiff's bottles and weighed it:—Held, that as against a second vendee, to whom the farmer had subsequently sold it, the property in the oil had passed to the plaintiff when bottled and weighed. *Langton v. Higgins*, 28 Law J. Rep. (N.S.) Exch. 252; 4 Hurl. & N. 402.

The plaintiff agreed to enter into partnership with W, who owed money to the defendant. The plaintiff, with the sanction and authority of W, wrote to the defendant, inclosing the halves of two bank notes, and asking for a statement of the full amount due from W. The defendant wrote, acknowledging the receipt of the half-notes, and stating that, on receipt of the second halves, he would send a stamped acknowledgment. The agreement for the partnership between the plaintiff and W went off, and the plaintiff required the defendant to return the half-notes. On his refusal to do so, he brought an action for their recovery:—Held, that he was entitled to recover. *Smith v. Mundy*, 29 Law J. Rep. (N.S.) Q.B. 172.

(B) CONVERSION.

[See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, (E) (a).]

A servant or agent who has received goods from his master or principal, may, on a demand made by the true owner of the goods, give a qualified refusal to deliver them up, without being liable to an action of trover; but where a bailee sets up or relies upon the title of his bailor, in answer to such demand, his refusal is evidence of a conversion by him. *Lee v. Robinson*, 25 Law J. Rep. (N.S.) C.P. 249; *nom. Lee v. Baynes*, 18 Com. B. Rep. 599.

A lost horse and found it at R's stable, and R refused to deliver it up, and said it belonged to B, and then both B and R refused; afterwards B said he bought it at X's, (not being market overt), which turned out to be true. A then offered R and B, separately, an indemnity, if they would deliver the horse up; but R refused to let it go, and B said he left the matter entirely to R:—Held, in an action of trover against B and R, that there was sufficient evidence of conversion by R. *Ibid.*

A demand and refusal may be sufficient evidence of a conversion, if the refusal is under a claim of right, even although it is retracted or not persisted in; if, in point of fact, the defendant, having the power to do so, does not in a reasonable time give up, or enable the plaintiff to obtain and take away the goods. *Burroughes v. Bayne*, 29 Law J. Rep. (N.S.) Exch. 185; 5 Hurl. & N. 296.

The plaintiffs sent to one F a billiard-table, on a written hiring for a certain time, with an option of purchase, on condition of due payment of the hire up to that time: the amount paid for hire to be, in that case, deducted from the price. The table was retained on hire until after that time had elapsed, and then F indorsed on the written hiring an acknow-

ledgment that so much remained due "for the purchase-money," which was to be paid at so much per month. Before this, however, F had assigned the table along with his own goods to the defendant by a bill of sale duly registered, and for an advance of money *bond fide* made by the defendant, for non-payment of which, according to the terms of the bill of sale, he ultimately took possession. The plaintiffs told him the table was theirs, and he desired to ascertain whose it was. The plaintiffs then served the defendant with a written notice to deliver up the table; but on looking at the indorsement on the back of the contract, he observed that it appeared to have been a sale, and desired until the next day to consider the matter. The next day the plaintiffs sent a cart for the table, and in the mean time the defendant, as he said, had desired it to be given up; but being absent when the plaintiffs' men came, and the room being locked (it did not appear by whom or by whose order), the table was not obtained; and though several days elapsed before action, it was not delivered to the plaintiffs, and in the end it was distrained for rent:—Held, that there was evidence of a conversion, and (*dubitante Bramwell, B.*) that the verdict for the plaintiffs must be supported. *Ibid.*

(C) PRACTICE.

In actions for the conversion of goods, the verdict may, on the general issue, and a plea of not possessed, be entered distributively; and when a verdict has been taken for the plaintiff, subject to a point reserved, on which the defendant has leave to move to enter the verdict or to reduce the amount of damages, and the Court, on the hearing of the rule, determine in favour of the plaintiff, except as to a portion of the chattels claimed, distinguishable, whether as fixtures or otherwise, this is equivalent to a direction that the verdict should be entered for the defendant for such portion, and not merely that the damages shall be reduced by the value of such goods; and the costs will follow such entry of the verdict, as on a distributive issue. *Freahney v. Wells*, 26 Law J. Rep. (N.S.) Exch. 228.

If a question arises as to the meaning and intention of the Court, the application should be made to the Court to explain its direction; but if the question is as to the actual facts whether the goods are distinguishable or not, or whether there was any separate parcel of goods, the reference should be to the Judge who tried the cause, as the question can only be settled by a reference to the facts stated in his notes, and it will be for him to arrange the entry of the verdict in conformity with the direction of the Court. *Ibid.*

TRUCK ACT.

Butty colliers engaged to get coal and ironstone from a mine at so much per yard or ton, who are bound to work personally in the mine, and who do so work, are artificers within the meaning of the Truck Act, 1 & 2 Will. 4. c. 37, although they employ other workmen under them. *Per Erle, J.*—persons who engage to work by the piece may be artificers within the act, though they do not contract to work personally, if their contract and position in life are consistent with the supposition of their doing

the work in person, and they in fact assist in performing it themselves. *Bowers v. Lovelock*, 25 Law J. Rep. (N.S.) Q.B. 371; 6 E. & B. 584.

An artificer, to whom wages were due, was paid by his master, by means of a note for the payment in goods, the master knowing that the payment would be made in goods, and not in the current coin of the realm. The agent of the master delivered goods in obedience to the note, and the master was convicted before Justices of an offence under the Truck Act, although the place where the goods were delivered was not within the jurisdiction of the Justices:—Held, that the conviction was right, as under the circumstances the offence was complete when the note was given. *Athermuth v. Drury*, 28 Law J. Rep. (N.S.) M.C. 5; *nom. Athermuth v. Drury*, 1 E. & E. 46.

The plaintiff, who was a labouring man, entered into a written contract with the defendant, a contractor for making a line of railway, by which he engaged to make as many bricks as the defendant required him to make; to take the clay in its present state, and to find all labour required in turning the clay and mixing it with ashes, &c.; to mould, set, and burn the bricks, and to stack them when burnt, finding all labour for drying the bricks; the defendant to find all materials, but all labour of every description to be found by the plaintiff, for the sum of 10s. 6d. per thousand for the bricks when finished; the plaintiff to proceed with the work as fast as possible, and as directed by the defendant, and to his satisfaction. The plaintiff, in fact, did part of the work himself under this contract:—Held, by *Lord Campbell, C.J., Coleridge, J. and Wightman, J.*, on the authority of *Riley v. Warden and Sharman v. Sanders*, that the case did not fall within the Truck Act (1 & 2 Will. 4. c. 37), as the plaintiff was not bound by the terms of the contract to do the work personally. Per *Erie, J.*, that it is not necessary to bring a case within the act that there should be in the contract of hiring a stipulation for personal labour; and that a contract to do work by the piece is within the act, although the party contracting may have the option of doing the work by himself or by others, but that the performance of such a contract is not within the act, unless the party has actually himself done the work in respect of which the wages are claimed. That the present contract was within the act in respect both of its subject-matter and the condition of the plaintiff, and that it being consistent with it that the plaintiff should work personally, and he having actually done substantial work, the act applied to render payment of his wages otherwise than in current coin illegal. *Ingram v. Barnes*, 26 Law J. Rep. (N.S.) Q.B. 82; 7 E. & B. 115: affirmed by the Exchequer Chamber, 26 Law J. Rep. (N.S.) Q.B. 319; 7 E. & B. 132.

Assuming he had been bound to give his personal labour,—*Quære*, whether the case would have been within the act, as the contract contemplated his employing others under him, and the payment was by a gross sum, which could not strictly be termed wages; and, *semble*, that the act applies only to cases where the labourer is paid for his labour by wages. *Ibid.* 26 Law J. Rep. (N.S.) Q.B. 319.

TRUST AND TRUSTEE.

[The Punishment of Frauds committed by Trustees, Bankers, and other Persons intrusted with Property, provided for by 20 & 21 Vict. c. 54.]

- (A) TRUST.
 - (a) *Constitution.*
 - (b) *Construction.*
 - (c) *Breach.*
- (B) TRUSTEE.
 - (a) *Appointment.*
 - (b) *Removal and Change.*
 - (c) *Liability and Disability.*
 - (d) *Powers, Rights and Duties.*
 - (e) *Investment by.*
 - (f) *Disclaimer.*
 - (g) *Release of.*
 - (h) *Notice to.*
- (C) TRUSTEES' RELIEF ACTS.
 - (a) *Practice.*
 - (b) *Costs.*
- (D) CESTUI QUE TRUST.
- (E) TRUSTEE AND MORTGAGEE ACTS.
 - (a) *Construction of.*
 - (b) *Case under 22 & 23 Vict. c. 35.*
 - (c) *Practice under.*

(A) TRUST.

(a) *Constitution.*

E B (being largely indebted to M B) effected a policy on his own life, in the name of B B and M B, as trustees for three daughters. No other declaration of trust was ever executed. One of the daughters died in his lifetime. On the death of E B (still indebted largely to M B) the policy money was paid to M B, who gave a receipt in his own and co-trustees' names, and invested it in the purchase of debentures of a bank, which he placed in a separate cover, marked with the names of E B's surviving daughters. Both in the books of the bank and of M B the names of the daughters were mentioned as owners of the debentures. Interest was regularly paid by the bank to M B, and by M B to the ladies, until the bank stopped payment and was ordered to be wound up, and then the debentures remained in his custody. Three years after, M B became bankrupt, a short time before which he handed the debentures to an agent for the ladies:—Held (affirming a decision of one of the Vice Chancellors, who had refused to disturb an order of the Master allowing the ladies' claim against the bank as a debt), that there was a valid trust of the policy money, unaffected by the fact that E B was indebted to M B; that M B was a trustee for the ladies of the policy money, and not a debtor to them for that amount. The Lords Justices refused to impound the money, though the order was made subject to the right of the assignee of M B to proceed at law. *Ex parte Marion and Mary Boyd, in re the Royal Bank of Australia*, 26 Law J. Rep. (N.S.) Chanc. 737; 1 De Gex & J. 223.

In consideration of money lent, real estates were conveyed to the lender, his heirs and assigns, upon trust, in case the principal money and interest should be repaid by a given day, for the borrower, his heirs or assigns; but, in case default should be made, then

upon trust for sale; and the trusts of the purchase-money were declared to be for payment of the principal money, interest and costs, and subject thereto for the borrower, "his executors, administrators or assigns." Default having been made,—Held, that the trust of the surplus being for the borrower, "his executors, administrators or assigns," and not for him, "his heirs or assigns," the deed operated to convert the property as between his real and personal representatives. It was therefore more than "merely a security for money"—more, that is, than a "mortgage" as defined by the 2nd section of the Trustee Act, 1850 (13 & 14 Vict. c. 60); it was a deed of "trust" within the meaning of the 15th section of the act, and the lender having died intestate, and it being impossible to find his heir, the Court had power to make a vesting order under that section. *In re Underwood*, 3 Kay & J. 745.

A V, a merchant in China, directed his correspondents in London to transfer 1,000*l.* from his tea account, and employ it in exchange transactions for the benefit of his children. In subsequent letters he wrote to the same correspondents, "that he had declined giving any opinion as to the reinvestment of the fund, as he considered he had no further control over it as it belonged to his children; that he had appropriated it to them, and his correspondents were to consider it as theirs." The correspondents accordingly opened a separate account, headed "A V, Esq., exchange account on account of children," previously informing him of their intention so to do:—Held, that by the first letter a trust was well created in favour of the children, although the fund was still so far in the control of A V as to be liable to his drawing; and notwithstanding A V, in one of the letters, had desired his correspondents to consider it as "subject to the order of his executors" in the event of his death. *Vandenberg v. Palmer*, 4 Kay & J. 204.

The authorities on this subject examined, and *Gaskell v. Gaskell*, 2 You. & J. 502, explained.

(b) Construction.

A sum of 2,000*l.* stock was transferred to trustees by J L, who, in a sealed letter found after his death, said, "the interest after my decease to be applied to the maintenance of C H and a daughter I have by her." He then requested the trustees to accept the trust, and said, "after my decease I wish the interest to be applied to their maintenance during their joint lives, and at the decease of her mother, if the child survives and lives till she has attained twenty-one, then the principal sum I bequeath to her; but in the event of both their deaths before the child shall have attained twenty-one, then the principal sum to revert to my surviving brothers and sisters or their heirs, to be equally divided amongst them." The child attained twenty-one, and died in the lifetime of her mother:—Held, that the mother and daughter took a joint interest for life in the fund; that the principal was vested in the child, subject to be divested by her dying under twenty-one. *Moor v. Abbott*, 26 Law J. Rep. (n.s.) Chanc. 787.

Trust monies settled on such trusts as the plaintiff should by deed or will appoint, ordered to be paid to the plaintiff. *Watts v. Campbell*, 2 Giff. 112.

Under a will, a trustee held an aggregate fund in trust as to one-third each for A, B and C respectively

for life, with remainder to their respective children. He, without any authority under the will, transferred one-third of the fund to the trustees of the respective settlements of A, B and C. The share of B having been dissipated by her trustees, held, that B's children were entitled to participate in A's third, which was still remaining in her trustees' hands. *Browns v. Butler*, 24 Beav. 159.

Under a trust, during twenty-one years, to accumulate until the same "should amount to the aggregate sum or value of 25,000*l.*," and then invest it in land, the value of part of the property being variable, it was held, that the trust for accumulation ceased on the day the funds, if realized, would produce 25,000*l.* *Huckison v. Leferre*, 26 Beav. 157.

Trustees, who had a power to sell and mortgage, and manage and receive the rents of an estate, were directed to pay a life annuity out of the rents or any other monies held by them upon the trusts:—Held, that "other monies" referred to those *ejusdem generis*, and that the annuity was payable out of income only, and not out of capital. *Clifford v. Arundell*, 27 Beav. 209.

Under a trust by sale or mortgage of real estate to pay, first, personal debts; and, secondly, the mortgages on the estate, with a direction to pay an annuity to A until the mortgages were paid off:—Held, that the annuity was payable until both the personal debts and mortgages had been satisfied. *Ibid.*

A testatrix devised her real and personal estate to trustees, and directed her avowson of F to be sold by them immediately after the decease of H, the incumbent:—Held, that although on H's death the living must be filled before there could be a sale, still that the Court had authority to direct the sale of the next presentation in the lifetime of H for the benefit of the residuary legatees. *Bristow v. Skirrow* (No. 2), 27 Beav. 590.

(c) Breach.

Two trustees of a marriage settlement sold out 1,818*l.* consols, which produced 1,115*l.*, and this sum was lent to the husband upon a mortgage of his life estate in certain property, his bond for the repayment of the money, and an assignment of a policy of assurance upon his life. One trustee died; and the 1,115*l.* having been paid to the survivor, was again lent by him to the husband without sufficient security. The husband and the surviving trustee became insolvent; and upon a bill filed by the children of the marriage, it was held, that the estate of the deceased trustee was liable to make good the original sum lent to the husband. *Lander v. Weston*, 25 Law J. Rep. (n.s.) Chanc. 235; 3 Drew. 389.

A reversionary fund was assigned to trustees upon the trusts of a settlement for a wife, husband, and children. One of the trustees died, and a solicitor was appointed in his place. The fund fell into possession, and was paid to the trustees, who both joined in a receipt. The solicitor-trustee did not invest the money according to the trusts of the settlement, but lent it upon security, which was insufficient, and the fund was lost. The solicitor-trustee was discharged, under the Act for the Relief of Insolvent Debtors, and in his schedule the amount of the trust fund was inserted. *The cestui que trust*

for life from time to time received small interest for the lost money from the solicitor-trustee, both before and after the insolvency. She filed a bill against both the trustees, and the Master of the Rolls made a decree against the solvent trustee to replace the fund:—Held, upon appeal, that the decree was correct, for that the discharge under the insolvency was a complete discharge from the debt, though the co-trustee had liberty to go in under the insolvency and prove against the estate of the solicitor-trustee. The Court *ex mero motu* ordered the solicitor-trustee to shew cause why he should not be struck off the roll. *Thompson v. Finch*, 25 Law J. Rep. (N.S.) Chanc. 681; 22 Beav. 316.

Where a tenant for life gave his consent (as required by the terms of a settlement) to the investment by trustees of certain trust funds upon a particular mortgage, it was held, that he could not afterwards, on the security turning out inadequate, complain that it was an improper investment; but, the loss being chiefly attributable to the subsequent mismanagement and negligence of the trustees, that he might recover against the trustees the loss of interest incurred thereby, and that his original consent to the improper investment gave them no counter claim against the funds in court representing his life interest, in respect of the costs, &c. incurred by them in various suits and proceedings instituted on account of the trust funds. *Lockhart v. Reilly* and *Reilly v. Lockhart*, 25 Law J. Rep. (N.S.) Chanc. 697.

In the above case the consent of the tenant for life was obtained from him by the acting trustee, when he was just of age, in pecuniary difficulties, and without a proper knowledge of the facts; yet, the deed which signified such consent never having been set aside, it was held that the Court was bound to treat it as a binding consent. *Ibid*.

Where there were two trustees, one of whom was a solicitor, and intrusted by the other with the management of the trust estate, to which, by his negligence, loss accrued, as between the two trustees, the solicitor-trustee was held bound to reimburse his co-trustee all the costs, charges and expenses properly incurred by the latter in suits and other proceedings rendered necessary by such negligence of the former. *Ibid*.

In a suit to restore trust property instituted by the representatives of a trustee against his co-trustee, both of whom had, with the concurrence of some of the *cestuis que trust*, committed breaches of trust, such *cestuis que trust* were held to be necessary parties. *Jesse v. Bennett*, 26 Law J. Rep. (N.S.) Chanc. 63; 6 De Gex, M. & G. 609.

A and B were trustees of a settlement, and a breach of trust was committed, B being the guilty party. The trust fund was ultimately restored, and A's costs were directed to be paid out of B's estate:—Held, that these costs were not a specialty debt as against B's estate. *Lockhart v. Reilly* and *Reilly v. Lockhart*, 27 Law J. Rep. (N.S.) Chanc. 54; 1 De Gex & J. 464; 25 Law J. Rep. (N.S.) Chanc. 697.

A paid a sum on account of his costs, after the passing of the 19 & 20 Vict. c. 97, and it was held that the sum was paid in the character of surety, and therefore that, under the 5th section of that act, he was entitled to claim as a specialty creditor on account of it. *Ibid*.

A testator gave funds to trustees, to pay the income to his wife, or otherwise, for the maintenance of his seven children till the youngest should attain twenty-five, if a son, and if a daughter, till that age or marriage, and when the youngest should attain twenty-five, to divide the same equally amongst the children, the share of the daughters to be for their separate use. The trustees four years after the testator's death sold out the trust funds and invested the proceeds in railway shares (which resulted in great loss). The youngest child attained twenty-five. Upon a bill by a married daughter of the testator claiming her original share of the trust funds,—Held, that she, though aware of the sale of the trust funds, either immediately before or shortly after the purchase of the railway shares, had not sanctioned the breach of trust; that she was bound to assume that the discretion vested in the trustees was properly exercised, and, though she did not complain for some years afterwards, that she was entitled to have her share of the stock replaced, allowing for the sums paid for maintenance beyond those which would have arisen from the dividends of the trust stock. *Davies v. Hodgson*, 27 Law J. Rep. (N.S.) Chanc. 449; 25 Beav. 177.

The bill alleged a breach of trust by a deceased tenant for life under a settlement, in the application to the liquidation of a charge on the settled estates of the proceeds of part of such settled estates, while there was in his hands, as personal representative of the settlor, personal estate of such settlor primarily applicable to the liquidation of the charge. The answer of the personal representative of the deceased tenant for life asserted the trust to have been duly and regularly performed by such tenant for life, and as evidence thereof set forth references to the accounts rendered of the settlor's personal estate by his representative, the deceased tenant for life, to the Stamp Office. The plaintiffs did not amend their bill to meet the *prima facie* case thus set up by the defendant:—Held, the alleged breach of trust having taken place (if at all) at least thirty years back, that the plaintiffs were not, under the circumstances, entitled to an account of the settlor's personal estate. *Morris v. Morris*, 28 Law J. Rep. (N.S.) Chanc. 829; 3 De Gex & J. 823.

Mrs. E. Linzee, by her will, gave stock to her three daughters for life, with remainder to their children respectively. W A H was one of the trustees. He ultimately became possessed of the whole fund, and sold out part and applied the same to his own purposes. G E V, by his will, gave 8,000*l.* consols to Mrs. Thorndike for her life, with remainder to her children. W A H was one of the trustees. He ultimately became possessed of this fund, and sold it out and applied the proceeds to his own use. Mrs. Thorndike filed a bill against him (*Thorndike v. Hunt*), and an order was made that he should transfer into court the amount sold out, and he accordingly transferred into court 3,253*l.* consols (which in fact was part of the trust estate of Mrs. Linzee). The dividends were paid for many years to Mrs. Thorndike. W A H became insolvent, and the parties beneficially interested under the will of Mrs. Linzee filed a bill (*Browne v. Butter*), and soon afterwards presented a petition in both suits, praying that the 3,253*l.* which originally belonged to the trust estate of Mrs. Linzee, but

which had been transferred to the name of the Accountant General in the suit of *Thorndike v. Hunt*, might be transferred to the suit of *Broune v. Butter*, and that the dividends which had been paid to Mrs. Thorndike might be repaid; and the Master of the Rolls ordered accordingly, on the ground that the 3,253*l.* was part of Mrs. Linzee's trust estate. The plaintiff in the first suit, Mrs. Thorndike, appealed to the Lords Justices, who held, reversing that decision, that the legal estate in the fund had by transfer become vested in the Accountant General for the purposes of the suit of *Thorndike v. Hunt*; that Mrs. Thorndike was a purchaser for valuable consideration without notice of the fraud, and was entitled to hold the fund against the parties interested under Mrs. Linzee's will. *Thorndike v. Hunt and Broune v. Butter*, 28 Law J. Rep. (n.s.) Chanc. 417; 3 De Gex & J. 568.

Strictly, a bill ought to have been filed, though the merits were so plain that their Lordships felt themselves enabled to decide upon petition. *Ibid.*

W A H, who was a solicitor of the Court, was ordered to shew cause why he should not be struck off the roll, and was struck off. *Ibid.*

A testator devised a public-house to A and B, as trustees, upon trust, as soon as convenient after his death, to sell the same, invest the proceeds, and pay the income to C for life, and divide the capital, after the death of C, as therein mentioned. The testator died in 1834. In 1836 the property was advertised for sale, and, soon after, an offer was made of 900*l.* for it. The trustees having been advised that the property was worth 1,000*l.* did not accept of this offer. Shortly afterwards the property became depreciated in value from the scheme of a railway. A died in 1842. C, the tenant for life, died in 1842. B died in 1856. The property was unsold. In a suit instituted in 1856 for the administration of the testator's estate,—Held, that the property must be sold, and that the estates of A and B should be held liable for the difference between the purchase-money and the rents from 1842, and 900*l.* and interest at 4*l.* per cent. from 1842. *Fry v. Fry*, 28 Law J. Rep. (n.s.) Chanc. 591; 27 Beav. 144.

By a will, dated in 1761, a trust was created in favour of a certain class of the testator's relations, nearly all of whom were paid their proportions. The surviving executor and trustee of the testator had the remainder of the funds standing in his name at his death, and by his will he recognized the existence of the trust and directed that it should devolve upon his nephew. Administration *de bonis non* was granted in 1822 to the surviving executor's estate, and subsequently to another person in 1826, when the remaining trust fund was mixed up with such administrator's personal estate and applied in the purchase of real estate. A bill was filed by a person claiming part of the legacy under the original testator's will, charging a breach of trust by the surviving executor, and that his real and personal estate were liable to make good the amount:—Held, upon demurrer to the bill, that the real estate could not be charged with the legacy; that there was an implied trust created by the will, but the right of the claimants having accrued more than twenty years since, their claim was barred by the Statute of Limitations. *Henderson v. Atkins*, 28 Law J. Rep. (n.s.) Chanc. 913.

A B, by his will, dated in 1836, gave freehold and leasehold estates, and the residue of his personal estate, to his son, C D, and appointed his wife, E B, his sole executrix. The son died intestate, in March 1838, leaving his two sisters, F and G, and his niece, H, his co-heiresses-at-law, and them and his mother his sole next-of-kin. The mother took out letters of administration to her son; and, by her will, appointed her daughter, F, sole executrix and universal legatee, and died in 1841. In December 1858 F took out letters of administration *de bonis non* to her brother C D's estate; and in the same month, H, his niece, and her husband, filed a bill to recover her share of the real and personal estate of C D, and for the administration of the same:—Held, by one of the Vice Chancellors, that the plaintiffs were entitled only to an account of the rents of the real estate for a period of six years before the suit, but that the Statute of Limitations, 3 & 4 Will. 4. c. 27, was no bar to an account of the personal estate, and of the rents of the leasehold estate, received by E B, the mother and administratrix, or by F, her executrix, from the time of the death of the intestate, C D, notwithstanding the 42nd section of the statute; and the same was affirmed by the Lords Justices. *Obee v. Bishop*, 29 Law J. Rep. (n.s.) Chanc. 148; 1 De Gex, F. & J. 137.

Where a breach of trust is committed by a trustee holding property upon an "express trust," his assets in the hands of his personal representatives continue liable to the *cestui que trust*, even after a lapse of six years from his death. *Ibid.*

Personal estate was given to executors in trust to invest 50,000*l.*, part thereof, in the purchase of land, to be conveyed to the use of a nephew, with remainders over, and as to a considerable residue in trust for his nephew as residuary legatee. The executor did not prove, and the residuary legatee became administrator, with the will annexed, and purchased several estates, partly with money of the testator, in his own name, at prices amounting to 49,773*l.* He subsequently improved one of these estates, so that it was worth 60,000*l.*, and by his will gave it to the tenant in tail in remainder of the estates directed to be purchased, on condition that he should accept it in satisfaction for all claims under the original will:—Held, on the evidence, that the estates purchased for 49,773*l.* were purchased in execution of the trust for investment, and that the condition was nugatory. *Mathias v. Mathias*, 3 Sm. & G. 552.

By a decree, the estate of two deceased trustees were declared severally liable to replace a fund. The representatives of one only admitted assets, and the decree directed payment by them and an account of the estate of the other. The whole being paid by the former, Held, that their right to contribution against the estate of the latter constituted a mere simple contract debt, although as against both estates the demand was a specialty debt. *Priestman v. Tindall*, 24 Beav. 244.

The Court will not visit a trustee with the consequences of a breach of trust committed with the sanction or by the desire of the *cestui que trust*, or of one committed without such sanction or desire, if when it comes to the knowledge of the *cestui que trust* he has acquiesced in and obtained the benefit of it for a long period. *Griffiths v. Porter*, 25 Beav. 236.

Two trustees, A and B, joined in the receipt of

trust money. A allowed B to retain the cheque for the money, which against the remonstrances of A he placed in the hands of a solicitor to invest on mortgage, and it was lost:—Held, that both were liable. *Ibid.*

Two trustees had allowed trust money to be received by their solicitors. The *cestui que trust* authorized its investment on mortgage by B alone. The money being in danger and the solicitors pressed, a mortgage was given, but as to which B exercised no judgment, and it turned out insufficient:—Held, that both trustees were liable for the loss. *Ibid.*

Tenant for life received 5l. per cent. on a mortgage improperly taken by trustees, and for which on a loss they were made responsible:—Held, that he was only entitled to 4l. per cent. in taking the account of income, and that the remaining 1l. per cent. must be taken as part of the subsequent income. *Ibid.*

By a marriage settlement a debt due from A was assigned to A and B, upon trust "with all convenient speed" to get in and invest in consols. For two and a half years B took no steps to get in the money, and A then became bankrupt:—Held, that B was responsible for the loss. *Grove v. Price*, 26 Beav. 103.

A husband being held liable at the suit of the children of his wife's first marriage to replace trust funds received by him, claimed a large sum expended in maintaining, &c., the children after the second marriage. The claim was disallowed. *Grove v. Price*, 26 Beav. 105.

(B) TRUSTEE.

(a) Appointment.

Upon a separation between husband and wife a deed was executed, in which a trustee covenanted that in the event of the husband allowing the wife to live separate and have the custody of their children, the trustee would indemnify the husband against the debts, &c. of the wife. Upon the decease of the trustee, —Held, as the deed contained no power to appoint new trustees, that the Court, under the Trustee Acts, had jurisdiction to appoint new trustees of the property. *In re Matthews*, 28 Law J. Rep. (n.s.) Chanc. 295; 26 Beav. 463.

A power for the surviving or continuing trustees to appoint new trustees in the stead of any trustees dying or declining to act, does not authorize declining trustees to appoint new ones in their own stead. *Nicholson v. Wright*, 26 Law J. Rep. (n.s.) Chanc. 312.

The trustees of a will having agreed with C that one of them, in consideration of 75l. to be paid to him by C, should retire from the office of trustee, and C be substituted in his place, this agreement was afterwards carried into effect by a deed, which did not mention any pecuniary consideration, but purported to be made in exercise of a power contained in the will to appoint a new trustee in the place of a retiring trustee:—Held, that this deed was null and void; and that the 75l. paid by C to the trustee professing to retire must be repaid by such trustee, not to C, but for the benefit of the *cestui que trust* of the will. *Sugden v. Crosland*, 25 Law J. Rep. (n.s.) Chanc. 563; 3 Sm. & G. 192.

On a petition for appointing new trustees of a will containing gifts to classes, an affidavit of the solicitor was received as sufficient evidence of the persons constituting the classes, without the production of

baptismal and other certificates. *In re Hobins*, 4 De Gex & J. 436.

Trustees of a congregation, which, by the terms of its trust, was to be in connexion with the established Church of Scotland, adopted the opinions of the Free Church of Scotland, and refused to retire from the trust. They were ordered to pay the costs of the new appointment of trustees. *Attorney General v. Murdock*, 2 Kay & J. 571.

A trustee who had paid money into court under the Trustees' Relief Act (10 & 11 Vict. c. 96), held to have retired from his trust; and a new trustee held to have been duly appointed in his stead, under a power for that purpose to arise in the event of a trustee "refusing or declining to act in the trusts of the settlement." *In re William's Settlement*, 4 Kay & J. 87.

The Master of the Rolls, except in cases of absolute necessity, will not appoint a near relative of the parties interested to be a trustee. *Widing v. Bolder*, 21 Beav. 224.

(b) Removal and Change.

A trustee thirty years after his appointment, when one of his colleagues, the acting trustee, had died, was, upon a bill filed by him, held entitled to be relieved from the trusts of the settlement. Held, also, that he was as trustee entitled to the costs of the suit, as between solicitor and client, and also to his costs, charges and expenses. *Gardiner v. Downes*, 25 Law J. Rep. (n.s.) Chanc. 881; 22 Beav. 395.

The want of confidence in a co-trustee is a ground for asking to be relieved from the administration of trusts. Difficulties in the administration of a trust estate, not contemplated when the trust was accepted, justify a trustee in asking to be relieved from the administration of the trusts. A trustee, if not acting from caprice, will be allowed the costs of a suit seeking to be discharged from the trusts. The costs of evidence arising out of personal transactions between trustees will not be allowed to them, or charged on the trust fund. The personal costs of the *cestui que trust* in respect of this evidence must be borne by themselves; but in the present case, as no one objected, they were allowed out of the trust fund. *Forshaw v. Higginson*, 26 Law J. Rep. (n.s.) Chanc. 170.

Upon petition for the removal of a trustee, under the Bankruptcy Consolidation Act, on the ground of bankruptcy and vexatious conduct, it was held, that the mere fact of bankruptcy did not make it compulsory upon the Court to remove a trustee, and that vexatious conduct could not be made a ground of complaint by petition, but must be raised by bill; that as the bankruptcy took place five years previously, and a certificate of the first class was awarded, and it was not shown that bankruptcy was any real impediment to the trustee continuing to act, the petition must be dismissed with costs. *In re Bridgman*, 28 Law J. Rep. (n.s.) Chanc. 844; 1 Dr. & Sm. 164.

A sum of stock was standing in the name of a person of unsound mind, part of such stock being his own beneficially, and part of it being vested in him as trustee. The Court had made an order appointing new trustees, and vesting in them the right to call for a transfer of the trust stock and to receive the arrears of dividends. It was found that

an order in this form could not be acted on, as to the arrears of dividends, since the bank could not pay arrears on part of a sum. The Court, therefore, varied the order so as to enable the new trustees to receive the past dividends on the whole sum of stock, and to retain for the purposes of the trust that portion which had accrued due in respect of the trust stock. *In re Stewart*, 2 De Gex, F. & J. 1.

(c) *Liability and Disability.*

The incomplete appointment of a new trustee will leave the retiring trustee responsible for any breach of trust committed by the intended new trustee. A retiring trustee is not justified in signing a power of attorney for the transfer of stock to a continuing and new trustee before the appointment has been completed. A trustee not duly appointed who joins in doing acts which enable a breach of trust to be committed will be responsible to the extent of the money which has come to her hands. *Pearce v. Pearce*, 25 Law J. Rep. (N.S.) Chanc. 898; 22 Beav. 248.

One of three trustees for sale was also the solicitor employed in the matter, and he alone received the purchase-money, and neglected to apply it. The conveyance was executed, and the receipt signed by all three of the trustees:—Held, that the solicitor was not the agent of the other trustees so as to make the receipt by him the receipt of all; and the other trustees, having joined merely for the sake of conformity, were not chargeable. The difference in this respect between the case of trustees and executors. *Re Fryer's Estate, Martindale v. Piquot*, 26 Law J. Rep. (N.S.) Chanc. 398; 8 Kay & J. 317.

A trustee was removed by decree of the Court, and ordered to pay the balance of the trust fund in his hands to the new trustees appointed by such decree; but no time was fixed by the decree for the payment. The retiring trustee, having omitted for some weeks to make the payment ordered, a correspondence took place between his solicitor and the solicitors of the new trustees, who in their last letter fixed a day by which they said the payment must be made. Shortly before the day so fixed, the bank in which the trust balance had been deposited by the retiring trustee failed:—Held, that the retiring trustee was personally liable to make good the fund to the trust estate. *Lunham v. Blundell*, 27 Law J. Rep. (N.S.) Chanc. 179.

A B filed his bill against C D, praying that C D might be declared a trustee for him of a certain farm, and that an account of the profits of the farm might be taken, A B offering to allow for the sums advanced or expended by C D, and to pay to C D what, if anything, should be found due on taking the account. C D, by his answer, denied that he was a trustee, and stated that the carrying on of the farm had been attended with considerable loss. At the hearing, A B's counsel waived the account which was asked for, but the Vice Chancellor declared C D to be a trustee for A B, and gave A B costs up to the hearing, and directed the accounts to be taken. A B appealed from so much of the decree as directed the accounts, but the appeal was dismissed without costs; and the decree was varied by giving A B leave to apply for his costs subsequent to the hearing, on his paying C D what should be found due to him on taking the account. *Kendall v. Masters*, 29 Law J. Rep. (N.S.) Chanc. 805.

A lapse of twenty years will prevent a *cestui que trust* from enforcing in a Court of equity accounts which the trustees considered as settled. A letter by a solicitor, since deceased, making an offer on behalf of a *cestui que trust*, will, in a suit by the *cestui que trust*, twenty years after, against the trustee, be admitted as evidence, though the *cestui que trust* denied that the solicitor was employed by him, or that he acted on his behalf, but the value of such evidence is for the consideration of a jury or the Court, which has the province of a jury. A bill of costs sent to trustees by a solicitor who acted for them will be admitted in a suit by a *cestui que trust* against trustees for an account as evidence of attendances on the *cestui que trust* and of his having knowledge of the business transacted. *Bright v. Leggison*, 22 Law J. Rep. (N.S.) Chanc. 862.

Under a trust to lend trust money to one of the trustees on his personal security until the trustees should deem it advantageous to invest the money in the funds,—Held, that the omission to call in the money, which had been accordingly lent to the trustee, and its consequent loss, did not, in the absence of any proof of misconduct on the part of his co-trustee, create any liability on the part of such co-trustee. *Paddon v. Richardson*, 7 De Gex, M. & G. 563.

Held, also, that as payment of the debt was only enforceable in equity, and the *cestui que trust* might have enforced it himself, this circumstance was an answer to a suit by him seeking to render the co-trustee personally liable. *Ibid.*

Trustees for sale on demise of tenant for life having a prior legal estate,—Held, not to have any lien upon the property in respect of the costs of an abortive sale attempted by them during the tenancy for life, or of proceedings against them at law or in equity in reference thereto, notwithstanding such sale was attempted upon the solicitation of the tenant for life, and with the consent and approbation and by the direction of the *cestui que trust*, one of whom was *sui juris*, the shares of the others, who were married women, being settled to their separate use without power of anticipation. *Leedham v. Chawner*, 4 Kay & J. 458.

The Court sanctioned proceedings under the 18th section of the 20 & 21 Vict. c. 54, upon an affidavit stating that a trustee had paid 1,400*l.* into his private bankers', had drawn out the whole with the exception of 28*l.*, and had paid a private debt of 150*l.* out of the trust funds. *Wadham v. Rigg*, 1 Dr. & Sm. 216.

Where the representative of a deceased trustee made a suit necessary by a wanton refusal to act in the trust and to receive the dividends of the trust funds,—Held, that she was not entitled to the costs of a bill filed to remove her and appoint other trustees. *Legg v. Mackrell*, 1 Giff. 165; decree varied, on appeal as to costs, 18 Dec. 1860.

Semble—a disclaiming trustee is entitled only to costs as between party and party. *Ibid.*

A trustee unreasonably resisting the claims of his *cestui que trust* ordered to pay the costs of the suit. *Price v. Loaden*, 21 Beav. 508.

A trustee in two independent matters for the same person is not justified in mixing up the two transactions and refusing to pay over the first trust fund, until all questions as to the second have been settled. *Ibid.*

The personal interests of a trustee in a trust fund in court will be made applicable to the discharge of all claims against him as trustee. *Irby v. Irby* (No. 3), 25 Beav. 632.

A B was entitled to a share of funds held upon the trusts of his father's marriage settlement, and for which his father's estate was liable. He was one of his father's executors. In a suit to administer the trusts of the settlement and his father's estate, a large balance was found due from A B as executor:—Held, that the trustees of the settlement were entitled to retain such balance out of A B's share, and that purchasers from A B pending the suit, with notice of the proceedings, were bound by the same equity. *Ibid.*

The trustee indemnity clause does not exonerate a trustee from the consequences of a breach of trust. *Brumridge v. Brumridge*, 27 Beav. 5.

Two trustees (A and B) were ordered to pay a sum of money into court; this was paid by A alone. They had severed in their defences, and obtained but one set of costs. B's share of the costs was ordered to be paid to A by way of contribution. *Prinos v. Hine* (No. 2), 27 Beav. 345.

A B, one of the two trustees and executors of a will, and resident in London, authorized a person to get in three mortgagees, part of the estate. The solicitor forwarded the deeds of reconveyance to C D, the other trustee, in the country, who executed and returned them. The solicitor received the money, and paid it to A B alone, who misapplied it:—Held, that C D was liable for the amount. *Cowell v. Gatcombe*, 27 Beav. 568.

Where an agent is authorized by trustees to receive trust money and receives it accordingly, the receipt of that money by the agent binds the trustees and discharges the person who paid it. *Robertson v. Armstrong*, 28 Beav. 123.

Trustees authorized their solicitors to receive trust money. The solicitors received it and handed it over to the tenant for life, whereby it was lost:—Held, that a bill by a *cestui que trust* seeking to charge the solicitors only and not the trustees could not be maintained, for that it was only through the trustees that the solicitors could be made liable. *Ibid.*

A trustee for sale bought the trust estate at an auction and died:—Held, that his heir-at-law had no right, as against his next-of-kin, to have the contract completed for his benefit. *Ingle v. Richards* (No. 1), 28 Beav. 361.

By a marriage settlement the husband assigned a policy on his life to trustees, and covenanted to keep it up. The trustees neglected either to obtain possession of the policy or to give notice to the office, and the policy was mortgaged by the husband and afterwards sold and surrendered. The husband appearing to have been in insolvent circumstances and unable to keep up the policy; and the trustees having no available funds for the purpose,—Held, that the trustees were not liable for the loss. *Hobday v. Peters* (No. 3), 28 Beav. 603.

(d) Powers, Rights and Duties.

Where one of a set of trustees is a solicitor, and by the direction of his co-trustees acts professionally in matters relating to the trust estate (such business being done out of court, and not in a cause in Chancery), he will not be allowed any remuneration

for professional services, but only be entitled to costs out of pocket. *Broughton v. Broughton*, 25 Law J. Rep. (N.S.) Chanc. 250; 24 *Ibid.* 190.

Where one of a set of trustees is one of a firm of solicitors, and the firm act, by the direction of the trustees, professionally in the matters of the trust estate (such business being done out of court, and not in a cause in Chancery), the firm will not be allowed any remuneration for their professional services, but only be entitled to costs out of pocket.—*Cradock v. Piper* remarked upon. *Ibid.*

The real estate of a testator was conveyed by his family to trustees, upon trust to sell and pay debts and annuities proved to be due, and to distribute the remainder of the produce. The trustees sold an estate, and, at the request of the purchaser, and in order to free the estate from all claim in respect of a legacy of 500*l.* which the testator had bequeathed, and which the executor had neglected to pay, paid the same, with interest, to the legatee:—Held, (reversing a decision of the Master of the Rolls), that the trustees having acted *bona fide*, and with a reasonable discretion for the benefit of the estate, and in the honest execution of the trusts reposed in them, this payment must be allowed. *Porshaw v. Higginson*, 26 Law J. Rep. (N.S.) Chanc. 174, 342.

Trustees in exercise of a discretion are justified in not selling a reversionary interest in stock at the end of one year after the death of a testator. *Wilkinson v. Duncan*, 26 Law J. Rep. (N.S.) Chanc. 495; 23 Beav. 469.

A power of sale given to trustees and the survivors and survivor of them, his heirs and assigns, may be exercised by the devisees of the surviving trustee. *Hall v. May*, 26 Law J. Rep. (N.S.) Chanc. 791; 3 Kay & J. 585.

Funds were settled for the benefit of the survivor of husband and wife for life, and after the death of the survivor to be held in trust for all or one of the children or child or remoter issue of the marriage as husband and wife should jointly appoint, and in default as the survivor should appoint. There was only one child of the marriage, a son, and the wife died without having exercised the joint power. Two months after the son came of age the father appointed that the fund should be paid to him after his own decease. Soon after this the father and son applied to the trustees to transfer the funds into their joint names. The father had also, during the minority of the son, applied to the trustees to transfer the far greater part of the fund into his sole name. The trustees laid a case before counsel, who advised that if certain requisitions were complied with, the trustees might safely transfer without suit. The requisitions were complied with, but the trustees refused to transfer without the protection of the Court. The father and son filed a bill to compel the transfer to them, and prayed that the trustees might pay the costs. One of the Vice Chancellors made a decree for the transfer, but ordered the father and son to pay the costs of the suit; and upon appeal, as to costs, by the father and son,—Held, that the decree was correct: *Lord Justice Knight Bruce* dissenting. *King v. King*, 27 Law J. Rep. (N.S.) Chanc. 29; 1 De Gex & J. 663.

Trustees who are directed to sell an estate are not justified in raising money by mortgage, notwithstanding a discretion is given to them to postpone the

sale. *Devaynes v. Robinson*, 27 Law J. Rep. (n.s.) Chanc. 157; 24 Beav. 86.

A by deed assigned to B timber and stock-in-trade upon trust to sell and apply the money arising from the sale in paying the expenses of preparing for, making and completing such sale or sales, "including the usual auctioneer's commission and otherwise incidental to the aforesaid trusts." B was an auctioneer, and had been employed as such by A:—Held, affirming a decision of the Master of the Rolls, that the words appeared to have been inserted to provide for B being employed in the sale, and that B was entitled to charge his commission. *Douglas v. Arobbutt*, 27 Law J. Rep. (n.s.) Chanc. 271; 2 De Gex & J. 148.

If trustees, defendants to a bill filed against them for the execution of the trusts of a will, appear separately and sever in their defence, one set of costs alone will be allowed, and in the absence of evidence shewing misconduct, the Court will not order the costs to be paid to one trustee only. *Course v. Humphrey*, 28 Law J. Rep. (n.s.) Chanc. 327; 26 Beav. 402.

The duly elected pastor of a society of Baptists having been charged with conduct unbecoming his position of minister, the majority of the trustees of the chapel of the society and a considerable number of the members of the society, at a meeting convened for the purpose of considering such charges, passed a resolution, in execution of which he was removed from his office of pastor, and the chapel and pulpit were closed against him. The deposed pastor, alleging that the meeting at which he was deposed had been irregularly convened, and that its resolutions were not binding upon the society, procured, at a meeting irregularly convened, a resolution to be passed by a portion of the society, including the minority of the trustees, reinstating him in his office, and, in execution of such resolution, took forcible possession of the chapel and held it against the majority of the trustees. An injunction was granted by the Vice Chancellor, restraining the pastor and the minority of the trustees from molesting or interfering with the majority of the trustees in the exercise of their right to the possession and management of the chapel; and, on appeal, this decision was affirmed by the Lords Justices. *Perry v. Shipway*, 28 Law J. Rep. (n.s.) Chanc. 660; 4 De Gex & J. 353; 1 Giff. 1.

Certain real estates subject to incumbrances, the interest of which more than exhausted the rents, were conveyed by the mortgagor to trustees upon trust for his creditors. After the execution of his creditors' deed, one of the trustees thereof was employed by the mortgagees as their agent to collect the rents:—Held, that he could not be allowed any commission out of the rents. *Nicholson v. Tutin*, 3 Kay & J. 159.

Trustees who have paid a fund into court, under the Trustee Relief Act, cannot prevent its being paid out to the *cestuis que trust* absolutely entitled to it, on the ground that he is about to file a bill against them to take the accounts of the trusts. *In re Wright's Trusts*, 3 Kay & J. 419.

Trustees have a right to some sort of discharge from their *cestuis que trust*, not perhaps a release unless the instrument creating the trust was under seal; and trustees between whom and their several *cestuis que trust* disputes have arisen as to the

amounts actually due to them respectively are justified in paying into court, to the separate account of each *cestuis que trust*, the sum to which they believe him to be entitled, and may have their costs of making such payment out of the respective funds. *Ibid.*

A bare trustee who, under the 31st section of the Fines and Recoveries Abolition Act (3 & 4 Will. 4. c. 74.) is protector of a settlement, can insist on retaining the legal estate only so long as the purposes of the trust exist,—that is, so long as, according to the rules of this Court, he is required to be a trustee. *Buttenshaw v. Martin*, Johns. 89.

Therefore, where there was a devise of lands to trustees upon trust for testator's daughter during her life, for her separate use, without power of anticipation, with remainder to the use of her children as tenants in common in tail, with remainder over:—Held, that testator's daughter having become discover and being *sei juris* could compel a conveyance by the trustees of their legal estate. *Ibid.*

As to the right of the trustees to retain money bequeathed to them by the will, and directed to be invested in the purchase of other lands to be settled to the same uses. *Ibid.*

There being some disagreement between three trustees, the majority acted alone and took securities in their own names, omitting the name of the dissentient trustee:—Held, that the plaintiff who was interested in the trust property was entitled to a receiver. *Swale v. Swale*, 22 Beav. 584.

The rebuilding of a dissenting chapel was intrusted to three of the several trustees in whom the estate was vested. There being a deficiency of money, they borrowed on a deposit of the title-deeds of the chapel 500*l.*, which they personally engaged to pay. Interest for a long time was paid out of the chapel funds, but ultimately the representatives of the trustees were compelled to pay the money. The legal estate was vested in new trustees:—Held, that the representatives of the persons who had had the 500*l.* had a lien on the deeds, but that they were not entitled to a decree for foreclosure or sale, as by granting such relief the trust would be altogether destroyed. *Darke v. Williamson*, 25 Beav. 622.

An estate was devised to trustees for different persons in fifth shares, some of which shares were given to living persons absolutely, and the others to living persons for life, with remainder to their children in fee. An unlimited power of sale over the whole estate was given to the trustees:—Held, that this power of sale was valid, and could be exercised over the whole estate so long as any of the trusts of any of the shares remained to be performed. *Tait v. Swinstead*, 26 Beav. 525.

Trustees applied a part of the capital of a fund belonging to infants, who had been left destitute by their father, for their benefit. They were allowed the amount. *Prince v. Hine*, 26 Beav. 634.

(c) Investment by.

[*Raby v. Ridehalgh*, 7 Law J. Dig. 709; 7 De Gex, M. & G. 104.]

A testator at the time of his death was possessed of Navy 5*l.* per cent. annuities. By his will, after giving various bequests, he directed his executrix and executors to sell the residue, and invest the money

"upon government or other good and sufficient security," and gave the dividends and interest to his wife, the executrix, for life. She did not convert the Navy 5l. per cents. into consols, and the Navy 5l. per cents. were subsequently reduced to 3½l. per cents.—Held, overruling a decision of the Master of the Rolls, that the non-conversion into consols was not a breach of trust, and that the wife's estate (she having died) was not liable to make good the difference. *Baud v. Fardell*, 25 Law J. Rep. (N.S.) Chanc. 21; 7 De Gex, M. & G. 628.

Howe v. Lord Dartmouth (7 Ves. 137) observed upon. *Ibid.*

A trustee is bound to preserve evidence of his acts. A trustee, by omitting to invest a sum of money sufficient to pay an annuity of 100l. a year to a party for life, is liable, when the parties in remainder become entitled to the fund, to make good any rise in the stock, assuming it had been purchased; and although the principal sum directed to be invested was paid, and a release obtained, still it was set aside, and the difference in value was directed to be paid to the *cestui que trust*, who were illiterate and ignorant of their rights. *Aspland v. Watte*, 25 Law J. Rep. (N.S.) Chanc. 53.

A testator directed his trustees to invest in the funds, or on Government securities, "or upon the security by way of mortgage of any freehold, copyhold or leasehold hereditaments in England or Wales":—Held, that this did not authorize the investment upon the security of railway mortgages made in conformity with the 8 Vict. c. 16. s. 38, or in Great Northern Railway debenture stock. *Mortimore v. Mortimore*, 28 Law J. Rep. (N.S.) Chanc. 558; 4 De Gex & J. 472.

Money having been paid into court in obedience to the Standing Orders, upon an intended application to parliament for a bill for the construction of a railway, the parties paying in the money applied that the same might be invested in the New East India 5l. per cent. Loan, raised under the powers of the statute 22 & 23 Vict. c. 39; but one of the Vice Chancellors was of opinion, that such investment would not be "East India stock" within the meaning of the Trustees' Relief Act, 1859, 22 & 23 Vict. c. 35, and the full Court of Appeal concurred. Such investment is not what the Court of Chancery would sanction; but if a trustee had so invested money, and were brought before the Court as for a breach of trust, and he pleaded the provisions of the Trustees' Relief Act, 1859, the Court would be bound to decide in his favour. *In re the Colne Valley and Halstead Railway Bill*, 29 Law J. Rep. (N.S.) Chanc. 33; 1 De Gex, F. & J. 53; Johns. 528.

If an act of parliament contains provisions enabling trustees, with the sanction of the Court, to invest trust funds upon securities neither recognized by the Court, contemplated by the legislature, nor sanctioned by the settlor or testator at the time the trusts were created, this Court, in the absence of an express legislative declaration, will not give the act any other than a prospective operation or advise trustees under the 22 & 23 Vict. c. 35. ss. 30, 32, to invest the trust funds upon any other securities than those comprised within the provisions of the instrument creating the trust. *In re Miles's Trusts*, 29 Law J. Rep. (N.S.) Chanc. 47; 27 Beav. 579.

Upon an application under section 30. of the

22 & 23 Vict. c. 35, for the opinion of the Court whether under a trust for investment in Government or other approved securities, trustees would be justified in investing a trust fund in East India stock or railway debentures or on mortgage of freehold, copyhold or leasehold hereditaments, the Court approved of an investment on freeholds in England or Wales, but declined to give any answer sanctioning investment in the other securities mentioned. *Re Simson's Trust*, 1 Jo. & H. 89.

Where trust funds are, without authority, lent to traders, with notice of the trust, and employed in their business, such traders are not liable to account to the *cestui que trust* for a share of the profits of the business. *Stroud v. Gwyer*, 28 Beav. 180.

(f) Disclaimer.

If a party, having a derivative interest under a trustee refuses to execute a formal disclaimer to the trust property upon the appointment of a new trustee, he will be made to pay the costs of an application to the Court. Under the Trustee Acts, the Court has not jurisdiction to give the costs to a *cestui que trust*, compelled, in consequence of the assignees of a bankrupt trustee refusing to sign a disclaimer, to apply to the Court to procure a transfer of the trust funds. *Ex parte Primrose*, 26 Law J. Rep. (N.S.) Chanc. 666; 23 Beav. 590.

Upon a petition for the appointment of new trustees by the Court, it is not necessary that a disclaiming trustee, who has never acted, should disclaim by deed, but a disclaimer by his counsel at the bar is sufficient. *Poster v. Danber*, 1 Dr. & Sm. 172.

(g) Release of.

Trustees on receipt from other trustees of trust monies are not bound to execute a release; all that can be required from them is a written acknowledgment of the receipt of the money. *In re Cater's Trusts* (No. 2), 26 Beav. 366.

(h) Notice to.

Although as a general rule, notice to one of several trustees is a notice to all, yet where one of such trustees was also a beneficiary and assigned his beneficial interest in the trust fund to a stranger,—Held, that the notice acquired by such trustee, as assignor, did not constitute notice to the trustees, so as to prevail over subsequent incumbrancers, it being the interest of such trustee, as assignor, to conceal the assignment; but that where such trustee assigned his beneficial interest to one of his co-trustees, the notice which that co-trustee required, as assignee, constituted during his life, notice to the trustees, it not being his interest, as assignee, to conceal the assignment, and therefore that it prevailed over subsequent incumbrancers with notice. *Brown v. Savage*, 4 Drew. 685.

(C) TRUSTEES' RELIEF ACTS.

(a) Practice.

Where trustees having paid money into court under the Trustees' Relief Act (10 & 11 Vict. c. 96), afterwards apply by petition under the 4th Order of the 10th of June 1848, for a distribution of the fund, the Court has jurisdiction to make an order upon the petition, and is bound to exercise that jurisdiction. But where such a petition was presented by trustees

without consent of the parties claiming beneficial interests in the fund, and no cause was shewn by the trustees for taking upon themselves to be the movers in the matter, the Court, to discourage such applications, allowed them only respondent's costs. *In re Casneau's Legacy under Housman's Will*, 2 Kay & J. 249.

(b) Costs.

Trustees had paid money into court, under such circumstances that the Court considered that they had thereby acted oppressively. The trustees had deducted from the money paid in a sum in respect of their costs. Upon a petition, by the *cestui que trust*, that the money paid in might be paid out to them, that the trustees might refund the amount retained, and that the trustees might pay the costs of the petition, the Master of the Rolls made an order in accordance with its prayer. On appeal to the Lords Justices, they held the paying in to be an act of oppression, and the full Court of Appeal held that the trustees should pay the costs; both Courts, therefore, dismissed the appeal of the trustees from the decision of the Master of the Rolls, with costs. *In re Woodburn's Trusts*, 26 Law J. Rep. (N.S.) Chanc. 522; 1 De Gex & J. 333.

Trustees, after being warned by J T C and W B C, their *cestui que trust*, that if they paid the trust fund into court under the Trustees' Relief Act, they, the *cestui que trust*, should object to the trustees being allowed the costs of paying the fund into and taking it out of court, nevertheless paid the fund into court under the act, stating by their affidavit, not that they had any doubts as to the title of their *cestui que trust*, but that, "to the best of their knowledge and belief the said J T C and W B C were the only persons interested in or entitled to the said trust fund, and that the facts mentioned in that affidavit were stated upon their own knowledge, and they had acquired such knowledge as trustees of the said trust fund." The *cestui que trust* then presented their petition for the payment of the fund out of court, and praying that the costs of the petition and of paying the fund into court might be paid by the trustees personally:—Held, that the trustees who had been served with and appeared upon the petition were not entitled to the costs of such appearance, but only to their costs of paying the money into court. *In re the Trusts of W. Covington's Will*, 25 Law J. Rep. (N.S.) Chanc. 238.

Where, by the affidavit of trustees paying money into court under the Trustees' Relief Act, it appeared that there was only one person entitled to the money, and that person was able and willing to give them a discharge without the intervention of the Court, the trustees were not allowed their costs of a petition for payment of the money out of court. *Re Heming's Trust*, 26 Law J. Rep. (N.S.) Chanc. 106; 3 Kay & J. 40.

A trustee will be allowed his costs of paying money into court under the Trustees' Relief Act where there is a case of *bond fide* responsibility. He is not bound to take upon himself the responsibility of deciding between adverse claimants. *In re Headington's Trusts*, 27 Law J. Rep. (N.S.) Chanc. 175.

Trustees having *bond fide* doubts are justified in paying funds into court, under the Trustees' Relief Act, and will receive their costs; the Court con-

sidering it important not to make the rule too stringent as to their costs in such cases. *Re Wyllie's Trusts*, 28 Beav. 458.

A trustee paid money into court under the Trustees' Relief Acts without making inquiries for the parties entitled to the fund:—Held, that he must pay the costs which the *cestui que trust*, who were officers in the Austrian service, had been put to in obtaining payment of the money out of court. *In re Knight's Trusts*, 28 Law J. Rep. (N.S.) Chanc. 625; 27 Beav. 45.

Where the trustees of a legacy, given for the benefit of a lady for life, with limitations over, one of such trustees being also the residuary legatee under the will, refused to comply with the request of the tenant for life, that they would pay the legacy into court under the provisions of the Trustees' Relief Act, 1847, although she offered to pay the costs of the proceedings for that purpose, and she consequently instituted a suit and obtained an order for payment of the fund into court, the costs of the suit were directed to be paid out of the residue. *Handley v. Davis*, 28 Law J. Rep. (N.S.) Chanc. 873.

The costs incurred by trustees in paying money into court under the Trustees' Relief Act, and also the costs of their appearing on paying it out, are subject to taxation. *In re Hue's Estate*, 28 Law J. Rep. (N.S.) Chanc. 893; 27 Beav. 387.

The trustees of a will paid money into court under the Trustees' Relief Act, and at the same time presented a petition themselves for distribution of the fund among the parties who should be found entitled thereto. Notice of this proceeding was given by the trustees to five persons whom they knew to be *cestui que trust*:—Held, that the trustees were not justified in presenting such a petition, except under special circumstances which did not exist in this case; but that having paid the money into court, they should have left the *cestui que trust* to take such steps as they might be advised. The trustees were only allowed respondents' costs, and the carriage of the order was given to the *cestui que trust*. *In re Hutchinson's Trust*, 29 Law J. Rep. (N.S.) Chanc. 356; 1 Dr. & Sm. 27.

A petitioner claiming a fund under the Trustees' Relief Act allowed his costs, though his claim failed. *In re Birch's Legacy*, 2 Kay & J. 369.

Trustees who have paid trust-funds into court under the Trustees' Relief Act, and take copies of affidavits of parties claiming to be beneficially interested in the fund, will not be allowed their costs of the copies of affidavits so taken by them. *In re Lazarus*, 3 Kay & J. 555.

Payment into court by an executor, of a legacy bequeathed to a married woman, not specifically appropriated, the husband and wife being abroad, and the husband requiring it to be paid under a power of attorney:—Held, that the executor had a right to pay it in, his costs of paying in to be out of the general estate; his costs of appearing on a petition to pay out the legacy, out of the legacy. *Re Jones*, 3 Drew. 679.

A trustee vexatiously paying trust-money into court, under the Trustees' Relief Act, ordered to pay the costs of the petitioner for obtaining payment. *In re Cater's Trust* (No. 1), 25 Beav. 361.

A trustee paid trust funds into court, under the Trustees' Relief Act, merely because other trustees

to whom it was payable declined to give a release. He was ordered to pay the costs of getting the money out of court. *In re Cater's Trusts* (No. 2), 25 Beav. 366.

(D) *CESTUI QUE TRUST*.

Purchase by a trustee and executor from his *cestui que trust* of a portion of an unascertained residue set aside. *Smedley v. Varley*, 23 Beav. 358.

An executor purchased a share of the residue, and in an administration suit he was ordered to pay the assets into court, minus the amount of the purchased share. Afterwards, in another suit, the purchase was set aside:—Held, that the executor was not entitled, on setting aside the transaction, to a decree for repayment of the consideration-money; but that it must be paid into court in the administration suit. *Ibid*.

(E) TRUSTEES AND MORTGAGE ACTS.

(a) *Construction of*.

Where a power of sale is given by will to two trustees, one of whom is an infant, the Court, under the 32nd section of the Trustee Act, 1850, will appoint a new trustee in the place of the infant. *Re Porter's Trusts*, 25 Law J. Rep. (N.S.) Chanc. 482.

Where the last surviving trustee of a term of years died in 1799, and it appeared that there would be great difficulty and expense in obtaining limited administration, the Court appointed a new trustee under the 15 & 16 Vict. c. 55, s. 9. *Davis v. Chanter*, 27 Law J. Rep. (N.S.) Chanc. 577.

A B gave all his real and personal estate and effects of what nature or kind soever, to C D, upon trust to pay to his wife for her life the rents of his real estate and the interest on all sums due to him on mortgage, bond, note or other security, and after her death to get in all debts owing to him on any security, and pay the same over to other persons. C D died intestate, leaving E F, his eldest son and heir-at-law, a person of unsound mind and an infant:—Held, that the legal estate in the mortgaged property passed to C D, and that he was a trustee, and persons were appointed to convey the property comprised in the mortgages to the purchasers thereof, under sections 3. and 20. of the Trustee Act, 1850. *In re Arrowsmith's Trusts; In re Thompson*, 27 Law J. Rep. (N.S.) Chanc. 704.

It is not necessary to resort to the jurisdiction in lunacy for such an order, but it may be made in the jurisdiction in Chancery. *Ibid*.

The Court of the County Palatine of Lancaster has not any jurisdiction to appoint a new trustee in the place of a trustee of unsound mind not so found by inquisition. Such jurisdiction is given by the legislature (by the Trustee Acts) to the Lord Chancellor, or other persons intrusted with the care of lunatics, and not to the Court of Chancery. *In re Ormerod*, 28 Law J. Rep. (N.S.) Chanc. 55; 3 De Gex & J. 249.

A testator devised lands in trust to sell for the payment of debts; the trustees disclaimed, and the heir-at-law could not be found; the lands were sold under a decree in a suit for administration, and an order was obtained, under the Trustee Act, 1850, appointing the vendor's solicitor to convey to the respective purchasers:—Held, by the Lord Chancellor, on the question being raised by one of the

purchasers, that the provisions of the 9th and 20th sections of the Trustee Act, 1850, applied to the case, and that the order which had been made was correct. *Wilks v. Groom*, 6 De Gex, M. & G. 205.

The Trustee Act held to apply to a case in which the executor of a surviving trustee had not proved the will, and had neglected to transfer stock on the requisition of a new trustee appointed out of court. *Re Ellis's Settlement*, 24 Beav. 426.

The Court directed the circumstances, bringing a case within the Trustee Act, to be inserted in an order vesting the right to transfer stock. *Ibid*.

The sole trustee of money for A and B invested it in stock in the joint names of himself and B (an infant). After the deaths of the trustee and A, the infant was held to be a trustee, within the Trustee Acts, and a vesting order was made. *Sanders v. Homer*, 25 Beav. 467.

(b) *Case under 22 & 23 Vict. c. 35.*

Where questions of great nicety arise, and the facts have not been precisely ascertained, it is not proper for trustees to state a case for the advice of the Court, under the 30th section of the 22 & 23 Vict. c. 35, the effect of such advice being only to indemnify the trustees in the particular state of facts appearing by the statement. *Re Mockett's Trusts*, 29 Law J. Rep. (N.S.) Chanc. 294; Johns. 628.

Where it is desired to obtain the sanction of the Court to the laying out of trust monies in permanent improvements upon the trust property, the proper course is to file a bill, and not to state a case under Lord St. Leonards' Act, the Court not being authorized, under that act, to go into evidence as to the propriety of the expenditure, or to exercise any control over the subject-matter. *Re Barrington's Settlement*, 29 Law J. Rep. (N.S.) Chanc. 807; 1 Jo. & H. 142.

(c) *Practice under*.

Where copyholds of inheritance had been sold by order of the Court in a suit by an equitable mortgagee against the infant customary heir, who had not been admitted, and the personal representative of the deceased mortgagor, the consent of the lord of the manor evidenced either by his appearing and consenting, or by a verified certificate of his consent, was held to be a necessary preliminary to the drawing up of a vesting order under the Trustee Act (13 & 14 Vict. c. 60.) made upon the petition of the purchaser, the infant heir, and the personal representative of the mortgagor. *Cooper v. Jones*, 25 Law J. Rep. (N.S.) Chanc. 240.

Semble—that upon the legal estate in mortgaged property having descended to the heir of the mortgagee, the Court will not, where there is no sale or transfer proposed, vest the estate in the administrator of the mortgagee, although the administrator is beneficially interested in the money secured. *In re Hewitt*, 27 Law J. Rep. (N.S.) Chanc. 302.

A sum of stock was standing in the names of four trustees, one of whom was residing abroad:—Held, that the 13 & 14 Vict. c. 60. s. 22. (the Trustee Act, 1850,) empowered the three resident trustees to ask for an order that the dividends of the stock due, and accruing due, might be paid to them without any authority from the fourth trustee. On appeal, the order was varied by restricting it to the dividends to

accrue during the joint lives of the three. *In re Peyton's Settlement*, 27 Law J. Rep. (N.S.) Chanc. 476; 25 Beav. 317; 3 De Gex & J. 290.

If the Bank of England is required to act upon an order made in pursuance of the Trustee Acts, the circumstances bringing the case within the acts must appear upon the order of Court. *In re Mainwaring*, 28 Law J. Rep. (N.S.) Chanc. 97; 26 Beav. 172.

On the neglect of old trustees to transfer stock to new trustees appointed by the Court, this Court will, upon motion, vest the right to transfer the stock in the new trustees, and that whether the order upon the old trustees was made in a cause or upon petition. *In re Holbrook's Will*, 29 Law J. Rep. (N.S.) Chanc. 200.

Real estates devised to married women and infants having been sold under a decree in a creditors' suit in several lots; upon petition under the Trustees' Acts, the Court appointed the plaintiffs' solicitor to convey their shares to the several purchasers. Form of the order. *Hancock v. Spittle*, 3 Sm. & G. 478.

Under the 10th section of the Trustee Act, 1850, the Court will now make an order vesting lands in a new trustee, jointly with continuing trustees, notwithstanding the doubts suggested. *In re Watts's Settlement*, 9 Hare, 106, and *In re Plyer's Trust*, Ibid. 220. *In re the Marquis of Bute's Will*, 1 Johns. 15.

TURNPIKE.

[Certain Turnpike Acts in Great Britain, continued by 19 & 20 Vict. c. 49.—Certain Acts for regulating Turnpike Roads in Ireland continued by 19 & 20 Vict. c. 71.—Certain Provisional Orders made under the 14 & 15 Vict. c. 38. to facilitate Arrangements for the Relief of Turnpike Trusts confirmed by 20 & 21 Vict. c. 9.—The taking of Toll on Turnpike Roads in Ireland discontinued, and the Maintenance of such Roads as public Roads provided for by 20 & 21 Vict. c. 16.—Certain Turnpike Acts in Great Britain continued by 20 & 21 Vict. c. 24.—Certain Turnpike Acts in Great Britain continued by 21 & 22 Vict. c. 63.—Certain Turnpike Acts in Great Britain continued by 22 & 23 Vict. c. 51.—An Act to continue certain Turnpike Acts in Great Britain, and to extend the Provisions of the Act of the Fourteenth and Fifteenth Years of Her present Majesty, Chapter Thirty-eight, 23 & 24 Vict. c. 73.]

- (A) CONSTRUCTION OF ACTS, IN GENERAL.
- (B) TOLLS.
- (a) *Liability to and Exemption from.*
- (b) *Amount and Number of.*
- (C) TOLLHOUSE.
- (D) REPAIR OF TURNPIKE ROADS.

(A) CONSTRUCTION OF ACTS, IN GENERAL.

A turnpike act provided that no toll-gate should be erected, nor any toll taken, within three miles of B. The road authorized by that act did not extend to B, but there was a communication between its termination and B by another turnpike road, and also by a public road made since the act was passed:—Held, that under these circumstances the three

miles within which toll-gates could not be erected were to be measured from B in a straight line on a horizontal plane, and not along any of the roads. *Jewell v. Stead*, 25 Law J. Rep. (N.S.) Q.B. 294; 6 E. & B. 350.

The trustees of a turnpike-road being desirous of obtaining an act authorizing the making a new road connected with the former, the plaintiff agreed to advance 2,000l. for the purpose of making the new road, upon having the repayment secured by a mortgage of the tolls of both roads. The trustees obtained an act which authorized the making of the new road, repealed the act under which the old road was made, and placed both roads under one system of management, treating them for most purposes as one road. By this act it was provided that the tolls of the old road should be applied, first, in paying the expenses of obtaining the act; secondly, in paying the interest on mortgages of the tolls receivable under the old act; thirdly, in repairing the old road; and, fourthly, in paying the principal of the old mortgages: and that the tolls of the new road should be applied, first, in paying the expenses of obtaining the act; secondly, in making and repairing the new road; thirdly, in paying the interest of money borrowed on the tolls of the new road; fourthly, in paying the principal of monies borrowed under the repeal act, or borrowed on the tolls of the new road. The plaintiff advanced the 2,000l., and a mortgage was made to him of the tolls, toll-houses, &c., in such a form that it was doubtful whether it extended to the tolls of the new road:—Held, on the context of the act, that it did not take away the power of mortgaging given by the General Turnpike Act, 3 Geo. 4. c. 126. a 81; that the trustees, therefore, had power to mortgage the tolls of the old road as well as the new road for monies borrowed for the purposes of the new road; and that the plaintiff, having advanced his money on the faith of having a security on both roads, was entitled in equity, if not at law, to a security on the tolls of the old road as well as of the new. *Lord Crowe v. Edlestone*, 1 De Gex & J. 93.

A mortgagee of turnpike tolls and toll-houses which are in lease and are subject also to other mortgages, may apply to this Court to have a receiver appointed, instead of taking steps to obtain possession at law. Ibid.

(B) TOLLS.

(a) *Liability to and Exemption from.*

A local turnpike act exempted from toll carriages, &c. "employed in carrying manure employed in husbandry for manuring or improving land." The 5 & 6 Will. 4. c. 18. also exempts from tolls carriages "when employed in carrying, &c. only dung, &c., or manure for land":—Held, that a cart carrying manure to a place of deposit, where it was to be kept to be used or sold for the purpose of manuring land, was exempt from toll under both of these acts. *Regina v. Freke*, 25 Law J. Rep. (N.S.) Q.B. 64; 5 E. & B. 944.

By 3 Geo. 4. c. 126. a 82, "No toll shall be taken for any horses or carriages which shall only cross any turnpike-road or shall not pass 100 yards thereon." E., after crossing a turnpike-road from P to W at a toll-bar, proceeded for a mile and a half along a parish road, and then passed more than 100 yards along a turnpike-road from P to C, which was under

the same trust as that from P to W:—Held, that the 100 yards must be on the identical road with that on which the toll-bar is erected, and that E was, therefore, exempt from toll. *The Queen v. Gerrard*, 26 Law J. Rep. (n.s.) M.C. 148.

A steam-engine with a thrashing-machine passed along a turnpike-road, and through a toll-gate, on its way to a farm where it was to be employed in working the thrashing-machine, that being the only purpose for which it was used. At the time of passing through the gate, it was not connected with the thrashing-machine. Toll was demanded and taken for the steam-engine by the keeper of the gate, for which taking he was subsequently convicted. He appealed to the Sessions, when the conviction was affirmed:—Held, upon a case stated for the opinion of the Court of Queen's Bench, that the steam-engine must be taken to be part of the thrashing-machine, and that, therefore, being free from toll, the conviction was right. *The Queen v. Matty*, 27 Law J. Rep. (n.s.) M.C. 59; *nom. R. v. Matty*, 8 E. & B. 712.

Semble, also, by Lord Campbell, C.J., that it would be free from toll, if it had been sent along the road for the purpose of being used for working a thrashing-machine, though such thrashing-machine was not with it at the time of passing the gate. *Ibid*.

The 41st section of the 3 Geo. 4. c. 126. enacts, that if any person shall with any horse, cattle, beast, or carriage go off or pass from any turnpike-road through or over any land or ground near or adjoining thereto (not being a public highway, and such person not being the owner or occupier, or servant, or one of the family of the owner or occupier of such land or ground), with intent to evade the payment of the tolls granted by any act of parliament, he shall for every such offence forfeit and pay any sum not exceeding 5*l*. Section 82. of the same statute provides that no toll shall be taken for any horses or carriages which shall only cross a turnpike-road, or shall not pass above 100 yards thereon:—Held, that these two sections are to be read together, and therefore, where the appellant, with a carriage and horse went off from a turnpike-road and through and over a private road, along which he had no right to go, with intent to evade the payment of the toll upon the turnpike-road, but had only gone 84 yards along that road before going off from it over the private road, it was held that he was not liable to conviction under section 41. Held, also, that two or more journeys cannot be coupled together so as to make out that the appellant had gone above 100 yards along the turnpike-road before going off on to the private road, but that the distance of 100 yards mentioned in the act, means 100 yards upon one journey. *Veitch v. the Trustees of the Exeter Turnpike-road*, 27 Law J. Rep. (n.s.) M.C. 116; 8 E. & B. 986.

The 8 Geo. 4. c. 126. s. 82. exempts from turnpike toll any rector, vicar, or curate, going to or returning from visiting any sick parishioner, or on other his parochial duty within his parish:—Held, that a clergyman acting temporarily as curate of a parish, with the permission of the bishop, though without his licence, was a curate within the exemption; and that the exemption extended to a turnpike without the parish to which he was going on parochial duty. *Temple v. Dickinson*, 28 Law J. Rep. (n.s.) M.C. 10; 1 E. & B. 84.

By the permission of the Queen, one of her carriages, drawn by her horses and driven by her coachman, was used by the wife of G, the Crown Equerry, and was driven through the toll-gate of W. G's wife was in the carriage, and was being driven for her own pleasure; but G was not present, nor were the carriage and horses used on the particular occasion in the discharge of his duty as Crown Equerry:—Held, that the carriage and horses were exempt from the payment of tolls. *Westover v. Perkins*, 28 Law J. Rep. (n.s.) M.C. 227.

By section 25. of the 10 Geo. 4. c. 59. (amending the 7 Geo. 4. c. 142. for consolidating the trusts of the turnpike-roads north of the Thames), when the toll has been once paid in respect of any horse or other beast, cattle or stock, no further toll shall be demanded or taken during the same day, except in the cases hereinafter mentioned, for or in respect of the same horse, &c., at any other gate or bar within the same district, or on returning or re-passing through the same gate. Section 28. provides that toll shall be paid "for every horse or beast drawing any stage-coach, van, caravan, waggon or other carriage, conveying passengers or goods for pay, hire or reward, for each time of passing along any of the roads":—Held, that section 28. does not apply to cases where the carriage itself is let to hire, and that therefore where toll had been paid for horses with an empty van hired to remove furniture, toll cannot be demanded on the return of the van laden with the furniture. *Short v. Hudson*, 29 Law J. Rep. (n.s.) M.C. 208.

A parish road crossed a turnpike-road from P to W, at a place where there was a toll-bar, and then met another turnpike-road from P to C under the same trust as the first, but not being the same road. A carriage, passing along the parish road, crossed the turnpike-road from P to W at the turnpike, and then, without proceeding further on that turnpike-road, followed the parish road, and then went more than 100 yards on the road from P to C:—Held, that it was exempted from toll by stat. 3 Geo. 4. c. 126. s. 32, not having passed over 100 yards on the same turnpike-road, though it had passed more than that distance on one in the same trust. *Gerrard v. Parker*, 7 E. & B. 498.

(b) Amount and Number.

A local act provided that upon the W turnpike-road certain tolls should be chargeable, and amongst others, "for every horse or other beast drawing any other chaise, chair or calèche, or any taxed cart, a sum not exceeding the sum of 8*d*."—Held, that a cart upon which a tax had been imposed and paid in the previous year, was within the above enactment, and that no larger toll than 3*d*. could be charged for passing through the toll-gate. *Purdy v. Smith*, 28 Law J. Rep. (n.s.) Q.B. 150; 1 E. & B. 511.

By a local act (10 Geo. 4. c. cxxxiii. s. 14.) the trustees of a certain road were authorized to take certain tolls at the toll-gates erected under the act. By a subsequent section (s. 15.) it was enacted, that if any person should have paid the toll thereby authorized to be taken for the passing of any horse, &c. through any of the turnpikes erected by virtue of this act, the same horse, &c. should, upon a ticket denoting the payment thereof on that day being produced, be permitted to pass and re-pass toll-free

through the same toll-gate, and also through such other gate or gates, if any, as the ticket for such payment should free, at any time during the same day. The 16th section enacted, that no more than one full toll should be taken in respect of the same horse, &c. for passing on the same day through all or any of the toll-gates along the whole line of the said road:—Held, that after payment of one maximum toll, no toll was payable for passing once on the same day with the same horse, &c. through any other toll-gate on the whole line of the said road. *Johnson v. Cocksedg*, 27 Law J. Rep. (n.s.) M.C. 314.

(C) TOLLHOUSE.

The powers given by the 9 Geo. 4. c. 77. s. 5. to trustees of turnpike-roads to erect toll-houses on the sides of a turnpike-road, and to take and inclose on the sides of such road suitable garden spots, extend only to the strips of land on the side of the road over which the public have an easement, and the trustees cannot take part of uninclosed waste adjoining the road, over which the public have no easement. *Beckett v. Upton*, 25 Law J. Rep. (n.s.) Q.B. 70; 5 E. & B. 629.

(D) REPAIRS OF TURNPIKE ROADS.

When a turnpike-road is out of repair the proper person to be summoned and proceeded against in the first instance before Justices, under section 94. of the 5 & 6 Will. 4. c. 50, is the treasurer, or surveyor, or other officer of the turnpike-road. An order on the parish surveyor for the repairs of a turnpike-road can only be made upon its appearing to the Justices that the turnpike trust-funds are insufficient. *In re Surveyors of Gorton*, 25 Law J. Rep. (n.s.) M.C. 70.

A piece of road in the borough of G had been for many years common to two turnpike trusts. An agreement had been entered into between them that one set of trustees should repair the road, and that the other should pay to them a certain sum annually so long as the road should remain common to both trusts, and should be maintained and kept in repair:—Held, that it was competent for the trustees to enter into this agreement, and that an action would lie to recover the sum of money so agreed to be paid. *Swinburne v. Robinson*, 28 Law J. Rep. (n.s.) Q.B. 4; 1 E. & E. 80.

By a local act, it was provided that it should not be lawful for the said trustees (the defendants) to apply any of the tolls or monies raised by them in repairing, &c. any part of the said turnpike-roads in any town or place which was or should be paved or repaired by any Commissioners or trustees for executing any local act of parliament:—Held, that the fact that the borough of Gateshead had been brought under the provisions of the Public Health Act, 1848, did not prevent the agreement entered into between the two sets of trustees from being binding upon the defendant. *Ibid*.

A summons was taken out under stat. 5 & 6 Will. 4. c. 50. s. 94, against the surveyors of the highways of the township of G, on a complaint that a road in the township was out of repair. At the hearing it appeared that the road was a turnpike-road. The complainant offered to prove that the turnpike-road trust had no funds, and stated further that he

appeared on behalf of the turnpike-road trust. The Justices refused to receive any evidence upon this summons, and dismissed the complaint. On a motion for an order compelling the magistrates to hear the summons,—Held, that they had done rightly; and the order was refused. *Regina v. Trafford*, 5 E. & B. 967.

UNDUE INFLUENCE.

[See PARENT AND CHILD.]

Where a father and son, the son having recently come of age and being still under the parental influence, arrange to re-settle the family estates, of which the father is tenant for life, with remainder to the son in tail, with a view to secure the peace and honour of the family, or to prevent disputes and litigation in the family, or to preserve the property in the family, if the arrangement appears to the Court to be upon the whole and in its parts a reasonable arrangement, that transaction will be supported by this Court, even although the son, being under the influence of the father, may not have been fully cognizant and made aware of all his rights. But if the father acquires a material and substantial, and not merely a trifling and unimportant benefit for himself, from and at the expense of his son, the transaction cannot be supported, unless it can be shown that the son was placed beyond the parental influence, and had the assistance of independent professional advice, and was perfectly informed of all his rights, and thoroughly understood all the details and particulars of the transaction; and the onus of shewing that it is such a case lies on the father. *Dimsdale v. Dimsdale*, 25 Law J. Rep. (n.s.) Chanc. 806; 3 Drew. 556.

Where, therefore, a son filed a bill against his father to set aside a family arrangement of the above character, but was not able to present to the Court the simple case above stated as an exception to the general rule; where the son could not offer to put himself and his father in their original position, to restore those benefits which the son had acquired from the father at his expense, and to ask for those back which the father had acquired from the son: in that case the plaintiff was not himself in a position to do equity, and his bill was dismissed with costs. *Ibid*.

In 1848, a person pretending that he had a divine mission obtained a gift of stock from a lady, by imposing a belief on her mind that he sustained a supernatural character. The lady's relations were aware of the gift at the time it was made, and she resided with and was supported by the donee from 1848 up to her death, in 1858. Upon a bill by the administrator of the lady, the Court ordered the donee to refund the stock, with interest thereon from the time of her death. Whether the donee really believed that he was the supernatural being he represented himself to be, is immaterial. *Notridge v. Prince*, 29 Law J. Rep. (n.s.) Chanc. 857; 2 Giff. 216.

A mining lease granted by a person two years after coming of age set aside. *Grosvenor v. Sherratt*, 28 Beav. 659.

A young lady, two years after she came of age, granted a mining lease, as to part of the property in

possession, and as to the rest in reversion, to her brother-in-law and uncle, at the suggestion and advice of her father's executor, and with no independent advice. Three months afterwards the executor was taken into partnership with the lessees. It appeared that applications of other parties to become lessees had been discountenanced and concealed from the knowledge of the lady:—Held, that to support the lease in equity the lessees were bound to shew that no better terms could have been obtained; that the grantor had the fullest information on the subject; that she had separate, independent and disinterested advice, and that she had deliberately and intentionally made the grant, and the lessees having failed in proving this, the lease was cancelled. *Ibid.*

A reversionary sale and a grant of a reversionary lease stand on the same principles. *Ibid.*

UNIVERSITY.

[The 17 & 18 Vict. c. 81, concerning the University of Oxford and the College of St. Mary, Winchester, amended by 19 & 20 Vict. c. 31.—The good Government and Extension of the University of Cambridge, of the Colleges therein, and of the College of King Henry the Sixth at Eton, further provided for by 19 & 20 Vict. c. 88.—The University of Oxford and Colleges in the said University, and the College of St. Mary of Winchester near Winchester, empowered to sell and exchange Lands under certain Conditions, by 19 & 20 Vict. c. 95.—The powers of the Commissioners under the 17 & 18 Vict. c. 81, concerning the University of Oxford and the College of St. Mary, Winchester, continued, and further amended by 20 & 21 Vict. c. 25.—Provision made for the better Government and Discipline of the Universities of Scotland, and improving and regulating the Course of Study therein; and for the Union of the Two Universities and Colleges of Aberdeen, by 21 & 22 Vict. c. 83.—Repeal of part of an Act, 43 Eliz. c. 29, concerning the several Incorporations of the Universities of Oxford and Cambridge, and the Confirmation of the Charters, Liberties, and Privileges granted to either of them, by 22 & 23 Vict. c. 19.—Doubts as to Admission to the Office of Principal in the Universities of Scotland removed by 22 & 23 Vict. c. 24.—The Powers of the Commissioners under an Act, 19 & 20 Vict. c. 88, concerning the University of Cambridge and the College of King Henry the Sixth at Eton continued by 22 & 23 Vict. c. 34.—The Consideration of an Ordinance laid before Parliament in a Report of the Oxford University Commissioners provided for by 23 Vict. c. 23.—The Provisions of the Universities and College Estates Act (1858), and of the Copyhold Acts, and of the Act, 3 & 4 Vict. c. 113, and 17 & 18 Vict. c. 84, so far as the same relate to Universities and Colleges, extended by 23 & 24 Vict. c. 59.—Doubts respecting the Craven Scholarships in the University of Oxford removed and the University enabled to retain the Custody of certain Testamentary Documents, by 23 & 24 Vict. c. 91.]

USE AND OCCUPATION.

In an action of debt, not upon a deed or an award,
Digest, 1855—60.

or any specialty or *quasi* specialty, the venue will still be changed on the common affidavit before issue, if it is not answered by any affidavit shewing that the trial can take place more conveniently in the original county; as, for example, on the ground that the witnesses reside there. *Smith v. O'Brien*, and *Julland v. Riches*, 26 Law J. Rep. (N.S.) Exch. 80.

Thus, in actions for use and occupation the venue will be changed on the common affidavit before issue, although the claim be for rent on a lease, it not appearing on the affidavit in answer that the action is on a deed, nor that the plaintiff's witnesses reside in the original county. *Ibid.*

An action for use and occupation is one of contract, and is founded on the relation of landlord and tenant; it therefore requires evidence of an occupation by the permission of, and under a contract with, the plaintiff; and though the title on the part of the plaintiff and occupation by the defendant may, in the absence of any other evidence, be a *prima facie* case from which such a contract may be inferred, yet where the letting has been by another party, the plaintiff will not be allowed to recover. So where he fails to prove title or actual contract with himself. And where the letting has been by another party, mere notice by plaintiff (even though he has the title) to pay the rent to him, will not convert the occupation into an occupation by his permission and under a contract with him; for such notice, unless assented to by the tenant, does not create a new contract, and can only enable the party to bring ejectment to recover possession of the premises. *Churchward v. Ford*, 26 Law J. Rep. (N.S.) Exch. 354; 2 Hurl. & N. 446.

To a declaration in an action for use and occupation, the defendant pleaded, upon equitable grounds, that (except so far, &c.) before the commencement of such use and occupation, he had become tenant of the premises and of certain buildings thereon; that by reason of such buildings standing thereon he agreed to pay a larger rent than he otherwise would have done; that the plaintiffs had insured such buildings against damage by fire, by the terms of which insurance it was stipulated that in case of damage by fire, the insurance office might either pay to the plaintiffs the amount of damage or might rebuild and reinstate the buildings; that the said buildings were accidentally destroyed by fire, whereby the value of the premises to the defendant was much lessened; that but for that insurance by the plaintiffs the defendant would have insured the buildings against damage by fire, but that by reason of his belief that in case of destruction by fire, the same would be rebuilt and restored by the said office, or by the plaintiffs through the insurance money, he was induced not further to insure the same; that the plaintiffs chose to receive and had received the money from the insurance office, and that the buildings had not been rebuilt or reinstated, although the said insurance money was sufficient for that purpose; that the value of the premises was much lessened, and that the value of the use and occupation in respect whereof the plaintiffs claimed was deteriorated and reduced, and did not exceed the sum of 120*l.*, which sum was brought into court:—Held, upon demurrer, that this was a bad plea. *Lofft v. Dennis*, 28 Law J. Rep. (N.S.) Q.B. 163; 1 E. & E. 474.

In an action for use and occupation it was proved that one K, the superior landlord, had let the premises to the plaintiff, who underlet them to the defendant for the whole of his term, leaving no reversion in himself. There was evidence of the defendant having, upon the expiration of his tenancy, applied to K for a fresh term, and of such application being refused by K, who referred the defendant to the plaintiff as being the tenant. The defendant having continued to occupy after the expiration of the term, the plaintiff sued him in respect of such occupation, and after action paid rent to K for the time the defendant had so held over:—Held (*Willes, J. dissentiente*), that there was evidence from which a jury might infer a contract that the defendant should pay the plaintiff for the occupation of the premises. *Levy or Levi v. Lewis*, 28 Law J. Rep. (n.s.) C.P. 304; 6 Com. B. Rep. N.S. 766.

Tenants in common may join in suing for use and occupation, a tenant holding under them. The plaintiffs were children of L. The tenant paid rents to an agent of the family, who gave a receipt "on account of the family of the late Mrs. L":—Held, that this was evidence of a joint letting, and of a tenancy to them jointly. *Last v. Dinn*, 28 Law J. Rep. (n.s.) Exch. 94.

In an action by overseers for use and occupation, and for rent of parish lands, evidence that the defendant and his ancestors had for upwards of a century, up to the last ten years, paid rent for the land as "common lands," (he refusing to produce the deeds under which he professed to hold), is sufficient evidence to go to the jury, in the absence of any evidence that the payments were made by way of chief-rent or rent-charge. *Harden v. Heslith*, 28 Law J. Rep. (n.s.) Exch. 137; 4 Hurl. & N. 175.

USURY.

[See DEED (B).]

[*Earl of Mansfield v. Ogle*, 7 Law J. Dig. 719; 7 De Gex, M. & G. 181.

The Usury Act (2 & 3 Vict. c. 37.) does not, in cases of loans on security of lands merely invalidate the security on lands, and leave the contract valid; but it leaves in such cases the statute of Anne untouched, and consequently, the contract being invalid, not only are the securities on land avoided, but also any personal securities, whether bonds or bills of exchange, are likewise avoided; confirming *Hodgkinson v. Wyatt* and *Fussell v. Daniel*, and overruling the recent equity cases to the contrary—*Ex parte Warrington*, cited in *Lane v. Horlock*. *Langton v. Haynes*, 25 Law J. Rep. (n.s.) Exch. 319; 1 Hurl. & N. 366.

There had been a loan of money on the security of bills, which bills being unpaid, others for a larger amount (including the interest due on the first set) were taken in their stead and were discounted, and discounted at usurious interest, and on this second occasion a warrant of attorney was taken, on which judgment was instantly entered up and registered, so as to become a charge on land under the 1 & 2 Vict. c. 110:—Held, that the lender of the money was entitled to enforce his security against the land, as the circumstances under which it was given did not render it void under the 2 & 3

Vict. c. 37. s. 1. *Lane v. Horlock* (House of Lords), 25 Law J. Rep. (n.s.) Chanc. 253; 22 Law J. Rep. (n.s.) Chanc. 985.

The plaintiff advanced money in 1853 at usurious interest, upon a bill of exchange at six months' date, and secured by a judgment. The bill was renewed from time to time until January 1856. The borrower became bankrupt in December 1855, and a suit was instituted for the purpose of having it declared that the freehold and leasehold property of the borrower was bound by the judgment, and ought to be sold in order to satisfy the amount due to the plaintiff:—Held, that the judgment was a security upon land, and could not be enforced upon the freehold and leasehold property. Bill dismissed, but without costs. *Bond v. Bell*, 27 Law J. Rep. (n.s.) Chanc. 233; 4 Drew. 157.

VACCINATION.

[Further Provision for the Practice of Vaccination in Ireland made by 21 & 22 Vict. c. 64.]

VAGRANT ACT.

The Vagrant Act, 5 Geo. 4. c. 83. s. 5, subjects to imprisonment every person being found in or upon any dwelling-house, &c., or in any inclosed yard, garden, &c., for any unlawful purpose; every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony. The commitment stated that the said Thomas Cross, then being a suspected person and reputed thief frequenting the public streets and places of and in the said city, then and there was found in Railway Place, being a public thoroughfare and one of the places of public resort of and in the said city, with intent feloniously to steal, &c.:—Held, that the commitment was not bad in stating that the prisoner was "found" in a place of public resort, instead of alleging that he was "frequenting" such place. *In re Cross*, 26 Law J. Rep. (n.s.) M.C. 28; 1 Hurl. & N. 651.

A conviction under the Vagrant Act, 5 Geo. 4. c. 83. s. 4, alleged that the defendant being a suspected person, on &c., at the railway station in the parish of D, the same being at the time a place of public resort, did frequent the platform of the said station with intent to commit felony:—Held, that it sufficiently appeared that the platform was a place of public resort, and that the conviction was, therefore, good. *Ex parte Davis*, 26 Law J. Rep. (n.s.) M.C. 178.

The appellant having been summoned before Justices under the Vagrant Act, upon the charge of wilfully refusing or neglecting to maintain his wife, repaid the parish officers the sum they had advanced to his wife, and undertook to pay her 12s. a week for her future support. This allowance the appellant did not pay, and he was a second time brought before Justices on a similar charge. On the hearing, the appellant offered to maintain his wife if she

would come and live with him, but this she refused to do, alleging that he had assaulted her and ill-used her, and that she was afraid to live with him. This the appellant denied, and expressed his willingness to repay any sums already advanced to her by the parish officers and to pay the costs of the hearing, but he declared himself not liable to pay any future advances, as he was willing to provide a house for his wife to live with him in, and he would undertake to treat her kindly and properly. The Justices convicted the appellant of the offence charged:—Held, upon a case stated from the Petty Sessions, under the 20 & 21 Vict. c. 43, that the facts did not shew that the appellant had been guilty of a wilful refusal or neglect within the Vagrant Act (5 Geo. 4. c. 83), and that the conviction, therefore, was invalid. *Flannagan v. the Overseers of the Poor of Bishopwearmouth*, 27 Law J. Rep. (N.S.) M.C. 46; 8 E. & B. 451.

A private house in which a sale by public auction is held, is for the time a place of public resort within the meaning of the Vagrant Act, 5 Geo. 4. c. 83. s. 4. *Snell v. Taylor*, 29 Law J. Rep. (N.S.) M.C. 50.

VENDOR AND PURCHASER.

[See INCUMBERED ESTATES.]

- (A) CONTRACTS AND CONDITIONS OF SALE.
- (B) TITLE.
- (C) LIEN OF VENDOR.
- (D) PURCHASER.
 - (a) *Rights and Protection of.*
 - (b) *Liabilities and Duties.*
 - (c) *Conveyance to.*
- (E) COSTS.

(A) CONTRACTS AND CONDITIONS OF SALE.

The purchaser of real estate is not entitled to compensation for the loss of his bargain where the vendor, though he could not make a title, had reasonable grounds for supposing, and did suppose, that he could when he contracted to sell. *Pownett v. Fuller*, 25 Law J. Rep. (N.S.) C.P. 145; 17 Com. B. Rep. 660.

The defendant having an agreement in writing, but not under seal, whereby C. let to him the right of shooting over a manor for four years, contracted to sell such right to the plaintiff:—Held, that the defendant had reasonable grounds for supposing that he could make a good title. *Ibid.*

The plaintiff having discovered the defect in the defendant's title, prepared a grant of the right, with covenants for title, which the defendant offered to execute, but the plaintiff, having discovered that C. objected to the defendant underletting, refused to accept it:—Held, that the plaintiff could not recover from the defendant the costs of preparing that deed, nor of subsequent futile negotiations to obtain C.'s consent. *Ibid.*

An estate, described in the particulars of sale to be land-tax redeemed, was sold, in 1856, subject to a condition "that every deed dated more than ten years ago should be conclusive evidence of everything recited or stated therein." In the witnessing part of a deed of conveyance, dated in 1844, and

which formed part of the title, the purchase-money was acknowledged to have been received by M, the then vendor, from H, the then purchaser, "in full for the absolute purchase of the premises, and the fee simple and inheritance thereof in possession, free from land-tax and all other incumbrances":—Held, that this was not a direct recital of the fact that the land-tax had been redeemed so as to bind the purchaser under the above condition. Held, also, that a statutory declaration by M. made in 1844, "that to the best of his knowledge and belief no land-tax had ever been paid for or in respect of the freehold subsequently to the purchase or redemption thereof in or about the year 1799," left it doubtful whether the land-tax had ever been redeemed. The proper evidence that the land-tax had been redeemed would have been the certificate of the Commissioners, or a copy of the register. *Buchanan v. Poppleton*, and *Poppleton v. Buchanan*, 27 Law J. Rep. (N.S.) C.P. 210; 4 Com. B. Rep. N.8. 20.

Semle—that a purchaser who has dispensed with proof of title earlier than a given date, is not entitled to be furnished with an abstract of such earlier title. *Ibid.*

A purchaser may rescind a contract for the purchase of an estate within a given time, if the vendor within the time fixed refuses to remove the objections to the title. *Not v. Riccard*, 25 Law J. Rep. (N.S.) Chanc. 618; 22 Beav. 307.

A condition of sale limiting the inquiries which a purchaser shall make must be strictly and substantially complied with. *Ibid.*

Leaseholds were sold under special conditions of sale, which provided that possession under the lease should be conclusive evidence of performance or waiver of any breach of covenant up to the completion of the sale; there had been an omission to keep up the policy of insurance against fire before the sale, and the policy existing at the sale was allowed after the sale to drop for a few days:—Held, that the conditions of sale were notice that breaches of covenant might then exist, and that they must be considered as waived. *Howell v. Kightley*, 25 Law J. Rep. (N.S.) Chanc. 868; 21 Beav. 831.

Held, also, that the breach of covenant after the sale was not provided for by the condition, and that a purchaser was not bound to take the title. *Ibid.*

In a contract for sale of land the vendor, being a tenant for life with a proviso against alienation, agreed to apply for an act of parliament to enable him to convey: the Court refused, upon demurrer, to stop a suit for specific performance on the ground that the act of parliament had not been yet obtained. *Devenish v. Brown*, 26 Law J. Rep. (N.S.) Chanc. 23.

The particulars of sale described the subject of the sale as the interest, if any, of F N. The vendor knew at the time that the interest sold was of no value, and he made no representation as to the value. The purchaser purchased, with notice that the subject of sale might be of no value, but without any means of ascertaining whether it was of any value or not. Upon a bill filed by the purchaser, the Court ordered the sale to be set aside, and the purchase-money refunded, with interest and costs. *Smith v. Harrison*, 26 Law J. Rep. (N.S.) Chanc. 412.

The owner of a piece of arable land lying in a common field surrounded by land belonging to other persons, and to which arable land there was no apparent road or footway, contracted to sell the land, no mention of a right of way being made in the contract. The purchaser required a right of carriage or road-way, and a good title to such way to be shewn, in default of which he refused to complete. The vendor filed a bill for specific performance, which was decreed by one of the Vice Chancellors; but, upon appeal, —Held, that such a contract could not be enforced against the purchaser without proof of right of way; and unless the plaintiff elected to take an inquiry as to the existence of such right, the bill must be dismissed. *Denna v. Light*, 26 Law J. Rep. (n.s.) Chanc. 459.

The plaintiff purchased at an auction a house and premises, which were the subject of one lease; there were stables, &c. attached, accessible only from the premises purchased, but which had been built upon a piece of land, comprised in the lease of the land upon which the adjoining house was built: these adjoining premises were also sold at the same auction to a different person, they being described as in the occupation of A B, who, in fact, was tenant of this house only. An abstract was delivered to the plaintiff, but he did not discover that the stables were not included in it, and he took a conveyance of the house and premises comprised in the one lease only. The stables, as being upon the land in the second lease, were assigned to the purchaser of the adjoining house. Upon a bill by the purchaser of the first house, —Held, by the Master of the Rolls, that the contract could not be rescinded, that the assignment could not be rectified, and that no ground existed to ask for compensation; but upon appeal, relief was decreed against the purchaser of the adjoining house, and the bill was dismissed as against the vendor. *Leuty v. Hillas*, 27 Law J. Rep. (n.s.) Chanc. 534; 2 De Gex & J. 110.

A vendor has duties inseparable from that character which he is bound to perform, and cannot avoid by restrictive conditions of sale. A vendor is not justified in rescinding a contract under a restrictive condition of sale reserving that power, when he has not answered the purchaser's requisitions, or made an attempt to answer the objections to the title. *Greaves v. Wilson*, 27 Law J. Rep. (n.s.) Chanc. 546; 25 Beav. 290.

Upon a sale by auction, the property sold was described as a leasehold ground-rent of 50*l.* per annum, amply secured on certain houses producing a rental of 250*l.* let on a lease for the whole term at 82*l.*, held under two leases direct from the original lessor for an unexpired term of twenty-six years, at ground-rents amounting to 32*l.* The purchaser objected to complete, because the ground-rent was not amply secured, and the nature of it was not sufficiently set out:—Held, that as the facts stated in the particulars were sufficiently explicit to lead to inquiry, and as, by the conditions, inspection of the documents was offered previous to the sale, the purchaser could not plead ignorance of what he might have made himself acquainted with, and the purchase must be enforced. *Smith v. Watts*, 28 Law J. Rep. (n.s.) Chanc. 220; 4 Drew. 338.

A contract for sale, by the defendants to the plaintiff, of an advowson was entered into, subject

to conditions of sale, one of which provided that if any objections and requisitions should be made which the vendors were unable or unwilling to comply with, the vendors might, notwithstanding any treaty or discussion in reference thereto, or any attempt to remove or comply with the same, annul the contract, without payment of costs. After the purchaser had accepted the title, disclosed in an abstract delivered to him by the vendors, and his solicitor had sent to their solicitor a draft conveyance for the vendors' approval and execution, the purchaser's solicitor, upon a search at the office of Queen Anne's Bounty, discovered that the rectory was subject to a mortgage or charge payable to Queen Anne's Bounty, of which upwards of 600*l.* then remained undischarged. The vendors having refused to comply with the requisition that compensation should be made in respect of the deterioration of the value of the advowson by reason of the charge on the benefice, and insisting upon their right to rescind the contract according to the terms of the condition of sale, the purchaser filed his bill for specific performance of the contract with compensation. One of the Vice Chancellors made a decree for specific performance, but without compensation, and ordered the plaintiff to pay the costs of the suit; and, on appeal, the Lords Justices affirmed the decision in all respects, and the appeal was dismissed, with costs. *Edwards-Wood v. Marjoribanks*, 28 Law J. Rep. (n.s.) Chanc. 298; 3 De Gex & J. 329; 1 Giff. 384: affirmed 7 H.L. Cas. 806.

A vendor put up for sale "the absolute reversion to the sum of 2,000*l.* consols," with conditions that any objections to title should be made within ten days after delivery of the abstract, and that the vendor, in case he should be either unable or unwilling to meet any objection that should be raised, might rescind the contract upon return of the deposit without interest or costs. The vendor filed a bill for specific performance, and the case came on upon motion for a decree:—Held, that notwithstanding the expiration of the time allowed for making objections to title, the purchaser was entitled to raise objections in respect of matters not disclosed upon the face of the abstract, which he had subsequently discovered, and which would render the title bad or doubtful. *Wards v. Dixon*, 28 Law J. Rep. (n.s.) Chanc. 315.

Held, also, that the vendor could not rescind the contract under the condition without first dismissing his bill, with costs. *Ibid.*

The Court refused the motion for a decree, with costs. *Ibid.*

Freehold property, in a manufacturing town, consisting of a dwelling-house and factory, in the latter of which was a steam-engine with boilers, was put up to sale by auction, and in the particulars of sale was described as being "well supplied with water," one of the conditions of sale providing for compensation in the case of error or misstatement. Immediately after the sale the purchaser discovered that the only supply of water was obtained from a company in the town, at an annual charge of 23*l.* Hereupon he claimed compensation, which the vendor resisted; and on a motion before one of the Vice Chancellors, his Honour was of opinion that it was the purchaser's business to have inquired into the water supply, and that he was not entitled to

compensation, on the ground of misdescription; but, upon appeal,—Held, reversing this decision, that the description in the particulars was calculated to mislead by inducing a belief that there was a well or stream upon the premises, and was thus materially inaccurate; and that the purchaser was entitled to be relieved from his contract, or to have compensation, at the election of the vendors. *Leyland v. Illingworth, ex parte Walker*, 29 Law J. Rep. (N.S.) Chanc. 611.

An estate was put up for sale by auction and bought in, as the biddings did not reach the price fixed by the Court. The auctioneer, before he left the desk, made known the reserved price, and a person who had been present at the sale agreed to become the purchaser at that sum; he, accordingly, signed the bidding paper and paid the deposit:—Held, that the sale was good; and that he could not dispute the sale or the contract, or repudiate the purchase. *Eles v. Barnard, ex parte Courtauld*, 29 Law J. Rep. (N.S.) Chanc. 729; 28 Beav. 228.

Bill filed by a purchaser to rescind a contract, the plaintiff alleging that he had been induced to enter into it by fraud and misrepresentation. It appeared that the advertisement out of which the contract arose was of the sale of six houses, total rental £31. 6s. per annum, lease about seventy-five years, at a moderate ground rent of 50l. a year; but what the plaintiff, who agreed to give 420l. for the property, found himself liable to take was an under-lease of the houses at a rent of 50l. The Lord Chancellor, reversing the order appealed from, dismissed the bill without costs, being satisfied that though there was a misdescription of the property, there was no such substantial misrepresentation as called upon the Court to exercise its jurisdiction. *Bartlett v. Salmon*, 6 De Gex, M. & G. 33.

A house was, stated in particulars of sale to be "in the occupation of the C J Company under a lease." The company were in occupation by virtue of a lease which, however, had not been granted to them but to A B and C, who were their trustees. The vendor's solicitor, immediately before the sale, told the purchaser that he did not remember the names of the lessees, but believed that A and B were two of them. The purchaser objected to the title on the ground that the above statement in the particulars amounted to a representation that the company were the lessees:—Held, that assuming the statement to be such that if the case had stood on the particulars only the contract ought to have been rescinded, the purchaser having bought with the above information, must be held to his bargain. *Farbrother v. Gibson*, 1 De Gex & J. 602.

One of the conditions at an attempted sale by auction under a decree provided that the purchase should be completed on a day named, and that if from any cause whatever the purchase-money should not then be paid, interest should be paid from that date. The purchase was by private contract subject to the conditions of sale, and also subject to the purchase being approved by the Court. The purchase-money was a fund in court, and after a long delay the conveyancing counsel approved of the title for the purchasers:—Held, that neither party being to blame for the delay, the purchasers could not be relieved from their obligation to pay interest. *Tewart v. Lawson*, 3 Sm. & G. 307.

Where a house was described as substantial and convenient, and having five bed-rooms; on a bill for specific performance,—Held, that this was no misdescription, although the house was out of repair, and the walls in some places were only half-brick thick, and some of the bed-rooms extremely small inner rooms and without fire-place. *Johnson v. Smart*, 2 Giff. 151.

By the conditions of sale, the title-deeds were to be delivered to "the purchaser of the largest lot." A purchased the largest lot in value and extent, but B purchased several lots whose aggregate value and extent exceeded those of A's lot:—Held, that A was entitled to the custody of the deeds. *Scott v. Jackson*, 21 Beav. 110.

On the sale of a copyhold manor, it was stated that the "fine was two years' improved value." The 8th condition enabled the vendor in case of any objection to title to rescind, and the 11th condition provided for compensation in case of mistake or error. The abstract was delivered and no objection was taken to the title, within the time prescribed for that purpose. Subsequently some doubt arose as to whether the fine was of one or two years' improved value. —Held, that (so far) the plaintiff was entitled to specific performance with a compensation; but the purchaser having afterwards raised a question as to title, and filed a bill for specific performance, the vendor on the same day gave notice to rescind. Held, that although the objection as to title was waived at the bar, the vendor had a right to insist on the contract having been rescinded, and the bill was dismissed. *Hoy v. Smythies*, 22 Beav. 510.

Special conditions of sale are construed more strictly against the vendor. *Ibid.*

By the 8th condition of sale a vendor reserved a right to rescind, in case of objection to title, &c.; and by the 11th, misdescriptions were not to annul the sale, but be the subject of compensation. *Semble*—that the 8th condition did not apply to cases of misdescription within the 11th condition. *Ibid.*

Agreement for the sale of a lease "with possession on the 1st of December, the rent to commence at Christmas." Possession was not given until the 31st of January, through the default of the vendor:—Held, that the purchaser was entitled to compensation, and an inquiry was directed. *Geddes v. the Duke of Montrose*, 26 Beav. 46.

Where conditions of sale fix periods for delivery of the abstract and the completion of the purchase, and provide that interest shall run "if from any cause whatsoever" the purchase should not be completed, the purchaser must pay interest from the time fixed, though the completion is delayed beyond the time specified, in consequence of the state of the title, if there be no fraud or wilful delay on the part of the vendor. *Vickers v. Hand*, 26 Beav. 630.

By conditions of sale the abstract was to be delivered before the 18th of February, the purchaser was to take the rents from the 25th of March, and the purchase was to be completed on the 24th of June: and if from any cause whatever the completion should be delayed after that time, the purchaser was to pay interest at 5l. per cent. Imperfect abstracts were delivered, and a complete abstract was not delivered until the 17th of June. Further delay having occurred in completing, the purchaser deposited the purchase-money at a banker's, and

gave notice in August that he would pay no interest:—Held, that as there was no fraud or wilful delay on the part of the vendors, and as the delivery of an imperfect abstract arose simply from the state of the title, the purchaser must pay interest. *Ibid.*

The case of *De Vieme v. De Vieme* (1 Mac. & G. 336, and 19 Law J. Rep. (n.s.) Chanc. 52.) overruled. *Ibid.*

Where conditions of sale are not drawn *bond fide*, but are intended to cover difficulties arising from facts uncommunicated, they will not preclude the purchaser from taking the objection. *Jackson v. Whitehead*, 28 Beav. 154.

A testator having a leasehold bequeathed his residue to his widow for life, and afterwards to two trustees for sale; he appointed his widow and the two trustees his executors. The widow remained in possession twenty-three years, and after her death the executrix of the surviving trustee sold the property subject to a condition of sale, that the purchaser should admit the assent of the executors to the bequest of the leaseholds to the trustees:—Held, that such a condition was valid, although the vendor did not state that the administration *de bonis non* claimed to have the power of selling. *Ibid.*

The plaintiff agreed to sell the defendant an orchard, describing it as being in the "occupation of L P," and that the purchaser should have "possession" on the day appointed for completion:—Held, that "possession" did not mean "personal occupation"; and a decree for specific performance was made against the defendant, although the plaintiff was unable, by reason of L P's tenancy, to put him in actual occupation of the premises. *Lake v. Deen*, 28 Beav. 607.

(B) TITLE.

A title to an estate, which is dependent on a question of fact, which it is impossible to regard as reasonably certain, cannot be deemed a good and sufficient title as between vendor and purchaser; and the latter, when such is the case, is entitled to treat the title as insufficient, and to recover back his deposit-money. *Simmons v. Haseltine*, 28 Law J. Rep. (n.s.) C.P. 129; 5 Com. B. Rep. N.S. 554.

The plaintiff, who was a purchaser of certain tenements, brought an action to recover back his deposit-money, on the ground that the defendant, who was the vendor, had failed to make out a good title, because he had previously sold by auction part of such tenements to one D. The defendant had sold by auction other premises to D; and the question at the trial, upon which depended the ability of the defendant to make out a good title, was, whether this part of the tenements was included in the sale to D. As to this, the evidence was conflicting; the defendant's witnesses stating that the particulars of sale (which otherwise included this part) were so altered as to exclude it, and that the alteration was publicly mentioned by the auctioneer before D bought; and the plaintiff's witnesses stating the contrary. The jury, disbelieving the defendant's witnesses, found for the plaintiff. The Court refused to disturb the verdict, as, at all events, it shewed that the defendant's ability to make a good title depended on a doubtful question of fact, and therefore the plaintiff was entitled to recover back his deposit-money. *Ibid.*

Semble—that where in such action the ability of

the vendor to make out a good title arises only upon the construction of a deed, the Court will not consider whether the title be of a doubtful kind, such as a Court of equity would not compel a purchaser to take, but will simply determine whether the vendor has a good title or not. *Ibid.*

A mortgage in fee contained a power of sale to the mortgagee, his heirs, executors, administrators or assigns. The mortgage was transferred and the transferee died intestate. The administrator of the transferee contracted to sell the estate, and procured a conveyance of the legal estate from the heir of the intestate, upon trust for the personal representatives for the time being of the intestate, and to be disposed of as they should direct:—Held, affirming a decision of one of the Vice Chancellors, that the vendor could make a good title. *Salway v. Strawbridge*, 25 Law J. Rep. (n.s.) Chanc. 121, 7 De Gex, M. & G. 594; 24 Law J. Rep. (n.s.) Chanc. 393; 1 Kay & J. 371.

E D, by will, appointed R S D and T T R trustees and executors of her will, and she gave to them and the survivor 2,000*l.* upon trust to invest it and pay the produce to her daughter for life, with remainder to her children; and in default of children or descendants of a child who should attain a vested interest, in trust for R S D. She also gave her residuary real and personal estate, "subject to the payment of her debts and legacies," to R S D absolutely. R S D died; and T T R, by a deed which recited that all debts and legacies had been paid, conveyed the testatrix's real estate to the devisees of R S D. The plaintiff purchased the rectory of J; and on a re-sale the conditions provided "that if from any cause whatever the purchase-money was not paid at the time appointed interest should be payable." It was objected, that there was no proof that the debts and legacies were paid, and it was found that the 2,000*l.* had not been duly invested; but after some delay and expense, the objection was removed. Upon the vendor claiming interest upon the purchase-money:—Held, that the devisees made a good title to the vendor, without proving that the debts and legacies were paid as stated by the recital in the deed conveying the estate to them, and that a purchaser from them was not bound to make inquiries into the payment. Held, also, that the fact of proving the payment of the debts and legacies did not dispense with the conditions of sale; but that the vendor was entitled to interest upon the balance of the purchase-money. *Storry v. Walsh*, 27 Law J. Rep. (n.s.) Chanc. 338.

A conveyance to I, dated in 1797, reciting earlier deeds, was missing, but an entry of the execution of it appeared in the books of a deceased solicitor. It was held, that, as to the earlier deeds, if they did not cast reasonable suspicion on the title, no objection could be raised on account of their absence; and, further, that the purchaser was not entitled to have the solicitor's books delivered up to him. *Moulton v. Edmonds*, 29 Law J. Rep. (n.s.) Chanc. 181; 1 De Gex, F. & J. 246.

I, being seized in fee in 1797, afterwards became bankrupt. A conveyance in 1815 from the assignees of I, and certain mortgagees, recited several deeds affecting the property, the greater number of which were missing. The vendor produced an old abstract of the missing deeds, from which it was

mid the deed of 1815 was drawn; and it was held that the recitals in the conveyance of 1815, coupled with the production of the abstract, were sufficient secondary evidence of the missing deeds. *Ibid.*

E K, a tenant for life under a settlement, had a power to release the settled estates from charges, and to substitute other lands, and subject them to the charges, with the consent of the two trustees of the settlement, "to be signified by some deed to be duly executed by them respectively, and not otherwise." E K contracted to sell part of the settled estates called M to O, and he conveyed the same to him by deed, to which the two trustees were made parties, for the purpose of signifying their consent to the charges being transferred to other lands, in exoneration of M. In fact, this deed was executed by one trustee, under a power of attorney, dated six weeks after the date of the deed, and by the other trustee nine months after the same date. O contracted to sell the land called M to H, who objected to the title on the ground that the power of substitution in the settlement was not well exercised. O filed a bill to enforce specific performance, and produced an affidavit shewing that both the trustees had seen the draft of the deed before its execution, and were acquainted with and had consented to its contents:—Held, upon appeal, affirming a decision of the Master of the Rolls, that the due execution of the power had been sufficiently shewn, and that the purchaser must accept the title. *Offen v. Harman*, 29 Law J. Rep. (N.S.) Chanc. 307; 1 De Gex, F. & J. 253.

H, the purchaser, also objected that the vendor did not hand over three of the title-deeds, nor offer to covenant to produce them, but the Court held (also affirming the order at the Rolls), that, as in this case the deeds in question were only collateral to the title, and as the purchaser had inspected the three deeds, and had been furnished with attested copies of two of them, and had had an undertaking that an attested copy of the third should be produced, he must complete the purchase. *Ibid.*

An executrix, being also a devisee in trust to sell, and to divide the clear proceeds between herself and two others, with power to give receipts, married, and, with the concurrence of her husband, sold the estate:—Held, that she and her husband were capable of making a good title to the purchaser, notwithstanding there were judgment debts registered against her husband, and still unsatisfied. *Drummond v. Tracy*, 29 Law J. Rep. (N.S.) Chanc. 304; Johns. 608.

A satisfied equitable charge should be communicated to the purchaser, though it may not be necessary that it should appear upon the abstract. *Ibid.*

A vendor, after recognising an objection to the title, and undertaking to remove it, is by his conduct precluded from insisting that the objection is untenable. *Aston v. Wood*, 3 Sm. & G. 436.

Vendors who by their contract bind themselves to make out a good title to all the lands included in the contract, but were unable to shew a title to 1-330th part, not necessary to the enjoyment of the other parts included in the contract, which provided for compensation for errors in dimensions in the land, the bill averring that they could make title to all the lands sold, seeking performance as to all:—Held, that it was not competent to the vendors at

the hearing to seek specific performance with compensation. *Ibid.*

Devise to trustees and the survivor of them, and the heirs and assigns of such survivor, upon trust to sell, the surviving trustee having devised the trust estates to persons who sold and who filed a bill to enforce specific performance of the contract to sell. *Seem*—that the legal estate and trust to sell passed by the devise; but, held, that there was sufficient doubt upon the point to prevent the Court from forcing the title upon the purchaser. *Aston v. Wood*, 3 Sm. & G. 436.

A purchaser of real property, the title to which is derived under a will, is not entitled to have the will established or to have the concurrence of the testator's heir in the conveyance to him, unless some reasonable ground exists for doubting the validity of the will. *McClulloch v. Gregory*, 3 Kay & J. 12.

Where plaintiff and defendant claim leasehold under the same instruments, and defendant purchases the plaintiff's share, he cannot object that the lessor's title is not shewn. *Phipps v. Child*, 3 Drew. 709.

A defendant admitting by his answer that at the date of the contract the plaintiff was entitled, cannot at the hearing object that no abstract was delivered and no title shewn. *Ibid.*

I. A title more than sixty years old commenced by a general devise; a deed more than sixty years old recited the seisin of the devisor:—Held, that that coupled with the continued possession was sufficient evidence of seisin. *Parr v. Lovegrove*, 4 Drew. 170.

II. A title is first shewn when the abstract states all the matters which, if proved, make a good title. A title is made when the matters are proved. *Ibid.*

III. Where a title commenced by a general devise, and seisin only proved, as stated in Proposition I., and there was ground to assume that the vendor had deeds earlier than those on the abstract,—Held, the purchaser was entitled to inspection of those deeds if in the vendor's possession; but not to have them on the abstract. Whether a purchaser is generally entitled to inspection of deeds earlier than a sixty years' title—*quære*. *Ibid.*

Though the Court may entertain a strong opinion in favour of the title of a party, if it were a contest between him and another claiming title, that is not sufficient in a suit for specific performance. To force a title on a purchaser, the opinion of the Court must be so clear that it does not apprehend that another Judge would form a different opinion. *Rogers v. Waterhouse*, 4 Drew. 329.

On the purchase of an underlease, it is not a valid objection to the title that the underlease may become forfeited by the non-performance of the covenants in the original lease. *Hayford v. Criddle*, 22 Beav. 477.

A title depending on the validity of a purchase by a solicitor from his client forced on an unwilling purchaser, on proof of the validity of the transaction, though given in the absence of the client. *Spencer v. Topham*, 22 Beav. 573.

Prima facie taking possession after an abstract has been delivered, and not in pursuance of any provision in the contract, is a waiver of the objections appearing on the abstract, and it lies on the purchaser to rebut that presumption. *Bown v. Stenson*, 24 Beav. 631.

A purchaser had taken possession by his tenant, and not under the contract, after an abstract had been delivered, and he had made no objection to the title till long after, when a suit was threatened, and he had promised payment of part of the purchase-money:—Held, that by his conduct and on the correspondence, he had waived all objections to the title arising on that abstract; but, held, secondly, that he had not waived any objection not arising on the abstract. *Ibid.*

A copyhold was devised to trustees for certain persons, who after the testatrix's death sold it, and the purchaser was admitted on the surrender of the customary heir:—Held, that although the purchaser had thus obtained both the legal and equitable title, still to make a good title there must be a release from the trustees of their bare right to be admitted. *Steele v. Waller*, 28 Beav. 466.

(C) LIEN OF VENDOR.

Upon a contract for the purchase of real estate, a deposit was paid, and the balance of the purchase-money made payable at a future day, before the arrival of which the purchaser died intestate:—Held, that the lien for such balance upon the purchased estate was not a charge thereon within the meaning of the statute 17 & 18 Vict. c. 113; and that, consequently, the heir-at-law was entitled to have such balance paid out of the personal estate of the deceased purchaser. *Hood v. Hood*, 26 Law J. Rep. (N.S.) Chanc. 616.

Whether a vendor who sells an estate in consideration of an annuity has or has not a lien on the property for the payment of the annuity, must depend upon the circumstances of each particular case. *Dixon v. Gayfere*, 27 Law J. Rep. (N.S.) Chanc. 148; 1 De Gex & J. 655; 25 Law J. Rep. (N.S.) Chanc. 189; 21 Beav. 118.

Where a vendor sold land in consideration of an annuity for three lives, to be secured by a bond, it was held, that he was not entitled to a lien on the land for the annuity or the arrears. *Ibid.*

A firm of solicitors were employed in May 1853 by trustees to sell some copyhold estates. The purchaser also employed them to complete the purchase. They had money of his in their hands, more than sufficient to pay the purchase-money, and the purchaser directed the solicitors to apply it and pay the purchase-money. The purchaser was let into possession in October 1853. In December following the vendors executed a deed of covenant to surrender the estates purchased, and they signed the receipt for the purchase-money indorsed thereon: the title-deeds were retained by the solicitors, who deposited them in a box containing other title-deeds and documents of the purchaser. The steward of the manor was one of the firm of solicitors, and in June 1854 he admitted the purchaser to the land purchased. The purchase-money was not actually paid by the solicitors as directed by the purchaser, but they settled accounts with the vendors, the trustees, and gave them credit for the purchase-money as received by them, and after allowing costs and charges, there was a balance due to the trustees. Four-fifths of this balance were paid to four of the five *cestuis que trust* entitled to the proceeds of the sale. The solicitors retained the other one-fifth in their hands, and upon the remaining *cestui que trust* requiring pay-

ment of his share, the solicitor stated that the purchaser had not paid the purchase-money, and that they had retained the deeds, which the trustees required them to hold as security. The solicitors did not pay the purchase-money, and in February 1856 became bankrupt. Upon a bill by the vendors.—Held, that they were entitled to a lien upon the estate for the balance of the purchase-money remaining unpaid. *Wrought v. Dawes*, 27 Law J. Rep. (N.S.) Chanc. 635; 25 Beav. 869.

A purchaser, between whom and his vendor there were unsettled accounts, agreed to purchase Blackacre, and paid part of the purchase-money, but made no appropriation of the balance due to him by way of satisfaction of the residue, and allowed the vendor to retain the title-deeds, who deposited them by way of equitable mortgage without notice, and afterwards became bankrupt:—Held, that the mortgagee was entitled to priority to the extent of the unpaid purchase-money. *Rayne v. Baker*, 1 Giff. 241.

A trustee purchased an estate on behalf of the trust. The vendor executed a conveyance to the trustee, which recited the trust and that the trustee had called in trust-moneys sufficient to pay the purchase-money, and it contained a receipt for the whole purchase-money. In fact, only part was paid, and the trustee gave his bond and a memorandum of deposit for the deficiency, the latter reciting that the vendor had lent the trustee that sum to enable him to complete:—Held, that the vendor had no lien on the title-deeds in his possession for the unpaid purchase-money. *Muir v. Jolly*, 26 Beav. 148.

(D) PURCHASER.

(a) Rights and Protection of.

Where a person contracts to purchase an estate, and pays the required deposit, and afterwards, from any defect of title or other cause, not the fault of the purchaser, the contract cannot be completed, the purchaser will be entitled to file a bill to establish a lien upon the estate for the amount of his deposit. *Wythes v. Lee*, 25 Law J. Rep. (N.S.) Chanc. 177, 389; 3 Drew. 396.

Where no fiduciary relation exists between persons dealing together as vendor and purchaser, and there is no evidence of fraud, the deed conveying the property to the purchaser will not be set aside, although the consideration was very inadequate, and the vendor was an infirm old man acting without professional advice, and although the deed failed to secure to him the benefits for which he had stipulated, as the consideration for the sale. In such a case the burthen of proof lies upon the party impeaching the validity of the deed. *Harrison v. Guest*, 25 Law J. Rep. (N.S.) Chanc. 544; 6 De Gex, M. & G. 424: affirmed, 8 H.L. Cas. 481.

Semble—the above circumstances would have afforded good ground for rectifying the deed. *Ibid.*

The vendors of an interest in a freehold house, subject to a covenant to insure it against fire, contracted for the sale of the house to a purchaser within a given time. The contract was not completed by the specified time. There was no default on the part of the purchaser, but the vendors did not keep up the insurance after the time at which the contract should have been completed:—Held, that the purchaser ought to be discharged from his con-

tract. *Palmer v. Goren*, 25 Law J. Rep. (n.s.) Chanc. 841.

Upon the sale of a mill or factory, looms used in the mill are not within the words "steam-engines, boilers, shafting, piping, mill-gearing, gasometer, gas-pipes, drums, wheels, and all and singular other the machinery, fixtures and effects fixed up in or attached or belonging to the mill or factory or premises." *Hutchinson v. Kay*, 26 Law J. Rep. (n.s.) Chanc. 467; 23 Beav. 413.

Looms standing upon a loom-foot, from which they may be removed at pleasure, will not pass by the general terms of machinery, though they are worked by steam-power which is attached to the mill and mortgaged with it. *Ibid*.

An assignment for valuable consideration of a reversionary interest in stock carries with it any bonus which may be added between the assignment and the falling of the interest into possession. *Re Armstrong's Will*, 26 Law J. Rep. (n.s.) Chanc. 658; 3 Kay & J. 486.

Distinction between an assignment of a reversionary interest in a sum of stock and a covenant to transfer such a sum on a future day. *Ibid*.

The distinction taken in *Plunkett v. Mansfield*, between money consideration and marriage consideration, disapproved of. *Ibid*.

Vendors contracted to sell land, and the purchasers paid part of the purchase-money and were admitted into possession, but were unable from insolvency to complete the contract. The vendors filed a bill for specific performance, and in default for re-sale. There were at that time registered judgments against the purchasers, but they were not made parties to the suit. The vendors obtained a decree for sale, and the land was sold by auction. A B bought one lot, and required that the judgment creditors should release their interests as they were not parties to the suit:—Held (overruling a decision of one of the Vice Chancellors), that the original purchasers by entering into possession had accepted the title and had become owners in equity of the property, and that the judgment debts of their creditors attached under the 13th section of the 1 & 2 Vict. c. 110. *The Governors of the Grey-coat Hospital v. the Westminster Improvement Commissioners*, 26 Law J. Rep. (n.s.) Chanc. 843; 1 De Gex & J. 531.

Where a mortgage was made to secure a sum of stock, which was for the purpose sold by trustees who had power to give receipts for monies and power to vary securities, the mortgage was held, as between vendor and purchaser, not to be sufficiently discharged on payment of a sum of money to the trustees, the money not appearing to have been again invested in stock or upon security. *Pell v. De Winston*, 27 Law J. Rep. (n.s.) Chanc. 230; 2 De Gex & J. 13.

The vendor of an estate had granted to A B the right to work coals under the property, with a proviso, that when the workings of the coal had finally ceased, the pits should be filled up, and the land restored to a proper state of cultivation. A B ceased to work the mines, and filled in the pits. Upon the sale of the estate A B claimed to be entitled to re-work the coal, and the purchaser therefore claimed compensation: the Court considered that there had only been a temporary cessation to work the coals, and held, that the purchaser was entitled

to compensation, to be ascertained by an expert appointed by the Judge. *Ramsden v. Hurst*, 27 Law J. Rep. (n.s.) Chanc. 482.

A piece of land was advertised for sale. Two adjoining landowners were desirous of purchasing it; they agreed that one alone should attend the sale and purchase, if it should be sold for a sum not exceeding a sum named. If the land was purchased, terms were arranged, and it was to be divided between them. Upon a summons, by the vendors, to set aside the sale,—Held, that the agreement between the purchasers was not contrary to equity; that it did not vitiate the contract; and that the application could not be supported. *In re Carew's Estate Act*, 28 Law J. Rep. (n.s.) Chanc. 218; 26 Beav. 187.

The goodwill of a business comprises all the advantages that may be derived from the purchasers holding themselves out to the public as the persons interested in that business which has been identified with the name of a particular firm. Therefore, though it is well settled that the sale of a goodwill does not imply a contract on the part of the vendor not to set up again in a similar business, he is not at liberty to hold out to the public that he is continuing the same business by using the name of the old firm, even though his own name may be the only one that appeared in that firm. *Churton v. Douglas*, 28 Law J. Rep. (n.s.) Chanc. 841; Johns. 174.

A piece of building land was purchased and several houses erected upon it. The purchaser was afterwards evicted. Under the covenants for title in the purchase-deed,—Held, that the purchaser was entitled to damages, and that the amount must be determined by the sum expended in converting the land to the purposes for which it was purchased. *Bunny v. Hopkinson*, 29 Law J. Rep. (n.s.) Chanc. 93; 27 Beav. 565.

Held, also, that the estate of the vendor was liable to make good the amount, and that legatees under his will must contribute to make up the requisite sum. *Ibid*.

A purchaser offering to perform his part of the contract, required, by notice, the vendor to complete within a month:—Held, that the purchaser could not afterwards set up, as a defence to a suit for specific performance, misrepresentation of the vendor, of which he was aware at the time of giving the notice. *Macbryde v. Weekes*, 22 Beav. 533.

In a suit by a first mortgagee a sale was directed. The subsequent judgment creditors of the mortgagor were not parties. On an objection by a purchaser under the decree,—Held, that the judgment creditors were not bound by the proceedings, and liberty was given to bring them before the Court. *Knight v. Pocock*, 24 Beav. 436.

(b) *Liabilities and Duties.*

J B was tenant for life of the C and the S P estates, and by an agreement, dated the 8th of June 1827, he sold the whole to E B, his eldest son, who was tenant in tail in remainder; and by the same agreement E B contracted to pay off certain debts of J B, and to pay certain annuities. On the 21st of June 1827, E B agreed with T S, the family solicitor, to sell to him the estates, he, T S, agreeing to discharge the debts and to pay the said annuities, and it was agreed that a recovery should

be suffered to bar the entail. The recoveries were suffered in the following November. On the 4th of August 1828 E B died intestate, leaving F B his brother and heir-at-law. On the 23rd of February 1829, and in July 1830, T S effected two mortgages of different parts of the estates. In July 1830, F B filed a bill, against T S, J B and others, to set aside the agreements of the 8th of June and the 21st of June 1827, for fraud. On the 8th of May 1835 a decree was made dismissing the bill as to the agreement of the 8th of June, but setting aside the agreement of the 21st of June for fraud. Accounts were also directed as to the sums paid by T S; and it was declared that upon payment to T S of what should be due to him on taking these accounts, T S should convey to F B the estates free from incumbrances. In November 1833 T S effected a mortgage to G and B of the S P estate. In 1839 J B filed a bill against T S and F B for a specific performance of the agreement of the 8th of June 1827. In November 1847 specific performance was decreed, and it was declared that J B was an incumbrancer in respect of what remained unpaid of the purchase-money. In July 1856, upon the chief clerk's certificate, it was declared that J B's incumbrance was prior to that of G and B, it being considered by one of the Vice Chancellors that the pendency of the suit of F B, at the time the mortgage of November 1833 was effected, gave to G and B notice of the equitable claim of J B upon the estate of T S; but, upon appeal, it was held, that the incumbrance of G and B was prior to the claim of J B. *Bellamy v. Sabine*, 26 Law J. Rep. (n.s.) Chanc. 797; 1 De Gex & J. 566.

The doctrine as to *lis pendens* affecting a purchaser is not founded upon any doctrine of actual or constructive notice, but upon the fact that the law does not allow to litigant parties, and give to them pending the litigation rights in the property in dispute so as to prejudice the opposite party. *Ibid*.

A purchaser of leasehold property is bound to inform himself of the contents of the lease, and cannot avoid specific performance on the ground that it contains an unusual covenant, which was not mentioned in the particulars or at the sale. *Grosvenor v. Green*, 28 Law J. Rep. (n.s.) Chanc. 178.

A young man of the age of twenty-two, being the owner of a reversionary interest in a freehold estate, contingent on his surviving his father and mother, whose respective ages were fifty-four and forty-seven, sold the same by private contract. There was a doubt whether the reversion was in fee or in tail, but no steps were taken to ascertain its market value. Upon the death of the surviving tenant for life, after a lapse of thirty-eight years, the vendor claimed payment of a charge upon the estate, unknown at the time of the purchase, and he instituted a suit to rescind the contract, on the ground of fraud and inadequacy of price, or otherwise to foreclose the equity of redemption:—Held, that a purchaser must, under such circumstances, satisfy the Court by evidence taken at the time of purchase, that the purchase was *bona fide* and for full value; but that in the absence of such evidence the purchase must be set aside. *Salter v. Bradshaw*; *Bradshaw v. Salter*, 28 Law J. Rep. (n.s.) Chanc. 426; 26 Beav. 161.

T being the holder of certain shares in a company, upon which 204. each had been paid up, and being

also entitled to other shares in the same company, upon which 21. each had been paid, instructed his broker to sell the 21. shares. The broker sold the 201. shares, and brought to T for execution by him deeds of transfer in which blanks were left for the name of the transferee, for the number of shares sold, and for the distinctive numbers of the shares. The deeds bore stamps high enough to carry the 201. shares, and were executed in blank by T. The deeds were delivered in this condition, together with the share certificates for the 201. shares, which had been fraudulently obtained by the broker, to ~~bond~~ *bona fide* purchasers, who filled up the blanks. T filed his bill to set aside the deeds, and one of the Vice Chancellors held that they were void, and that T was entitled to the shares expressed to be thereby transferred and to have his name restored to the register, which decision the Lords Justices, on appeal, affirmed. *Taylor v. the Great Indian Peninsula Rail. Co.*, 28 Law J. Rep. (n.s.) Chanc. 255, 709; 4 De Gex & J. 559.

The practice of the Stock Exchange for a broker to deliver deeds of transfer in blank cannot prevail against the rule of law. *Ibid*.

If a party executes a deed as principal he at once takes the property and makes himself liable for the purchase-money, and he will not be heard to say that no contract existed with the vendor, or that his execution was obtained upon the representation of a third party that the purchase-money was paid, and that he took the property in the character of trustee only. *Wilson v. Keating*, 28 Law J. Rep. (n.s.) Chanc. 895; 4 De Gex & J. 388; 27 Beav. 121.

Property was sold as fee-simple under an order of the Court for Relief of Insolvent Debtors, and G became the purchaser. Upon investigating the title, G objected that the interest sold consisted only of an estate for life by the curtesy, for that, although it had been agreed that the property should represent money, yet the conduct of the parties beneficially interested had been such as to reconvert it into real estate so as to make the owner of the reversion in fee a necessary party to convey, and G gave notice that he rescinded the contract. Subsequently, however, G purchased from the reversioner the fee-simple, subject to the life interest, and took a conveyance from him. A suit was instituted by M, the creditors' assignee of the insolvent, for specific performance, making the official assignee (who refused to join as co-plaintiff) a defendant. One of the Vice Chancellors made a decree in favour of the plaintiff for specific performance, allowing G to retain the price he paid to the reversioner, but stating his disapprobation of the use made by G of his contract for purchase to the prejudice of the vendor. Upon an appeal by G,—Held (affirming the decision), that the plaintiff was entitled to specific performance, there being nothing to shew fraud or improper intention on the part of the vendor; and the Court expressed its opinion that the purchase of the reversion having been made by the defendant after he had acquired a knowledge from his contract, was a highly improper act, and ordered him to pay the whole costs of the suit and of the appeal. *Murrell v. Goodyear*, 29 Law J. Rep. (n.s.) Chanc. 425, 298; 1 De Gex, F. & J. 432; 2 Giff. 51.

A purchaser for value without notice from one who claimed under a conveyance obtained by fraud

from the rightful owner, cannot defend himself as against such rightful owner where the person who so claimed was not in possession as apparent owner at the time of the sale to the purchaser for value. *Ogilvie v. Jeaffreson*, 29 Law J. Rep. (N.S.) Chanc. 305; 2 Giff. 353.

The vendor of a manor is entitled to the fines paid for the admission of any new tenants, in the room of the tenants described in the particulars of sale, who may happen to die after the contract, but before the day fixed for the completion of the purchase, although the fines are not, in fact, paid till after that day. *Cuddon v. Tite*, 1 Giff. 395.

The purchaser of a leasehold having paid part of the price without calling for the title-deeds, was held fastened with notice of a mortgage by deposit, which was concealed by the vendor, but not with notice of an equitable mortgage which the vendor had fraudulently effected on the security of a spurious lease of the same property; and the purchaser, having obtained an assignment of the valid mortgage, was declared entitled to hold the property as security for the mortgage debt, and for all monies paid by him on the purchase, and for subsequent improvements. *Hipkins v. Amery*, 2 Giff. 292.

A sold to B (the owner of the adjoining premises) the right of using two chimneys in A's wall. The consideration was paid, and they were used for eleven years, but no grant was executed. C purchased A's house without notice of the right; but there being fourteen chimney-pots on the wall, and only twelve flues in A's house, the Court held, that C was put on inquiry, that he had constructive notice of the right, and was bound by it; and an injunction was granted to restrain him from stopping up the two chimneys. It was also held, that it was not necessary that the bill should pray for a specific performance, and that the absence of a grant was immaterial. *Harvey v. Smith*, 22 Beav. 299.

The rule with respect to the consequence of a purchaser abstaining from making inquiries does not depend exclusively on a fraudulent motive for such abstinence. When the circumstances of a case put a purchaser on inquiry a false answer, or a reasonable answer given to an inquiry, may dispense with the necessity of further inquiry; but where no inquiry has been made, it is impossible to conclude that a false answer would have been given if an inquiry had been made, or such as would have precluded the necessity of any further inquiry. *Jones v. Williams*, 24 Beav. 47.

A real estate belonged to three partners: one retired and conveyed his share to the two others, "subject to all charges and mortgages affecting the same," and the two made an equitable mortgage to the defendants. There were three charges on the property, but the defendants knew of two only, and made no inquiry as to there being more:—Held, that having notice of the terms of the conveyance to the surviving partners, the defendants were bound to inquire whether there was any other charge, and not having done so, that they could not, as against the third equitable charge, insist on being purchasers for valuable consideration without notice. *Ibid*.

It is not generally the duty of a purchaser to inform a vendor of any of the circumstances which may make it desirable for him to purchase. *Dolman v. Nokes*, 22 Beav. 402.

A first mortgagee with power of sale had entered into arrangements, but not a binding contract, for the advantageous sale of part of the mortgaged property. After this he bought up, at a reduced price, the interest of the second mortgagee, without informing him of the arrangements for sale:—Held, that he was not bound to inform the second mortgagee of the opportunity he had of selling; and a bill to set aside the sale on the ground of suppression of information was dismissed with costs. *Ibid*.

As between the vendor and purchaser of a reversion, the purchaser held liable to bear the succession duty payable in respect of it. *Cooper v. Trewby*, 28 Beav. 194.

(c) Conveyance to.

Where a purchaser requires the deed of conveyance to him to be executed by the vendor in the presence of, and to be attested by, his (the purchaser's) solicitor, that requisition ought not to be refused unless there are special circumstances justifying the refusal. *Viney v. Chaplin*, 27 Law J. Rep. (N.S.) Chanc. 434; 2 De Gex & Jo. 468; 4 Drew. 237.

The possession by the vendor's solicitor of the executed conveyance, with the signed receipt for the consideration money indorsed, is not in itself an authority to the solicitor to receive the purchase-money. *Ibid*.

Although a purchaser has not a right in every case to insist upon the vendor being present when the purchase-money is paid, the vendor is not entitled to refuse compliance with a request of this description when circumstances arise which are sufficient to justify it. *Ibid*.

A suit was instituted by a vendor for the specific performance of a contract to purchase an estate which, by deed, dated in 1841, was limited to the use of the vendor for life without impeachment of waste; and after the determination of that estate by any means in his lifetime, to the use of a trustee and his heirs during the life of the vendor, in trust nevertheless for the vendor and his assigns; and after the determination of the estate so limited to the trustee and his heirs, to the only use and behoof of the vendor, his heirs and assigns for ever. One of the Vice Chancellors held, upon objection taken by the defendant, that he was entitled to a conveyance of any interest which might have become vested by forfeiture or otherwise in the dower trustee, but no costs of suit were given to either party up to the hearing. The defendant appealed on account of the decree not giving him costs, and of his having to pay interest from a certain date on his purchase-money. The appeal was dismissed, with costs. *Collard v. Roe*, 28 Law J. Rep. (N.S.) Chanc. 560; 4 De Gex & Jo. 525; 27 Law J. Rep. (N.S.) Chanc. 295.

Semble—that the rule as to there being no appeal on the subject of costs alone is practically not now in force. *Ibid*.

Where a mortgagor contracts to sell the fee simple of the mortgaged estate free from incumbrances, the purchaser, with the concurrence of the mortgagee, is entitled, on procuring a discharge of the vendor from all liability in respect of the mortgage debt, and bearing any extra expense occasioned by his demand, to require a conveyance of the

equity of redemption, so as to keep the mortgage on foot. *Cooper v. Cartwright*, Johns. 679.

An estate was sold in a suit to raise a charge which was paramount to some annuities subsequently charged on the estate. The annuitants, who were parties to the suit, impeached the validity of a re-settlement of the estate intermediate between the charge and the annuities. The conveyance to the purchaser proceeded in some measure on the re-settlement:—Held, that the annuitants were necessary parties to the conveyance, and were bound to join in it, but without prejudice to any rights they might have against the purchase-money in case they should be able to impeach the validity of the re-settlement. *Sullivan v. Sullivan*, 28 Beav. 102.

Trustees had a power of sale over a real estate vested in them, and to give good discharges for the purchase-money. The tenant for life had a power to appoint new trustees, and "thereupon" the trust estate was to be conveyed to the old and new trustees. In 1857 A B was appointed a new trustee, but before any conveyance had been made to him, the estate was sold and conveyed to a purchaser, and the purchase-money was paid to the old and new trustees:—Held, that the purchaser had obtained a good discharge for the purchase-money. *Welstead v. Colville*, 28 Beav. 537.

(E) Costs.

Where, after contracting to sell land, the vendor devises to parties, some of whom are infants at his decease, his estate must bear the costs of the suit which he has thus voluntarily rendered necessary to a completion of the contract; and a mere devise of trust estates does not in such a case avoid the necessity of a suit. *Purser v. Darby*, 4 Kay & J. 41.

Distinction in this respect between suits rendered necessary as above by the voluntary act of the deceased, and those caused by the mere act of God, as where the deceased has died intestate leaving an infant heir. *Ibid.*

The rule which makes the costs of a suit for specific performance depend upon when the title was first shewn, relaxed: 1. Where the requisition was not made until after bill filed; 2. Where, although the requisition was made before bill filed, the non-compliance was attributable to the circumstance of the purchaser having claimed abatement or compensation, in respect of which his bill had been dismissed with costs. *Lyle v. the Earl of Yarborough*, Johns. 70.

Purchase of a reversionary estate tail of a person without issue set aside merely for inadequacy of consideration, there being no fraud or pressure, and with costs, the purchaser having resisted the relief; but he was ordered to pay those occasioned by his unfounded allegations of fraud. *St. Albans v. Harding*, 27 Beav. 11.

When sales of reversionary interests are set aside from mere inadequacy of consideration, it is upon the repayment of the consideration, with interest at the rate of 5l. per cent. *Ibid.*

VENUE.

The common law power of the Court or a Judge to change the venue in an action is not taken away by the 139th section of the Public Health Act, 1848, which requires that in actions against a local board of health for anything done under the act, the venue shall be laid in the county or place where the cause of action arose, and not elsewhere. *The Itchin Bridge Co. v. the Local Board of Health of Southampton*, 27 Law J. Rep. (n.s.) Q.B. 128; *nom. The Southampton and Itchin Bridge Co. v. the Local Board of Health of Southampton*, 8 E. & B. 803 (a).

The usual affidavit on the part of the defendant, on an application to change the venue to the assizes, i. e. that the cause of action arose in the country, and that the parties reside there, and their witnesses, is sufficient, if unanswered. But, *per Martin, B.*, it is answered by the inconvenience arising from the delay of the action until the assizes, unless that is counterbalanced by some advantage on the other side; as, for example, (when the question is only as to amount), the defendant's undertaking to pay money into court. *Gough v. Bertram*, 27 Law J. Rep. (n.s.) Exch. 53.

Where a Judge at chambers has made an order for changing the venue, the Court will not entertain an application to set aside that order, if it appears that the Judge exercised his discretion on the matter, on special facts brought before him on behalf of both parties. *Cartwright v. Frost*, 27 Law J. Rep. (n.s.) Exch. 278; 8 Hurl. & N. 278.

Where the issue in a cause was joined on the 2nd of January, two applications to change the venue having been made to a Judge at chambers on the 21st of December and the 11th of January respectively, and refused, and on the 19th of January a rule *nisi* for the same purpose was moved and obtained,—Held, that the delay and the previous hearings were fatal to the application. *Drury or Ducie v. Hopwood*, 29 Law J. Rep. (n.s.) C.P. 151; 7 Com. B. Rep. N.S. 835.

It is in the discretion of the Court or a Judge at chambers to change the venue in an action of debt, on the application of the defendant when under terms to take notice of trial for a particular sitting; but in such case, and where a Judge at chambers has already refused the application, it is for the defendant to shew special circumstances to induce the Court to exercise such discretion.—Report of the Judges in *De Rothschild v. Schilston* commented on. *Jackson v. Kidd*, 29 Law J. Rep. (n.s.) C.P. 221.

Where a Judge at chambers, on the application of a defendant in a transitory action, has made an order, changing the venue, the Court is not bound by that decision, and on motion will consider the affidavits and decide the case on its merits. But the onus is cast upon the party applying to set aside the order of shewing that the Judge at chambers has wrongly decided. *Schuster v. Wheelwright*, 29 Law J. Rep. (n.s.) C.P. 222; 8 Com. B. Rep. N.S. 883.

In an action, by the owner of a ship against the Mersey Dock and Harbour Board for negligence, whereby the ship was lost, the venue was laid in London. A similar action by the owner of the cargo had been tried at Liverpool, and a verdict found for the defendants. The Judge who tried that cause having, on the defendants' application, refused an

order changing the venue to Liverpool, being of opinion that a fair trial could not be had there, the Court refused to interfere, although the parties and all the witnesses resided there, and a view would be necessary, and great inconvenience and expense would result from a trial in London. *Penhallow v. the Mersey Dock and Harbour Board*, 29 Law J. Rep. (N.S.) Exch. 21.

On an information in the nature of a *quo warranto*, in which the venue was "Liverpool," for exercising the office of councillor of the borough of Liverpool,—Held, that the Court of Queen's Bench had power to order the venue to be changed to Middlesex; and that a suggestion on the record, that the trial of the issue could be more conveniently had in Middlesex than in the county of Lancaster, was sufficient to warrant the verdict by the Middlesex jury, and the subsequent judgment. *Clerk v. the Queen* (Ex. Ch.), 29 Law J. Rep. (N.S.) Q.B. 232.

The Court will not deprive the plaintiff of the right to lay his venue where he pleases, unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to change the venue. *Helliwell v. Hobson*, 3 Com. B. Rep. N.S. 761.

VESTRY AND VESTRY CLERK.

At an election of vestrymen and auditors, under the 'Act for the better local management of the metropolis,' the churchwardens who preside as returning officers may be required to decide upon the legality or illegality of a church-rate, though good on the face of it, and not before questioned; and the churchwardens if they act *bond fide*, though mistakingly, are not liable to an action. *Tozer v. Child*, 25 Law J. Rep. (N.S.) Q.B. 327; 6 E. & B. 289.

To a declaration alleging that at such an election, the defendants being the churchwardens presiding, to whom it belonged to take the votes, and had been requested to receive and allow the votes of the plaintiff, and well knowing the premises, but contriving and fraudulently and maliciously intending to injure the plaintiff and disappoint him of his privilege, had refused to receive his votes, &c., the defendants pleaded, admitting the scienter and not denying the allegation of malice, non-payment by the defendant of a church-rate made in due form by competent authority and good. Replication, that the rate was illegal and void, being made for, amongst other things, defraying expenses and outgoings for which such a rate could not legally be made. Rejoinder, that the rate was good on the face of it, and had not been questioned or adjudged to be illegal by any Ecclesiastical Court or other Court having jurisdiction:—Held, upon demurrer, the plea not denying the allegation of malice, that the replication was a sufficient answer to it, and that the rejoinder was insufficient. *Ibid*.

The effect of 58 Geo. 3. c. 69. and 59 Geo. 3. c. 85, although there are no privative words, is to make rating to the poor-rate the exclusive qualification of voting in all parish vestries. *Richardson v. Gladwin*, 27 Law J. Rep. (N.S.) M.C. 192; E. B. & E. 138.

Where, therefore, the 13 & 14 Vict. c. 99. has been adopted in a parish, the occupiers of small

tenements, not being rated to the poor-rate, although still liable to the church-rate, are not entitled to vote at a vestry held for the purpose of making a church-rate. *Ibid*.

Section 3. of the 58 Geo. 3. c. 69. gives to persons assessed to the last poor-rate one vote for every 25*l*. value, "so, nevertheless, that no inhabitant shall be entitled to give more than six votes"; by section 6. of the 13 & 14 Vict. c. 99. the owner of a small tenement, rated under the act, "shall have the same right to vote in vestry as if he were an occupier duly rated in respect of the same tenement":—Held, that the owner of more than six small tenements, rated under the latter act, was entitled to no more than six votes by force of the proviso in the former act. *Ibid*.

The vestry clerk of a parish, upon his appointment (by the vestry) to the office, was told that it would be part of his duty to collect the church-rate and poor-rate, and to apply them as his predecessor had done. In pursuance of these instructions, and in accordance with a practice which had prevailed in the parish for fifty or sixty years, the vestry clerk applied a portion of the money arising from a church-rate made in the plaintiff's year of office as churchwardens to the payment of certain parochial charges not legally payable out of the church-rate:—Held, that, inasmuch as one of the churchwardens was aware of the manner in which the money was about to be disposed of,—he having previously filled the office of overseer, and also of auditor of the parish accounts,—and did not object, the two were precluded from suing the vestry clerk for this misapplication of the rate. *Cooper v. Law*, 5 Com. B. Rep. 502.

VOLUNTARY SETTLEMENT.

R, a married man, by a deed dated in December 1845, in consideration of 500*l*. expressed to be paid to him by L, his wife's father, settled certain reversionary real estate upon trusts for the benefit of his wife and children, and under a power in that deed the property was sold for 4,300*l*. This sum was afterwards invested in stock, and by a deed of May 1846, the trusts thereof were declared, being trusts corresponding with those of the deed of December 1845. A bill was filed by a judgment creditor of R impeaching the latter deed only:—Held, that the consideration was illusory, and the whole transaction fraudulent and void against creditors; and, reversing the decree below, that it was competent to the plaintiff to impeach the latter deed only, not claiming his lien as a judgment creditor. *Goldsmith v. Russell*, 25 Law J. Rep. (N.S.) Chanc. 232.

Subsequently to the deed of 1846, process of outlawry issued against R:—Held, that this was no objection to the relief sought, as the settlement was valid against R, and, therefore, against the Crown claiming through him. *Ibid*.

After the institution of the suit, R took the benefit of the Insolvent Act:—Held, that this was no bar to the jurisdiction of the Court. *Ibid*.

A voluntary settlement of property, which contained a power to the settlor to revoke the deed, was executed in favour of the settlor's wife and children. The settlor kept the deed in his own possession, and informed no one of its existence up to the time of

his decease, which took place in 1852, when he was in insolvent circumstances. He had large debts at the date of the settlement, some of which still remained due. Upon a bill, filed by a creditor whose debt arose subsequently to the execution of the deed, it was held, that such a deed might be maintained, and inquiries as to the debts were directed. *Jenkyn v. Vaughan*, 25 Law J. Rep. (n.s.) Chanc. 338; 3 Beav. 419.

A debtor executed a voluntary assignment of the greater part of his estate to his sons, the deed being prepared with the concurrence and under the direction of a creditor to a large amount. The debtor appointed this creditor one of his executors, who acted for seven years. The voluntary deed, if good, left the debtor's estate insolvent, and no steps were ever taken by the creditor to impeach it:—Held, overruling a decision of one of the Vice Chancellors, that, there being no evidence of ignorance or mistake on the part of the creditor, the deed was not void under the statute 13 Eliz. c. 5, and could not be impeached by the creditor or any one claiming under him. *Oliver v. King*, 25 Law J. Rep. (n.s.) Chanc. 427; 8 De Gex, M. & G. 110.

A person gave annuities to seven persons, secured on real estate. He afterwards, standing *in loco parentis* to four of these persons, gave other annuities to five out of the seven, secured by covenant and not on land:—Held, affirming a decision of the Master of the Rolls, that the second grant was not substitutionary for the former, and that the objects of it were entitled to both provisions. *Palmer v. Newell and Benham v. Newell*, 25 Law J. Rep. (n.s.) Chanc. 461; 8 De Gex, M. & G. 70; 20 Beav. 32.

F, being at the time unable to meet his engagements, agreed, in writing, to sell his business, stock in trade and fixtures, for a sum of money paid down, and for an annuity to be paid to himself during the joint lives of himself and the purchaser, and for a smaller annuity to be paid to his wife, in case she survived him, during the joint lives of the wife and the purchaser, but with power to F during his life absolutely to dispose of the annuity provided for the wife. F died, leaving his wife surviving, and without having disposed of her annuity. Upon bill by a creditor to set aside the wife's annuity,—Held, reversing the decision of the Court below, that the settlement of the annuity upon the wife was within the mischief of the 13 Eliz. c. 5, and void as against creditors. *French v. French*, 25 Law J. Rep. (n.s.) Chanc. 612; 6 De Gex, M. & G. 95.

If the creditors are delayed by a voluntary settlement the case is within the 13 Eliz. c. 5, even though the settlor may have debts owing to him or reversionary interests, which, if realized or fallen in, would be sufficient to meet all claims upon him. Ibid.

An heir cannot take advantage of the want of consideration to defeat his ancestor's voluntary conveyance *bona fide* executed. *Lewis v. Rees*, 26 Law J. Rep. (n.s.) Chanc. 101.

Money and bank notes, being liable under the 12th section of the 1 & 2 Vict. c. 110, to be attached by creditors, are goods and chattels within the 13 Eliz. c. 5; and therefore a voluntary purchase and settlement of stock by a person in insolvent circumstances out of monies belonging to him, would be held fraudulent and void as against creditors. *Barrack v.*

McCluck, 26 Law J. Rep. (n.s.) Chanc. 105; 8 Kay & J. 110.

By indenture of settlement, after reciting that C J P was indebted in divers small sums not exceeding 208*l.*, C J P, in consideration that W P P would discharge the debts out of his own money, settled his life interest in a sum of 9,000*l.* stock upon trust to apply the income thereof in and towards the maintenance, clothing, lodging and support of C J P, his wife and children, or any of them, or otherwise for their or any of their use and benefit, in such manner as the trustees should in their or his uncontrolled discretion think proper. At the date of the settlement C J P owed other debts besides those mentioned in the deed. There being perfect *bona fides* on the part of W P P,—Held, first, that there was sufficient consideration to support the settlement against the creditors not mentioned in the deed; and, secondly, that there was no such trust for the benefit of C J P as would render any part of the stock liable to the demands of his creditors. *Holmes v. Penney*, 26 Law J. Rep. (n.s.) Chanc. 179; 3 Kay & J. 90.

Persons having had an interest under a voluntary settlement, and still claiming to be *cestuis que trust*, may require the production of that and the other documents depending thereon, though their interest had been revoked by an appointment under a paramount power. *Bugden v. South*, 26 Law J. Rep. (n.s.) Chanc. 425.

A parol agreement by a husband, who was indebted at the time of his marriage, to settle his wife's railway stock after marriage, will not support a subsequent settlement against his creditors, even though he represented to the wife that it would be as good as if made before marriage. *Warden v. Jones*, 27 Law J. Rep. (n.s.) Chanc. 190; 2 De Gex & J. 76; 26 Law J. Rep. (n.s.) Chanc. 427; 23 Beav. 487.

An attorney being in insolvent circumstances, assigned the goodwill of his business in consideration of a sum of money paid down and an annuity secured by bond to be paid to his wife for life, with remainder to himself for life:—Held, that the settlement of the annuity was void as against creditors. *Neale v. Day*, 28 Law J. Rep. (n.s.) Chanc. 45.

C, being in embarrassed circumstances and indebted to H, applied to his mother for a loan of 190*l.*, which she consented to advance, on condition that he would settle real estate, of which he was seised, in trust for himself for life, with remainder to his children. To this he, with great hesitation, consented, and the same was so settled, the mode of doing so being by two deeds: one a mortgage for 400*l.* to his mother, and the other a conveyance of the real estate upon the trusts. No reference was made in either deed to the other. C subsequently became insolvent, and his assignee filed a bill to set aside the settlement; and one of the Vice Chancellors held, that the same was not void under the statute 13 Eliz. c. 5. (against fraudulent deeds), it being executed for value, and no proof being given that it was executed to delay, hinder or defraud creditors, which decision was affirmed by the Lords Justices, on appeal. *Thompson v. Webster*, 28 Law J. Rep. (n.s.) Chanc. 700; 4 De Gex & J. 600; 4 Drew. 628.

To render a deed void as against creditors, it is not sufficient that it is merely voluntary, but it must

be proved that the party making it intended to delay, hinder or defraud his creditors. *Ibid.*

On the question of a voluntary deed being void under the Statute of Elizabeth, all the surrounding circumstances must be looked at, and each particular case must depend upon those circumstances. *Ibid.*

A father having given a voluntary bond to trustees, conditioned for the payment after his death of a sum of money to them for the benefit of his two sons, afterwards, upon the marriages of his sons, assented to such bond being settled upon trust for the benefit of these sons and their respective wives and children. The marriages having taken place upon the faith of the provision thus assented to, one of the Vice Chancellors, in a suit for the administration of the father's estate, held that the trustees of the marriage settlement were entitled to rank as specialty creditors for value, and the *Lords Justices*, on appeal, affirmed the decision. *Payne v. Mortimer*, 28 Law J. Rep. (N.S.) Chanc. 716, 437; 4 De Gex & J. 447; 1 Giff. 118.

The cases of *George v. Milbanke* and *The East India Company v. Clavell* observed upon. *Ibid.*

P B, in 1840, became bankrupt, and did not obtain his certificate, and in 1849 had a grant of leasehold property made to him by the Crown. In the same year he settled that property on his sons and his daughters (then unmarried), and their children, but declared no trust in favour of their husbands. The daughters afterwards married, and one of them had children. C C was a simple contract creditor of P B, on a debt subsequent both to the bankruptcy and the settlement, and he filed a bill on behalf of himself and all other unsatisfied creditors of P B, against the assignees, the trustees of the voluntary settlement, the sons of P B, and the two daughters and their husbands, and the infant children of one of them, to set aside the settlement. One of the Vice Chancellors made a decree in the plaintiff's favour, but considered that the husbands had no present interest, and that the wives and children were mere volunteers. On appeal to the *Lords Justices*,—Held, that the plaintiff had no right to sue, he having no judgment, and not being in process of obtaining any, and their Lordships dismissed the bill, with costs, both of the appeal and of the original hearing. *Collins v. Burton*, 28 Law J. Rep. (N.S.) Chanc. 943; 4 De Gex & J. 612.

In September 1838 two bonds were granted by the Southampton Pier Commissioners to A and his sister, but the money thereby respectively secured was all advanced by A. When the bonds were purchased by A he wrote to his sister, informing her of that circumstance, and saying, "I shall order the said 1,000*l.* (the purchase-money of the two bonds) to be placed in my name and yours." During his life A applied the interest on the bonds for certain charitable purposes, and in letters addressed to his sister in the year 1849 he requested her, after his decease, to apply the interest for the same purposes, adding, in one of those letters, "I know I can depend upon you to fulfil all my wishes with regard to these charitable bequests without including them in my will or any other legal document." There was no undertaking on the part of the sister to hold the bonds upon any trust. A died in 1853, and after his death his sister applied the interest in the manner he had requested her to do:—Held, that as the sister

acquired a property in the bonds by the act of her brother many years before his death, without the creation of any trust, she was entitled to the bonds by survivorship without being subject to any trust. *Wheeler v. Smith*, 29 Law J. Rep. (N.S.) Chanc. 194; 1 Giff. 300.

Where there is a gift of property *inter vivos*, accompanied with the expression of a wish as to the mode of employing it, and at the same time with a declaration that no legal obligation is intended to be imposed, the clear intention is thereby shewn to be that the dominion of the property should remain in the grantee, and the evidence of the want of any consideration moving from the grantee cannot raise a resulting trust. *Ibid.*

The gift of a sum of money, in order that the donee may have ability to subscribe to certain charities, does not amount to a trust in favour of the charities. *Ibid.*

Purchaser for value from the heir not entitled, under 27 Eliz. c. 4. to set aside voluntary conveyance by ancestor. *Lewis v. Rees*, 3 Kay & J. 132.

A settlor by a voluntary settlement assigned a sum of consols standing in his name, and also his money at his bankers', to trustees, upon trust for himself for life, and upon trust after his decease to settle the same, so that his three reputed daughters should receive the income for their lives without anticipation, with trusts over. The stock remained untransferred, and the 8,000*l.* continued at his bankers', in the settlor's name, until his decease, twelve days afterwards:—Held, that the trusts of the voluntary settlement were effectually fastened upon both the consols and money. *Airey v. Hall*, 3 Sm. & G. 315.

A voluntary deed purporting to assign mortgage monies, notes of hand and household effects upon certain trusts, with a power of attorney to the trustees:—Held, to be valid. *Parnell v. Hingston*, 3 Sm. & G. 337.

Aliter in cases where (as in *Dillon v. Coppin*, &c.) there is no actual assignment by deed, and no sufficient declaration of trust. *Ibid.*

The trustee of a voluntary deed under which he is also a *cestui que trust*, having concurred in allowing the settlor to dispose of certain parts of the property:—Held, that he was not entitled to have the relief granted on a bill by one of the *cestuis que trust* extended for his benefit. *Ibid.*

In 1842 the testator executed a voluntary bond, payable after his death, and in 1850 he made a voluntary settlement in favour of other parties. His assets proved insufficient to pay the bond:—Held, that there was not sufficient ground for holding that the deed was fraudulent as against the bond creditors, and that the onus of proving the deed to be fraudulent attached to the obligees of the bond. *Dering v. Ware*, 22 Bear. 184.

By a voluntary settlement the settlor assigned a mortgage, and purported to convey copyholds; he also covenanted for quiet enjoyment and for further assurance. He died without having surrendered the copyholds:—Held, that this Court would not render its assistance to compel the voluntary settlement to be perfected. *Ibid.*

It has long been settled that the trustees and *cestuis que trust* under a voluntary settlement cannot compel the settlor to perform any further act than

he has already done to render such a settlement operative. *Ibid.*

A B made an irrevocable voluntary settlement of his estate in favour, amongst others, of a relative who acted as his solicitor. The Court considered that A B intended to reserve a power of revocation, but that the deed was in other respects unobjectionable. A B made his will, prepared by the same solicitor, making a general devise, but not revoking the settlement. The Court there held, that it was the duty of the solicitor when he prepared the will, specifically to have asked the testator whether he intended to revoke the deed; and not having done so, and it appearing to have been the intention of the testator that the estate should pass to his devisees, the Court decided, that although the deed would have been operative if A B had died intestate, yet that in the events which had happened, and as against all persons claiming under the settlement, the estate was subject to the trusts of the general devise contained in the will. *Nanney v. Williams*, 22 Beav. 452.

On setting aside a voluntary settlement made by a trader while insolvent, in favour of his wife and an infant child, the Court, as to the costs of the trustees and infant,—Held, that the utmost it could do was to make the decree without costs. *Elsey v. Cox*, 26 Beav. 95.

Voluntary gift of leaseholds by a father to his sons in 1835 and 1841 set aside, it being ascertained, on a reference, that at those periods the settlor's debts exceeded his assets. *Christy v. Courtenay*, 26 Beav. 140.

When a voluntary settlement of lands is avoided by a subsequent sale for valuable consideration, the volunteers have no equity against the purchase-money payable to the settlor. *Daking v. Whimper*, 26 Beav. 568.

Bill by purchaser against the vendor, who had previously executed a voluntary settlement of the property, and against the trustees and *cestuis que trust* under the settlement, to have the settlement declared void and delivered up, and for specific performance, sustained, the only objection to the title being the voluntary settlement. *Ibid.*

A B was entitled to 5,000*l.* charged on a freehold. It was secured by the legal estate vested in her, but no one was personally liable to pay it. A B executed a voluntary settlement, by which she assigned the money to trustees, and gave them a power of attorney to recover it; but she retained the legal estate:—Held, that as the money could only be recovered upon a reconveyance of the legal estate to the owner, which the trustees were unable to procure, the voluntary settlement was incomplete, and could not be enforced against the settlor or her estate. *Woodford v. Charnley*, 28 Beav. 96.

Upon a voluntary covenant to surrender copyholds, and in the mean time to stand possessed of them for trustees for the volunteers, though the covenant to surrender *per se* cannot be enforced, yet a valid trust is constituted for the volunteers. *Steele v. Waller*, 28 Beav. 466.

WARRANT OF ATTORNEY.

It is no ground for setting aside a warrant of attorney that the blank for the date had been filled

up since execution, the true date of execution having been inserted. *Keane v. Smallbone*, 25 Law J. Rep. (N.S.) C.P. 72; 17 Com. B. Rep. 179.

WARRANTY.

In an action for a breach of warranty, by the vendee against the vendor of goods, who has warranted them to be of a particular denomination, but not according to sample, it is a proper question for the jury whether the amount of adulteration in the goods supplied be such as to alter their distinctive character. A undertook to supply B with certain parcels of linseed, which he warranted should be "Calcutta linseed," and supplied him with linseed containing 15 per cent. of other seeds. It was proved that "Calcutta linseed," at the time the contract was made, contained usually from 2 to 3 per cent. of other seeds. The jury were asked whether this was such an adulteration or admixture of foreign substances as to alter the distinctive character of the article, and prevent its being saleable as Calcutta linseed; and whether this adulteration was such as might reasonably be expected:—Held, no misdirection. *Wider v. Schilizzi*, 25 Law J. Rep. (N.S.) C.P. 89; 17 Com. B. Rep. 619.

The plaintiff bought of the defendant a cargo of Arracan rice, per Severn, then on her way to Akyab: the cargo to consist of fair average Nicranzie rice, the price to be 11*s.* 6*d.* per cwt., with a fair allowance for Larong, or any other inferior description of rice (if any), but the seller engaged to deliver what was shipped on his account and in conformity with his invoice. The buyer to have the option, agreeably with the terms of the charter-party, of discharging the rice at any good and safe port in the United Kingdom, or on the continent between Havre and Hamburg, both inclusive. The contract to be void provided the vessel made the intermediate voyage between Akyab and Calcutta, agreeably with the conditions of the charter-party. Payment to be made in cash on arrival of the vessel at port of call. There were other provisions as to insurance, &c., and the contract was to be void if the vessel were lost:—Held, that except in the cases in which it was provided that the contract should be void, there was a warranty on the part of the seller that he would ship and bring home a cargo of Nicranzie rice, and that it should be fair average Nicranzie. *Simon v. Braddon*, 26 Law J. Rep. (N.S.) C.P. 198; 2 Com. B. Rep. N.S. 324.

The plaintiff contracted with the defendants for 1,170 bales of gambier, "now on passage from Singapore, and expected to arrive at London, viz. per R 805 bales, per L A D 365":—Held, that this was a warranty that such goods were on board; and the ships having arrived with 1,170 packages of smaller size than bales, the plaintiffs were entitled to maintain an action against the defendants.—Held, also, that evidence was admissible to shew what the word "bales" meant by the custom of the trade. *Gorriaen v. Perria*, 27 Law J. Rep. (N.S.) C.P. 29; 2 Com. B. Rep. N.S. 681.

A number of bales of the proper description sufficient to satisfy the contract actually arrived in the ships, but they were not consigned to the plaintiffs:—Held, that the defendants could not be taken to

have contracted to sell and deliver these bales to the plaintiffs, not having treated them as being goods at their disposal, or expected to arrive consigned to them;—distinguishing *Fischel v. Scott*. *Ibid*.

In an action on a contract for so many tons of pitch pine to arrive per the Ion from Savannah, warranted of a fair average quality (the action being for breach of this warranty), it appearing that pitch pine came from another place as well as from Savannah, but that such as came from that other place was superior to that which came from Savannah, and that the cargo in question was of a fair average quality of Savannah pitch pine, although it was not a fair average of that which came from the other place,—Held, that the contract meant a fair average quality of such as came from Savannah. *Jones v. Clark*, 27 Law J. Rep. (n.s.) Exch. 165; 2 Hurl. & N. 725.

Any defect in the structure of a horse, whether congenital or arising from subsequent disease or accident, that diminishes his natural usefulness and renders him less than reasonably fit for present use, is unsoundness. Convexity in the formation of the cornea of the eye of a horse, making him shortsighted, and so inducing a habit of shyng, is such a defect. *Holiday v. Morgan*, 28 Law J. Rep. (n.s.) Q.B. 9; 1 E. & E. 1.

The sale of an article by sample, but by a particular description, does not necessarily import a warranty, if all the circumstances shew that it was understood as a mere expression of opinion or belief. *Carter v. Orick*, 28 Law J. Rep. (n.s.) Exch. 238; 4 Hurl. & N. 412.

Words having a known natural meaning can have a particular meaning attached to them, as prevailing in a certain trade, only by clear evidence, as a matter of fact, of their general use and acceptance in such meaning. *Ibid*.

The defendant, a corn-dealer, sold to the plaintiff, also a corn-dealer, barley by sample, which he called "seed barley," but which he had himself just purchased by sample, not having seen the bulk, and as the plaintiff knew, being ignorant of what sort it was. It turned out to be an inferior kind of barley, and different from ordinary seed barley. There was no evidence that in the corn-trade the words "seed barley" had acquired a particular meaning, though there was evidence that it had in the locality such meaning:—Held, that there was no evidence of a warranty, nor of a contract for anything else than what the words naturally imported, viz., barley seed which would grow; and such barley having been delivered, that there was no cause of action. *Ibid*.

A cider-merchant, at Cheltenham, sold to the defendant, a publican, in London (to be delivered to him there), a hogshead of cider, warranted "good" and "prime." A hogshead being delivered, it was tapped, and found unfit for use. The defendant at once wrote to the plaintiff that the little he had sold was complained of, and that if it continued to be so, he should have to return it. No notice was taken of this letter for about a month, during which period the defendant was trying to sell it, and found it unsaleable. He then wrote to the plaintiff, proposing to return the hogshead, but the plaintiff refused to assent to this, and sued the defendant for the price. The defendant paid into court the value of the part he had used:—Held, that he was not

liable for the residue; and *semble*, that he was liable for none. *Lucy v. Moulet*, 29 Law J. Rep. (n.s.) Exch. 110; 5 Hurl. & N. 229.

The defendant sent to the plaintiff, the patentee of an invention called "Prideaux's Patent Self-closing Valve," and who carried on business under the name of "The Smoke Prevention Company," the following written order,—“Please prepare us a smoke-preventing valve,” giving the dimensions of the furnace-door to which it was to be applied. The plaintiff accordingly sent the defendant one of his patent self-closing valves, but it was found not to be of any use for the purpose for which it was designed. No fraud was imputed to the plaintiff; but the defendant, on being sued for the price of the article, relied on the statements contained in a circular which had been sent to him by the plaintiff,—to the effect that the patent article would consume smoke and effect a considerable saving in fuel,—as amounting to a warranty that it should be fit for the purpose to which it was to be applied:—Held, that no such warranty could be implied; but that, the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine, and was entitled to recover the price. *Prideaux v. Bunnett*, 1 Com. B. Rep. N.S. 613.

A contract for the sale in London of Taganrog wheat then lying afloat at Queenstown, in Ireland, contained the following provisions: “In case of any dispute, this contract not to be void; it being agreed by buyers and sellers to leave the same to two London corn-factors mutually chosen, or their umpire, and to be bound by their decision. The above cargo is accepted on the report and samples of Messrs. Scott & Co., of Queenstown”:—Held, that this latter stipulation amounted to a warranty that the bulk was equal to the report and samples, and was not merely a representation that the report was the genuine report of Scott & Co., and the samples taken by them. *Russell v. Nicolopulo*, 8 Com. B. Rep. N.S. 362.

WASTE.

The owner in fee simple of a large estate and of a small estate, eight miles asunder, lived in the mansion-house on the latter estate, where there was an avenue of large oak trees. In 1812 he settled the two estates on himself for life, with remainder to his eldest son for life, with remainders over. In 1823 he removed to the mansion-house on the larger estate, and left the other mansion-house wholly unoccupied. In 1845 he, with the assent of his eldest son, pulled down the unoccupied mansion-house, and, after felling a few trees, planted the avenue with underwood. In the same year he made his will, and devised both estates (subject to the settlement of 1812) to his second son for life, without impeachment of waste (with an exception not relating to timber), with remainder to the first and other sons of such second son in tail male, with remainders over. In January 1856 the testator died, and in the following July the eldest son died, and the limitations of the settlement of 1812 failed. The second son became tenant for life in possession of both estates, and in March 1857 contracted to sell some of the oaks in the avenue, and on a bill filed by a tenant for life in

remainder, an injunction was awarded against him, to restrain the felling of the trees; but, upon appeal, —Held, that the injunction must be dissolved, because timber to be ornamental, so as to entitle it to the protection of the Court against equitable waste, must be connected with or adjacent to a residence. *Micklethwait v. Micklethwait*, 26 Law J. Rep. (N.S.) Chanc. 721; 1 De Gex & J. 504.

A tenant for life, without impeachment of waste, pulled down the family mansion-house, and built a better mansion in another part of the settled estate, using the old materials. It appeared that for years prior to 1819, the date of the settlement, the settlor had contemplated the abandonment of the mansion and the building of another, and that the settlement contained powers of sale and exchange, and also a power to grant building leases of the settled premises, including the site of the old mansion-house:—Held, that the tenant for life was not liable to an account and inquiry as to the application of the materials of the old mansion-house.—On appeal from the latter part of the decree, the Lords Justices affirmed the decision, as the tenant for life had neither sold nor applied to his own use any part of the old materials, but had merely enjoyed them in an altered form. *Morris v. Morris*, 28 Law J. Rep. (N.S.) Chanc. 329; 3 De Gex & J. 823.

A devisee in fee, subject to an executory devise over, is not impeachable for waste; but the Court will restrain him from committing equitable waste by cutting down ornamental or immature timber. *Turner v. Wright*, 29 Law J. Rep. (N.S.) Chanc. 470, 598; Johns. 740.

A conveyance by the lord of part of the demesne of the manor described the land as "All that piece or parcel of meadow ground, commonly called or known by the name or description of Chamberlain's Field, containing by estimation 3a. 8r. 36p., be the same more or less, and abutting towards the west on Hall Lane." The deed also contained the following general words,—"Together with all ways, &c. and appurtenances to the said message, &c., lands, &c., belonging, or therewith used, possessed, occupied or enjoyed, or accepted, reputed, taken, or known as part, parcel, or member thereof, or as appurtenant or belonging thereunto." Upon a special case, in which it was provided that the Court should be at liberty to draw inferences as a jury, it appeared that the grantee of Chamberlain's Field and those claiming under him had for sixty years used a small strip of land lying between the field and Hall Lane as a place of deposit for manure, that about the year 1841 the present owner cut and converted to his own use a tree which grew thereon, and that in 1843 he inclosed the strip. On the other hand, there was evidence that the lord of the manor had both before and since the date of the conveyance exercised various acts of ownership,—by making grants thereof, and giving to the owners of the adjoining lands licences to inclose,—over other similar strips of land by the road side, in other parts of the manor, the nearest of which was about three quarters of a mile distant from the spot in question:—Held, that the conveyance of Chamberlain's Field was sufficient to pass to the grantee the strip of land beyond the fence, and the soil to the centre of Hall Lane adjoining. *Simpson v. Dendy*, 8 Com. B. Rep. N.S. 483.

WATER AND WATERCOURSE.

The plaintiff and the defendant were the occupiers of adjoining closes. A natural brook flowed through part of the defendant's land, and an artificial channel had at some remote period been cut through his land, by which the water of the brook was diverted so as to irrigate his fields, and afterwards returned to the brook. As far back as living memory went, the occupiers of the plaintiff's land had been accustomed in the summer to go upon the defendant's land and place sods in the brook and in the artificial channel, so as to turn the water down the channel and thence into a pit on the plaintiff's land, where it was used for watering their cattle. In doing this they had never been interfered with, until the hindrance complained of in the action. In an action for preventing the water from flowing to the plaintiff's land along the watercourse, the Judge directed the jury that if the occupiers of the plaintiff's land had at all times, as their need might require, at their will and pleasure and without interruption, exercised the right of turning the water from the brook into their own land, they would be justified in returning a verdict for the plaintiff:—Held, that this direction was correct, as such enjoyment and acts, which without the existence of the easement would be tortious, were evidence of the right to the water, and that the fact of the channel along which the water flowed being artificial did not prevent the right being acquired, there being nothing to shew that the artificial channel was made for a mere temporary purpose. *Beeton v. Weate*, 25 Law J. Rep. (N.S.) Q.B. 115; 5 E. & B. 986.

Outside the defendant's land was a wet, springy spot, at which, at most seasons of the year, some water rose to the surface and flowed down the slope of the land. In wet seasons a great body of water flowed down, and after a long drought there was scarcely any, and sometimes none. There was no regularly formed ditch or channel for the water, the place where it flowed being constantly trodden in with cattle. The water which was not absorbed (and all was not absorbed, except in times of drought) ran into an old watercourse of the plaintiff. The water had so flowed for more than twenty years. The defendant, for the purpose of supplying some of his property with water and draining his land, diverted the water in question from the plaintiff's reservoir. At a certain other spot in the defendant's land there had always been, as far back as any one could recollect, water rising to the surface; there had generally been a regular drinking-place for cattle, formed with stones, and the overflow of the water went down a ditch and thence into a watercourse to the plaintiff's reservoir. The defendant carried a drain under the spot in question, and conveyed away the water to another portion of his property, so that the water ceased to rise to the surface and flow into the plaintiff's reservoir:—Held, that in neither case was the plaintiff entitled to the benefit of the flow of the water, and that the defendant was not liable for the diversion. *Rawstron v. Taylor*, 25 Law J. Rep. (N.S.) Exch. 33; 11 Exch. Rep. 369.

For more than twenty years before the act complained of the water flowed along an old drain in the defendant's land, and thence along an ancient watercourse in a close of the defendant, called Gin Bank,

and supplied the plaintiff's mills, since they were erected in 1845. The defendant, in 1845, by deed, conveyed to the plaintiff Gin Bank and another field, together with all ways, waters, watercourses, liberties and privileges, rights, members, and appurtenances to the same close or piece of land belonging or appertaining: provided, that it should be lawful for the defendant to use for any manufacturing, domestic, or agricultural purposes any water flowing from or through the contiguous lands of the defendant unto and into Gin Bank, returning the surplus, or so much as remained after being used for the purposes aforesaid, into its usual channel at a certain point, so that the water should not be diverted from its present course, but be allowed to flow into Gin Bank. The defendant diverted into a lock-up well water which arose on his land contiguous to Gin Bank, and which had been accustomed to flow along the old drain unto the ancient watercourse into Gin Bank, and caused the water to be conveyed from the well to a lower part of his land, to be there used by his tenants. The water so conveyed away was used for domestic, agricultural, &c. purposes, but some of it could not be returned to the point at Gin Bank:—Held, that the defendant was liable to the plaintiff in respect of the permanent diversion of the water by him. *Ibid.*

The right of a riparian owner to the lateral tributaries or feeders of the main stream, applies to water flowing in a defined and natural channel or watercourse, and does not extend to water flowing over or soaking through land previous to its arrival at such watercourse. *Broadbent v. Ramsbotham*, 25 Law J. Rep. (N.S.) Exch. 115; 11 Exch. Rep. 602.

The water of a shallow basin or pond formed by landlips, when exceeding a certain depth, escaped over the surface of the land, and thence by natural force of gravity found its way by land drains or dykes to a brook. In like manner, the overflow of water from an ancient well, and a swamp adjoining, ran in wet seasons to the brook. The overflow from another well used as a watering-place for cattle, formed a stream, which, after following the course of an artificial ditch along a hedge-side, and in other parts flowing down a small channel formed by the water, and over swampy places where the cattle had trodden in the soil, ran over a field, and thence along a natural valley and along hedge-sides and ditches, and discharged itself into the brook:—Held, that a mill-owner, having a right to the use of the water of the brook, had no cause of action against the occupier or owner of the land for diverting either of these sources of supply before the waters had arrived at a definite natural watercourse. *Ibid.*

The plaintiff was possessed of a mill on the river Calder and the defendant of a mill on the river Hebble, which flowed into the Calder at a point above the plaintiff's mill. Declaration complaining that the defendant threw, placed and deposited into and upon the bed of the Hebble, and on the banks and side thereof, at and near to the defendant's mill, large quantities of cinders, ashes, &c., which fell and were washed down and carried into the Hebble, and so were floated and passed with the water into the Calder, and unto and into the plaintiff's mill-pond, &c., and unto and into the plaintiff's part of the bed and channel of the Calder, filling them up and obstructing the working of his mill. Plea, as to the throwing, placing and depositing, &c., that the de-

fendant had been the occupier of the said mill on the river Hebble for more than twenty years before, &c., and that during all that time large quantities of cinders, ashes, &c. were necessarily produced at the said mill, being the refuse of the ash-pit of the engine and the sweepings of the said mill; and that being such occupier the defendant enjoyed as of right and without interruption the privilege and easement of throwing, placing and depositing upon the bed and channel of the Hebble, and the banks and sides and near to his said mill, all such quantities of cinders, ashes, &c. as were produced in the said mill. The plea then alleged that the cinders, ashes, &c. complained of were cinders, ashes, &c. produced in the defendant's said mill, and justified the grievance in the lawful exercise of the said privilege and easement:—Held, after verdict, that supposing the defendant to claim the banks and bed of the Hebble, on and in which the cinders, &c. had been deposited, as in his own occupation, or that the said banks and bed were in the occupation of some third person, as against whom a valid right by way of easement had been gained, in either view the plea failed to shew any right of easement as against the plaintiff. Held, also, that even if it were taken that an easement in the bed and banks of the Hebble had been alleged and proved, and as a natural consequence that the deposit on the bed of the Calder was necessarily established, still, as it was consistent with the plea that no perceptible deposit had been occasioned on the plaintiff's part of the bed of the Calder for twenty years, the plea was insufficient to shew a claim to an easement of depositing cinders, &c. on the plaintiff's part of the bed of the Calder. But *quære*, whether, if such a claim had been alleged, it could be considered as a valid claim to an easement, within the meaning of the 2 & 3 Will. 4. c. 71. s. 2. *Murgatroyd v. Robinson*, 26 Law J. Rep. (N.S.) Q.B. 233; 7 E. & B. 391.

As a general principle, the proprietor of lands on the banks of a natural stream has a right to use the water, so as not to work any material injury to the rights of proprietors above and below him, whether he does actually use it or not. Such a proprietor may, by usage, have a greater right, not justified by his natural rights. But an acquired right does not operate on the natural rights of a landowner above, unless the user by which it was acquired affected the power to use the water above, so as to raise the presumption of a grant. *Sampson v. Hoddinott*, 26 Law J. Rep. (N.S.) C.P. 148; 1 Com. B. Rep. N.S. 590.

The plaintiff, a riparian proprietor on the river Yeo, had immemorially enjoyed the use of the water of the river for the irrigation of his meadows, subject to the right of the defendant, a miller, above, to detain water for his mill. The defendant lately took the water after it had left the mill, and diverted it to water his own meadows, the result of which was, that though the quantity which came to the plaintiff's meadows was not found to be sensibly diminished, yet it arrived late in the day, and the plaintiff was thereby prevented from using it effectually:—Held, that the defendant had gone beyond the exercise of the natural rights of a riparian proprietor; that the detention was a use of the water in its character necessarily injurious to the natural rights of the plaintiff; and that it did not matter how much

the plaintiff had used, or whether he had used any at all; and in either case an action would lie. If the user by the plaintiff had been merely the exercise of natural rights, it would not have affected the defendant's natural rights; but if the plaintiff's user was larger than his natural rights, there was no evidence in the case of its affecting the defendant's tenement so as to make it servient—confirming *Embrey v. Owen*. Ibid.

Where a spring of water issuing from the ground flowed into a natural channel and thence into a brook to the plaintiff's ancient mill,—Held, that the defendants by taking the water at the spring head by tanks and pipes before it flowed into the natural channel, were guilty of a wrongful diversion. *Dudden v. the Guardians of Clutton Union*, 26 Law J. Rep. (n.s.) Exch. 146; 1 Hurl. & N. 627.

The privilege of washing away sand, stone and rubble, dislodged in the necessary working a tin mine, and of having the same sent down a natural stream running through the plaintiff's land, may be the subject of a grant, and may be pleaded as a prescriptive right, under the 2 & 3 Will. 4. c. 71, to a declaration charging the defendants with throwing such stone, sand and rubble into the stream, and thereby filling up its bed within the plaintiff's land, and causing the water to flow over it. Such privilege may also be well pleaded as a local custom. *Carlyon v. Lovering*, 26 Law J. Rep. (n.s.) Exch. 251; 1 Hurl. & N. 784.

A clause in a lease of land from the plaintiff to the defendant, reserved to the plaintiff power to enter upon the demised land, and to dig and make a covered sewer or watercourse through it in order to convey the waste water from the premises of the plaintiff to the river W. In pursuance of this power, the plaintiff did make a covered sewer across the demised land, after which the defendant made a drain from his own premises into the plaintiff's sewer, and through an opening which he made in it sent in water, &c. from his own premises:—Held, in an action by the plaintiff that he was entitled to recover, as by the grant he had a right to the exclusive use of the sewer which he had made under the power reserved to him. *Lee v. Stevenson*, 27 Law J. Rep. (n.s.) Q.B. 268; E. B. & E. 512.

The plaintiffs were owners of mines near, but not adjoining, a canal, and also of a steam-engine requisite for working the mines. By permission of the canal proprietors, the plaintiffs put a small pipe from their works to the canal, by which the water of the canal flowed in and supplied the boiler of the steam-engine. The defendant occupied some chemical works near the canal, and by means of a drain poured the refuse of his chemical works into the canal. The refuse polluted the water of the canal, which came to the plaintiffs' boiler and injured it. The plaintiffs sued the defendant, alleging in the declaration that they were possessed of mines and engines; and that they had enjoyed the benefit of the waters of a canal near to their engines to supply them with water; and that the water used and ought to run and flow without being fouled or polluted. It then averred that the defendant wrongfully polluted the water, and thereby damaged their engines. The defendant pleaded, that the water of the canal ought not to have run and flowed without the fouling and pollution alleged:—Held, by *Wightman, J.*, that the

declaration alleged no cause of action, and that the verdict ought to be for the defendant; by *Williams, J.*, that the declaration was bad, but that the verdict ought to be for the plaintiffs; by *Erie, J.* and *Crompton, J.*, that the declaration might be supported, but that the verdict ought to be for the defendant; by *Crowder, J.* and *Willes, J.*, that the declaration was good, and that the verdict ought to be for the plaintiffs. *Whaley v. Laing* (Ex. Ch.), 27 Law J. Rep. (n.s.) Exch. 422; *nom. Laing v. Whaley*, 3 Hurl. & N. 675.

By permission of the tenant for life of farms A and B, the defendant many years ago made a culvert from a brook, which in its natural course flowed to farm A, for the purpose of getting water for his own premises and for farm B. The culvert, which carried off nearly all the water from the brook, commenced in some lands of the defendant which were bounded by the brook, and then passed through farm B, where a portion of the water was drawn out of it by means of a small pipe, for the use of farm B. The rest of the water, namely, the larger portion, flowed on down the culvert, which, after traversing farm B, ended in other premises of the defendant, where the water was consumed. In September 1856 the then owner of farms A and B conveyed farm B in fee to the defendant, together with all waters and watercourses appertaining to the premises, or used, occupied or enjoyed with the same. He afterwards conveyed farm A to the plaintiff, with all waters and watercourses:—Held, that, as against the owner of farm A, the words of the conveyance of farm B were sufficient to convey to the defendant the right to the continuance of the culvert, and to the accustomed flow of water down it; and that his right was not limited to the taking so much of the water as had heretofore been used for the purposes of farm B. *Wardle v. Brocklehurst* (Ex. Ch.), 29 Law J. Rep. (n.s.) Q.B. 145.

The owner of an ancient water-mill on a river has no right of action against an owner of land adjacent, who digs a deep well on his land, and thereby diverts the underground waters, not known to be formed into a stream flowing in a defined channel, which otherwise would have percolated into the river, although the landowner does not use the water for purposes connected with his land, but pumps it up and carries it off in pipes, to supply persons resident in the neighbourhood, many of whom had no right as owners to the use of the waters at all. *Chasemore v. Richards* (House of Lords), 29 Law J. Rep. (n.s.) Exch. 81; 7 H.L. Cas. 349: affirming the judgment of the Exchequer Chamber, 26 Law J. Rep. (n.s.) Exch. 398; 2 Hurl. & N. 168.

An allegation that the plaintiff was possessed of mines, lands and premises, and of right ought to have had and enjoyed, and still of right ought to have and enjoy the water of a stream which had been used to flow alongside of the said lands and premises, is not supported by proof that the plaintiff was a lessee of mines under land adjoining the stream, with a grant from the surface owner of the use of the water for colliery purposes. *Insole v. James*, 1 Hurl. & N. 248.

Claim by the plaintiff to use water which flowed from his land to the defendant's land, and was there collected in a reservoir, whence it re-flowed into the plaintiff's land. Claim also by the plaintiff to the

overflow into his land of a pond which flowed through the defendant's land into that of the plaintiff. The claims being unsupported by evidence of twenty years' user,—Held, they could not be maintained. But, held, that the plaintiff was entitled to water flowing from surface springs in the defendant's lands, and which naturally flowed, but not through perfectly defined channels, into the plaintiff's land, and was entitled to an injunction to restrain the defendant from diverting it. *Ennor v. Barwell*, 2 Giff. 410.

WATERWORKS.

By a provision in a local act, a company were empowered to furnish a supply of water for "domestic use" to the owners and occupiers of houses, at a certain rent. The appellant occupied a private dwelling-house together with a coach-house and stable, in which he kept for his private use a carriage and horse:—Held, that water used by him for watering the horse and washing the carriage was water for "domestic use" within the meaning of the above-mentioned provision. *Busby v. the Chesterfield Waterworks and Gas-light Co.*, 27 Law J. Rep. (N.S.) M.C. 174; E. B. & E. 176.

By the 12th section of the 10 & 11 Vict. c. 17. (the Waterworks Clauses Act, 1847), powers for the execution of certain works are given; and it is provided that the undertakers shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers. In the execution of certain works authorized by a local act, incorporating that section, the appellants intercepted water, which would otherwise have percolated through the strata of earth into a well upon the premises of the respondent; and drained off water which had accumulated in the well. Upon a complaint, by the respondent, before Justices, in order to recover compensation for the damage she had sustained, the appellants were ordered to pay her a sum of money and costs:—Held, that this order was wrong; for that, inasmuch as no action would lie against the appellants, in respect of either quantity of water, supposing no act authorizing the execution of the works had been passed, the claim for compensation could not be sustained. *The New River Co. v. Johnson*, 29 Law J. Rep. (N.S.) M.C. 93.

WAY.

Where premises are demised or conveyed "with right of way thereto," it may be a question for the jury what is a reasonable use of such right. Where a right of way was expressed to be "through the gateway" of the plaintiff (which gateway led to other premises of the plaintiff), and, at the time of the lease, carts could come in to load and unload, and turn round, and go out again, but, through alterations of the premises, could not now do so without slightly trenching upon the plaintiff's premises,—Held, that in the reasonable use of the right of way the defendants had a right to do this; and that what was a reasonable user was for the jury. *Hawkins v. Carlines*, 27 Law J. Rep. (N.S.) Exch. 44.

A private estate act (6 Will. 4. c. 18), enabling

tenants for life to grant building leases, empowered the lessors to lay out and appropriate any part of the land authorized to be leased, as and for a way, street, square, passage, or sewer, or other conveniences for the general improvement of the estate and the accommodation of the tenants and occupiers:—Held, that exclusive private rights of way over land so appropriated for a way, might be granted to particular lessees, as such appropriation did not confer a right of user by all the tenants and occupiers. *White v. Leeson*, 29 Law J. Rep. (N.S.) Exch. 105; 5 Hurl. & N. 58.

A parol agreement for the substitution of a new way for an old prescriptive way, and a consequent discontinuance to use the old way, afford, no evidence of an abandonment thereof. *Lovell v. Smith*, 3 Com. B. Rep. N.S. 120.

The Cromford Canal Act was passed in 1789. It empowered the proprietors of lands and their lessees to make railways or roads across the lands of other persons to convey their coal and ironstone to the canal. In 1843, fifty-four years after the act, the lessees of some coal mines gave a notice to an adjoining landowner of their intention to avail themselves of the powers of the Canal Act to enable them to make a road over his land. This resulted in an agreement, which authorized the lessees to make the road, paying annually 5*l.* 6*s.* This sum was paid irregularly; at intervals the ownership of the land was changed, and the lessees afterwards abandoned the tramroad, and, apparently without any consent, except that of the tenant, made a railroad across the estate in a different direction. They also erected an engine-house partly on the old tramroad and partly on adjoining land, and for this they subsequently agreed to pay an additional 1*l.* 15*s.* The agreement of 1843 contained no limit for the continuance of the road, but six months' notice of its discontinuance was to be given by the lessees, who were to restore it to agricultural purposes. Upon the defendant becoming owner of the lands he complained of the carriage of goods not mentioned in the act, and gave the lessees notice that he should require an annual payment of 35*l.*, and upon their refusing to pay that sum he gave them notice to cease the use of the railway, and subsequently he took up the rails. Upon a bill by the lessees,—Held, that the landowner was bound by the agreement of his predecessor; that the abandonment of one way for another had not affected the agreement; that the alteration as well as the erection of the engine-house had been acquiesced in by the landowners; that the payment was fixed by the railway, but not for the engine-house; that the defendant was not justified in taking up the rails, and that he must answer in damages for the loss sustained by the plaintiffs; that the plaintiffs might restore the rails; and that the defendant must be restrained from interfering with them or with their use and enjoyment of the railway for all purposes. *Mold v. Wheatcroft*, 29 Law J. Rep. (N.S.) Chanc. 11; 27 Beav. 510.

WEIGHTS AND MEASURES.

[The 5 & 6 Will. 4. c. 63, relating to Weights and Measures, amended by 22 & 23 Vict. c. 56.—An Act to amend the Law relating to Weights and Measures in Ireland, 23 & 24 Vict. c. 119.]

By a local act Commissioners were appointed for the Town of B, and exercised in the markets a supervision with regard to weights and measures. Under the 37 Geo. 3. c. 143. and 55 Geo. 3. c. 43, the inhabitants of the parish of B procured copies of the standard weights and measures, and the vestry nominated examiners of weights and measures, who were afterwards appointed by the Justices of the county in petty sessions. This nomination and appointment was made annually until the incorporation of B, as after mentioned. Under the 4 & 5 Will. 4. c. 49, the Quarter Sessions of the county appointed the plaintiff inspector of weights and measures for a district co-extensive with the petty sessional division in which E is situate, and one copy of the weights and measures was deposited with him. By the 5 & 6 Will. 4. c. 63. the 4 & 5 Will. 4. c. 49. was repealed, and by section 17. it was provided that the Quarter Sessions of every county, or county of a city, should appoint inspectors of weights and measures for separate districts, and by section 25, in all places authorized under any act of parliament to appoint inspectors or examiners of weights and measures, and in all places which were by charter, act of parliament, or otherwise, possessed of legal jurisdiction, and which had been provided with copies of the imperial weights and measures, the Magistrates of such places or any other persons so authorized as aforesaid, might appoint inspectors within the limits of their jurisdiction, who were to have the same powers and duties as inspectors appointed by county Justices. Under this act, the Quarter Sessions of the county re-appointed the plaintiff for his former district, and he stamped all weights and measures in B, but the inspection of such weights and measures was performed by the examiners nominated by the vestry and appointed by the petty sessions. When the examiners ceased to discharge those duties, the copies of the weights and measures were deposited with the defendant as town clerk of B. A charter of incorporation and a separate Quarter Sessions were afterwards granted to B, and a Recorder and Justices appointed for that borough, which was not a county of itself. The borough Justices thereupon appointed the plaintiff inspector of weights and measures within the borough, and the Recorder also appointed another person to the same office. In an action by the plaintiff to recover the copies of the weights and measures deposited with the defendant:—Held, that the Recorder had no power to appoint an inspector of weights and measures; and that the appointment was in the county Quarter Sessions, and that the plaintiff was, therefore, entitled to recover. *Duly v. Sharood*, 25 Law J. Rep. (N.S.) Q.B. 413; s.c. *nom. Duly v. Sharwood*, 6 E. & B. 830.

The words "any inspector," at the end of section 25. of the 5 & 6 Will. 4. c. 63, apply to an inspector appointed under the provisions of that section, as well as to an inspector appointed by county Justices; so that any inspector, however appointed, who knowingly stamps the weights or measures of a person residing within the limits of any local jurisdiction for which another inspector may have been legally appointed, is liable to a penalty under that section. Therefore, where an inspector appointed by the mayor of the city of C stamped, at his office in the said city, certain weights,

knowing them to be the property of a person residing within a district for which an inspector had been appointed by the Justices of the county of C, and which weights were brought to him at his office, for the purpose of being stamped,—Held, that he was rightly convicted of an offence under this section. *The Queen v. Skellon*, 28 Law J. Rep. (N.S.) M.C. 222.

Justices convicted W, under statute 5 & 6 Will. 4. c. 73, for possessing false weights and an unjust weighing machine. On a case stated, under statute 20 & 21 Vict. c. 43, it appeared that W was receiver of the metropolitan police, and that a station-house and all the chattels there were vested in him under statute 10 Geo. 4. c. 44. s. 16; that in the station-house were weights which were light and a weighing machine which, from an injury, gave light weight; that these were used in weighing coals which were allowed to the constables. Conviction quashed: the weights, &c., not being used within the meaning of section 21. of statute 5 & 6 Will. 4. c. 63, and the station-house not being a store, &c. where goods were exposed or kept for sale, nor weighed for conveyance or carriage, and therefore section 28. being inapplicable. *Wray v. Reynolds*, 1 E. & E. 165.

WILL.

[The Law relating to Probates and Letters of Administration in Ireland, amended by 20 & 21 Vict. c. 79.]

[See DEVISE—LEGACY—SETTLEMENT.]

- (A) CONSTRUCTION OF WILLS.
 - (a) *General Points.*
 - (b) *Misdescription and Ambiguity.*
- (B) VALIDITY.
 - (a) *In general.*
 - (b) *Incompetency.*
 - (c) *Execution.*
 - (d) *Attestation.*
 - (e) *Alteration and Interlineation.*
- (C) ESTABLISHING.
- (D) REPUBLICATION AND REVIVAL.
- (E) REVOCATION AND CANCELLATION.
- (F) ELECTION UNDER.
- (G) PROOF OF.
 - (a) *In Solemn Form.*
 - (b) *Missing Will.*
 - (c) *Double Probate.*
 - (d) *Executor according to the Tenor.*
 - (e) *Citations.*
 - (f) *Confirmation and Probate Act.*
 - (g) *General Points.*
 - (h) *Costs.*
- (H) IN THE REGISTRY.
- (I) PROBATE DUTY.

(A) CONSTRUCTION OF WILLS.

(a) General Points.

[*Carver v. Burgess*, 7 Law J. Dig. 747; 7 De Gex, M. & G. 96.—*Bullock v. Bennett*, 7 Law J. Dig. 748; 7 De Gex, M. & G. 283.—*Dunns v. Dunne*, 7 Law J. Dig. 752: on appeal, 7 De Gex, M. & G. 207.]

A testator devised his real estate to M W in fee, but chargeable with the payment of a legacy, and he bequeathed to his executors all his monies, securities for money, household furniture, goods, chattels, personal estate and effects whatsoever and wheresoever, not thereinbefore specifically bequeathed, subject to the payment of his debts. There was no specific bequest of emblements:—Held, that in the absence of any words to rebut the ordinary presumption that it is the will of a testator that he who takes the land shall take the crops which belong to it, the emblements passed to the devisee of the real estate. *Cooper v. Woolfit*, 26 Law J. Rep. (N.S.) Exch. 310; 2 Hurl. & N. 122.

In 1856 G made and executed his will. In it was the following bequest—"I give to S F some household furniture, which she have got a list of." When the will was executed no such list was attached to it nor did it appear that any was produced. S F deposed that on the deceased's making a previous will, in 1852, he told her that it was his intention to leave her some portion of his furniture, and that he had made a list thereof, which he desired she would keep; that he then handed her a list, which remained in her possession till he made his will, in 1856, when he desired her to keep it; that the deceased never gave her any other list. The list referred to by S F commenced thus: "List goods I give to my godson J E F," and then specified divers articles of household furniture, and also some kitchen utensils, cutlery, crockery, plate, books, a watch, pictures, and musical instruments. J E F was the son of S F. On motion for a grant of administration, the Court held, that the list of household furniture produced was not incorporated in the will, its identity with that mentioned in the will not being sufficiently proved, and rejected the motion. *In the goods of Greves*, 28 Law J. Rep. (N.S.) Prob. & M. 18; 1 Sw. & Tr. 250.

Devise to E for life, contingent remainder to her unborn children as tenants in common in fee; devise over to her one brother, J, and two sisters, S and A, for life, in equal shares, with contingent remainders in fee to their respective children as to such shares. Then followed a limitation, "And further, in case of the death of my said son, or either of my said two daughters, without having a child, if a son who shall live to attain the age of twenty-three years, or if a daughter who shall live to attain the age of twenty-one years," gift over in favour of the children of the surviving brother and sisters. E died without children. A, one of the two sisters, died without having had a child:—Held, that on A's death the limitation over took effect as a contingent remainder, for that the event of A dying without having had a child was included in the event of dying without having children who attained twenty-three, and might be separated from it, and treated as a distinct devise; and, not being in itself too remote, it took effect on the determination of the particular estate. *Doe d. Evers v. Challis* (House of Lords), 29 Law J. Rep. (N.S.) Q.B. 121; *nom. Evers v. Challis*, 7 H.L. Cas. 531.

J M, the great-grandfather of the plaintiff and the defendant, had three sons, John, N, and Jonathan George, and on the marriage of N he settled certain estates, called "The Hickling," after a life estate to N, to the use of the first and other sons of the mar-

riage in tail male. N died in his father's lifetime, leaving Nathaniel the eldest son of such marriage, who succeeded to the Hickling estates as tenant in tail. J M, by his will of December 1797, devised his other estates to the use of his son John for life, remainder, in default of issue, to such one of testator's grandsons Nathaniel and S B, as John should appoint for life, remainder to the first and other sons of such appointee in tail male. Nathaniel married twice. In 1804, upon the occasion of his first marriage, he covenanted to settle the Hickling estates to the use of himself for life, and after his death to the use that his intended wife Lady Maria should receive a certain annuity, and subject thereto to the use of himself in fee. Subsequently to this marriage, he barred the entail in pursuance of this arrangement; but Lady Maria died soon afterwards, leaving her son M, the only child of such marriage. In 1810, upon the occasion of the second marriage of Nathaniel, certain proposals were adopted as the bases of a settlement, by which his uncle John, under the power given to him by the will of 1797, appointed the estates devised by that will to Nathaniel, according to the terms of such will. A marriage settlement was thereupon executed, by which Nathaniel conveyed the Hickling estates to the use of himself for life, remainder to trustees for a term of years, for securing certain annuities, and subject thereto to the use of himself in fee. The defendant was the eldest, and the plaintiff was the second son of that second marriage. John, the son of J M, and the tenant for life under the will of 1797, made his will in 1822, by which he devised a certain estate, called the "Iridge," in favour of his brother Jonathan George, and his issue, with a proviso that if the testator's nephew Nathaniel, and his first or other sons, should in the lifetime of Jonathan George, convey certain specified lands to Jonathan George in fee, the devise in favour of Jonathan George and his issue was to become void, and the Iridge estate was to pass to the defendant (second son of the testator's nephew Nathaniel), for life, remainder to the first and other sons of the defendant in tail male, remainder to the third and every other son of the said Nathaniel, excepting always the eldest son successively in tail male. The will then contained a shifting clause, by which, after stating that the eldest son of the testator's nephew Nathaniel might die, so that the second or other younger son of the said nephew Nathaniel, might "become entitled to the property settled on the marriage of the said Nathaniel, in the character of the then male heir of his body," it was declared that in order to prevent the union of the two estates in the same person, whilst there was in existence a younger son of the said Nathaniel, then in case the second or other younger son should, by death or failure of issue male of the eldest or other son become entitled to the settled property of the said Nathaniel, as the heir male of his body, the limitations in favour of such second or other younger son so becoming entitled should, immediately after such event, cease, and the next younger son of the said Nathaniel should become entitled to the estate as if his next elder brother, or issue male of his body, had been dead. The testator John died childless, and his nephew Nathaniel, with M, his son by his first marriage, fulfilled the terms of the proviso in the will of 1822, by making over the specified lands

to Jonathan George, conformably to such proviso, and the defendant afterwards entered into possession of the Iridge estate. His father, Nathaniel, died in 1856, having previously devised the Hickling estates to his eldest son, M, for life, remainder to his sons in tail male, with remainder on failure of such issue to his second son (the defendant) for life, with remainder to his sons successively in tail male, with remainders over. M, the eldest son, died a few months after his father, whereupon the defendant entered into possession of the Hickling estates, and of the property devised by the will of 1797, with the exception of the lands conveyed as above mentioned to Jonathan George:—Held, that the contingency provided for by the shifting clause in the will of 1822 had happened, as the defendant, the second son of the testator's nephew Nathaniel succeeded as heir male of the body of his father to "the property settled on the marriage of the said Nathaniel," within the meaning of that clause, and that therefore the plaintiff, the next younger son, had become entitled to the Iridge estate. *Micklethwait v. Micklethwait* (Ex. Ch.), 29 Law J. Rep. (N.S.) C.P. 75: affirming the judgment below, 28 Law J. Rep. (N.S.) C.P. 121; 4 Com. B. Rep. N.S. 790.

Devise of land to G, his heirs lawfully begotten, for ever, gives G an estate tail. Although there is no limitation over. And although the devise is made subject to G's making payments of specific legacies out of the land. *Good v. Good*, 7 E. & B. 295.

A testator, by his will, limited real estates to trustees for a term of years, upon trust, in a certain event, to raise 20,000*l.*, and to stand possessed of the same, as to one fourth part thereof, upon such trusts as were thereafter declared of a sum of 20,000*l.* bank annuities, thereafter bequeathed in trust for the benefit of his son W F H, his wife, children and issue as thereafter mentioned. In the latter part of his will he directed other trustees to stand possessed of a sum of 20,000*l.* 3*l.* per cent. annuities, upon trust to pay the interest, dividends, and annual produce thereof to his son W F H for his life, and after his decease in trust, during the widowhood of Elizabeth his wife, to pay her out of the interest, dividends, and annual produce thereof, the yearly sum of 200*l.*; and after the death of W F H, subject to the said provision for his wife, upon trusts for the children of W F H:—Held, upon appeal, reversing the decision below, that the widow of W F H took one annuity only of 200*l.* *Hindle v. Taylor*, 25 Law J. Rep. (N.S.) Chanc. 78.

A testator, by his will, gave the proceeds of the sale of his real estate, in a certain event, in trust for all his cousins who should be living at his decease:—Held, upon appeal, varying the decree below, that the gift was confined to first cousins only. *Stoddart v. Nelson*; *Stanger v. Nelson*, 25 Law J. Rep. (N.S.) Chanc. 116; 6 De Gex, M. & G. 68.

A testator devised real estate to trustees upon trust to demise, and pay rents to A for life, for her separate use, without power of anticipation, with remainder to the use of such persons as she should by will appoint, and in default of appointment to the use of the right heirs of A; and he also charged the estate with payment of 700*l.* to B on her attaining twenty-one. The trustees having occasion to sell the estate for the purpose of raising the 700*l.*,—Held, that they could make a good title. *Eids-*

forth v. Armistead, 25 Law J. Rep. (N.S.) Chanc. 237; 2 Kay & J. 333.

In the construction of wills the Court will consider the intention of the testator, the state of the parties provided for, and, to remove inconsistencies, will read the word "future" as "former." *Passmore v. Huggins*, 25 Law J. Rep. (N.S.) Chanc. 251; 21 Beav. 103.

A testator gave his residuary personal estate to T L, if he should be living, and able duly to discharge the executors at the time such residue should be payable; but if otherwise, then over. The legatee being an infant at the time the residue became payable,—Held, that as he was able, by filing a bill, to discharge the executors, he was entitled to the legacy. *Ledward v. Hassell*, 25 Law J. Rep. (N.S.) Chanc. 311; 2 Kay & J. 370.

A testator gave real and personal estate upon trust for the benefit of his son, to vest in him on his attaining the age of twenty-one years. The testator then directed that in case his son should die under twenty-one, or, having attained twenty-one, should not have made a will, then the property should go over. The son attained twenty-one, and died intestate:—Held, that the real and personal estate vested in him absolutely at twenty-one, and that, therefore, the devise over was repugnant and void. *Holmes v. Godson*, 25 Law J. Rep. (N.S.) Chanc. 317; 8 De Gex, M. & G. 152.

A testator gave his residuary estate to trustees, upon trust to pay the income to his wife until his youngest child should attain twenty-one, she therewith maintaining his children during their minorities; and when his youngest child attained twenty-one, upon trust to divide the same among his wife and children, as tenants in common, with benefit of survivorship. Two of the children died before the youngest child attained twenty-one, one of them having attained twenty-one:—Held, that the clause of survivorship applied to their shares, and that those shares were distributable among the legatees who were alive at the period of distribution, to the exclusion of the husband and administrator of one of the deceased children, who had married. *Vorley v. Richardson*, 25 Law J. Rep. (N.S.) Chanc. 335; 8 De Gex, M. & G. 126.

Quere—whether the share, which the last of the two children who had died took by accretion in the share of the pre-deceasing child, passed to the surviving legatees. *Ibid.*

Where there are trustees of a fund, to ascertain the rights of parties in which a special case is filed, they ought, under section 1. of the stat. 13 & 14 Vict. c. 35, to be made parties. *Ibid.*

A testator, who had married his deceased wife's sister, gave his real and personal estate to trustees for "my wife" for life; and, after her decease, for all and every "my children" hereafter to be born. The testator had no children at the date of his will, but his then wife was enceinte, and shortly afterwards a son was born:—Held, that there was a sufficient designation in the will to entitle the wife to a life interest in the estate; but that, the gift being to a class, the restrictions upon such marriages did not permit his son to be considered one of that class, and that there was no sufficient designation by which he could take. *Pratt v. Mathew*, 25 Law J. Rep. (N.S.) Chanc. 409; 22 Beav. 328.

A testator directed that the whole of his real and personal property should be divided between his nephews, grandnephews, and nieces at twenty-one, except as to his grandnephew Andrew, who was only to receive the interest of his portion until he attained the age of thirty; afterwards, if the executors should think him capable of using one-half the amount of his portion to advantage in his business, it was to be so applied, the remaining half to be continued in the stocks, the income of which he was to receive for life; and at his death to be equally divided among his "legal heirs." Andrew died before he attained the age of thirty:—Held, that no portion of his share was undisposed of, and that his next-of-kin, according to the Statute of Distributions, were entitled under the words "legal heirs." *Low v. Smith*, 25 Law J. Rep. (n.s.) Chanc. 503.

A testator, by his will, gave all his real and personal estate to trustees for the benefit of his granddaughter. By a codicil he gave "the whole of my estate and all my household goods," &c. "and all other my personal property," free from legacy duty, to J R, and in other respects the testator confirmed his will. The Vice Chancellor of the Duchy of Lancaster held, that on the construction of the whole will and codicil, the real estate did not pass under the codicil; and, upon appeal, the same was affirmed by *Lord Justice Knight Bruce*—*Lord Justice Turner* dissenting. *Molyneux v. Rowe*, 25 Law J. Rep. (n.s.) Chanc. 570; 8 De Gex, M. & G. 368.

A testator directed a fund to accumulate for a certain number of years, and then to go to "his nearest-of-kin in the male line in preference to the female line." By a codicil he directed certain articles of property and a grant of arms made to him in reward for his naval services to go to the inheritor of his "capital property." This grant was, in express terms, confined to himself, to his own descendants, and the descendants of his father. The testator's brothers died without children. One of his sisters had a son. A paternal uncle had a son:—Held, that though the son of the paternal uncle was the only person who was a male tracing through males, he did not fulfil the intention of the testator, as expressed on the face of the will, and could not claim the property under the terms of the will. *Sayer v. Boys*, 25 Law J. Rep. (n.s.) Chanc. 593; 5 H.L. Cas. 873; affirming 22 Law J. Rep. (n.s.) Chanc. 617.

A testator directed his real estate to be sold, and the proceeds to be deemed part of his personal estate; and he then gave certain legacies which did not exhaust the fund, and the will contained no residuary bequest:—Held, upon appeal, affirming the decree below, that, as between the heir-at-law and the next-of-kin, the real and personal estate should bear the debts and legacies *pro rata*. *Simmons v. Rose*, 25 Law J. Rep. (n.s.) Chanc. 615.

A testator (who at the time of making his will had three sons living), after devising estates to trustees, and directing accumulations, &c., appointed a time at which the estates were to be divided into three portions, and one was to be conveyed to the "eldest male lineal descendant" then living of the testator's eldest son. At the appointed time two persons were living who filled the character of "male lineal descendant." One was a youth who was

eldest in point of primogeniture: the other, his uncle, who was eldest in point of age:—Held, that, under the words of the will, the former was entitled to have the estate conveyed to him. *Thellusson v. Rendlesham*, 28 Law J. Rep. (n.s.) Chanc. 948; 7 H.L. Cas. 429.

Testator gave and bequeathed all his residuary estate to his wife, "upon trust" to pay thereout an annuity, and "upon further trust" to pay certain legacies, which did not exhaust the personal estate. He referred to his wife as his executrix in the will; but the will did not contain any express appointment of her as executrix:—Held, upon the construction of the will, that she was entitled beneficially to the surplus estate. *Williams v. Roberts*, 27 Law J. Rep. (n.s.) Chanc. 177.

A testator, by his will, bequeathed unto his wife all his leasehold property, wheresoever situate, for her sole use and benefit, except a certain house therein described; and in a subsequent part of his will he directed that as soon after the decease of his wife as might be practicable, all his leasehold property not already disposed of by her (save and except the before-mentioned house) should be sold, and the produce thereof distributed by his executors (of whom the wife was named one) amongst certain persons, in the proportions therein stated:—Held, that, upon the death of the testator, his widow became absolutely entitled under his will to the leasehold property bequeathed to her by such will, and that the direction to sell contained in such will and the expressed disposition of the proceeds of sale were repugnant to the preceding absolute gift to the testator's wife, and void. *Boves v. Goslett*, 27 Law J. Rep. (n.s.) Chanc. 249.

A testator gave his residuary real and personal estate to his wife for life, and afterwards to T H H for life, and after the death of the survivor he gave the same to and amongst his brothers and sisters (whom he named), and the brothers and sisters of his wife (whom he also named), and the children of her deceased brother and sister (who were also named). The testator provided that if any of his brothers and sisters, or the brothers and sisters of his wife then living, should happen to die in the lifetime of his wife and of T H H or of the survivor of them, without leaving issue, the share of him or her so dying should be divided amongst the survivors; but if any of them, his brothers and sisters, or the brothers and sisters of his wife, should so die leaving issue, the share or shares of him or her so dying should be divided among such issue. At the date of the will W H, one of the testator's brothers (named in the will) was dead (although the testator was ignorant of the fact) leaving children:—Held (reversing a decision of one of the Vice Chancellors), that the children of W H were entitled to their father's share, and that the words "now living" only applied to the brothers and sisters of the testator's wife. *Hannam v. Simms*, 27 Law J. Rep. (n.s.) Chanc. 251; 2 De Gex & J. 151.

A lady was absolutely entitled to property of which her brother was a trustee. She became of unsound mind, but was not found so by inquisition. The brother by his will bequeathed property to trustees upon trusts for investment, and directed them to pay half the income of the residue to the lady's husband for his life; and after his decease to pay

such half of the income to the lady for her life, or to apply the same, or so much thereof as might be necessary, for her support and maintenance; and if there should be any surplus, the same was to be accumulated and paid as in his will mentioned. After the death of the testator the lady was found lunatic by inquisition. The Master in Lunacy reported on the property and income of the lunatic, and the Court ordered a sum to be paid for her maintenance greater in amount than her life income under the will, and greater also in amount than the interest of her absolute property. A bill was filed, by the committee of the lunatic's estate, to have it determined which was the primary fund for her maintenance:—Held, that the life income given by the testator must be first applied, and the remainder only of the maintenance must be made up out of the income of the property to which she was absolutely entitled. *Rudland v. Crossier*, 27 Law J. Rep. (n.s.) Chanc. 261; 2 De Gex & J. 148.

A testator, by his will, dated in 1853, made specific bequests of real estate, and also a specific bequest of personalty in favour of each of his six children, by name, viz. A, B, C, D, E and F. He then made a specific bequest in favour of A and B equally, and finally he gave all the residue of his property, real and personal, to his said four children, C, D and E, equally:—Held, upon the context of the will and the evidence in the cause, that the name of F had been omitted by inadvertence in the gift of the residue contained in the will as executed, and that F was entitled to one-fourth of such residue. *Eddels v. Johnson*, 27 Law J. Rep. (n.s.) Chanc. 302; 1 Giff. 22.

A testator directed his trustees, out of the produce of the sale of his estate, to invest "sufficient to realize the clear annual income or sum of 200*l.* a year," and to pay the same to his wife for her life or widowhood, and after her death or second marriage, if he should die without issue, to hold the capital in trust for other persons; and as to the residue of the property, after "raising thereout money sufficient to realize the annuity for his wife," in trust for other persons. The estate was insufficient to raise 200*l.* a year:—Held (reversing the decision of the *Master of the Rolls*, which had been sustained by *Lord Justice Knight Bruce*), that the widow was not entitled to have the deficiency made good out of the corpus of the fund, and she was ordered to replace the stock which had been sold out under the order now reversed. *Baker v. Baker, in re Baker's Estate*, 27 Law J. Rep. (n.s.) Chanc. 417; 6 H.L. Cas. 616; 26 Law J. Rep. (n.s.) Chanc. 76; 7 De Gex, M. & G. 681; 20 Beav. 548.

A testator by will directed his trustees to collect and convert into money such part of his personal estate as should not consist of money, and to invest the same, and permit his wife to receive the annual income of the trust fund during her life, and he authorized his trustees to postpone from time to time the sale, calling in, collection or conversion of any part of his personal estate, to such period or periods as they should in their judgment think fit, and to pay the rents, dividends and produce of the same, or any part thereof not sold, called in, collected or converted, to the same person or persons, and in the same manner as the income of the money to arise by such sale, &c. would be payable under the trusts thereinbefore

declared. The testator, at the time of his death, was a partner in a mercantile firm under articles of partnership, which provided, amongst other things, that interest at 5*l.* per cent. should be allowed to the balances standing to the credit of the respective partners at the end of each year before any division of the profits; and that in the event of the decease of one or more of the partners during the term, the partnership should not cease, but the representatives of the deceased partner should be entitled to his share of the capital and profits up to the expiration of the term, and the survivors should pay to the representatives of the deceased partner the balance appearing to his credit at the expiration of the term, by three equal yearly instalments, with interest at 5*l.* per cent. in the mean time, on the balance remaining unpaid. The trustees allowed the whole of the testator's capital to remain in the business until the expiration of the partnership by effluxion of time, and large profits were made after the testator's death:—Held, that the widow was entitled to all the interest and profits arising from the testator's capital, as it stood at the first making up of the accounts after his death, together with a proportionate part of the interest on the balance standing to the testator's credit at the last previous making up of the accounts, for so much time as elapsed between his death and the next making up of the accounts. *Johnston v. Moore*, 27 Law J. Rep. (n.s.) Chanc. 463.

A testator gave the share of one of his daughters, in his personal estate, to trustees, to pay the interest to his daughter for life, and after her decease to divide the same among "her children and their issue, such children and their issue to be entitled as amongst themselves to the benefit of survivorship and accruer of surviving shares":—Held, that all the children and the issue of such children coming into esse during the life of the daughter were entitled to take after her death as tenants in common with benefit of survivorship. *Law v. Thorp*, 27 Law J. Rep. (n.s.) Chanc. 649.

A residuary estate was given to three brothers and a nephew for their lives as tenants in common, and after their decease then in trust for their heirs and assigns as tenants in common. The will then contained provisions that the shares of any or either of their children dying under twenty-one without issue should go to the survivors, and that the share of such child as died under twenty-one leaving issue should go to the children of such child; but that in case one child only of the brothers and nephew should attain twenty-one, or be married, then in trust for such child, his or her heirs or assigns:—Held, that the brothers and nephew took an absolute vested interest in the residuary estate, with an executory devise over in case of children being born. *Spence v. Handford*, 27 Law J. Rep. (n.s.) Chanc. 767.

Freehold estates were settled by deed, dated in 1832, subject to charges of 20,000*l.* and 1,650*l.* created by Edward Earl of O, upon trust to him for life, and then for his son Alfred Lord H for life, with remainder for securing an annuity, with remainder to the first and other sons of Alfred Lord H in tail male, with ultimate remainder in fee simple to Edward Earl of O. Copyhold and leasehold estates were settled similarly as near as might be. Edward Earl of O, by his will, dated in 1835, devised all his freehold hereditaments (subject to the charges and

incumbrances affecting the same), to the use of trustees for 500 years (to pay debts and legacies), remainder to his eldest daughter for life, with remainder to her first and other sons in tail male, with remainders over in strict settlement. He declared that every person who should become entitled in possession or to the receipt of the rents of the freehold hereditaments should, within one year of being so entitled, take and use the name and arms of H, or forfeit the same. He also gave powers of leasing and sale and exchange, to be exercised, with the consent of the tenant for life, who should be in the actual possession of the hereditaments, or entitled to the rents and profits thereof. The testator gave copyholds and leaseholds (by the term "all my leasehold messuages," &c.) upon trusts to correspond. By a codicil, dated in 1845, the testator, after reciting that his eldest daughter had married and had one daughter, devised his real estates, subject to the charges and incumbrances, and subject to the limitation to his eldest daughter for life, to the use of her daughter for life, with remainder to the first and other sons of that daughter, in tail male. No mention was made of copyholds or leaseholds, but the testator, in all other respects, confirmed his will. In 1835 and 1845 the testator was possessed of no real estate, but the estate for life and ultimate remainder in fee simple under the settlement of 1832. He subsequently acquired other real estate in fee simple in possession. His sister died possessed of a large leasehold estate, he being her sole next-of-kin, and, as such, he was, in a suit instituted after her death, declared entitled thereto, and that the same formed part of his personal estate. The testator died, when Alfred Lord H became Earl of O, who died, without issue, two years after his father. The eldest daughter of Earl Edward thereupon assumed the name and arms of H:—Held, that the eldest daughter had not committed any forfeiture by not sooner assuming the name and arms either as to the settled real estate or the after-acquired real estate; that the after-acquired leaseholds passed by virtue of the 24th section of the statute 7 Will. 4. & 1 Vict. c. 26. under the specific gift of leaseholds, and not under the residuary bequest; that the estates comprised in the settlement of 1832 were made the primary fund for the payment of the 20,000*l.* and 1,850*l.* and were liable thereto in the hands of the devisees, in exoneration of the testator's personal estate; and that the eldest daughter of Earl Edward was as equitable tenant for life of the leaseholds entitled to the possession of the title-deeds, upon giving security. *Lady Langdale v. Briggs*, 26 Law J. Rep. (n.s.) Chanc. 27; 8 De Gex, M. & G. 391; 3 Sm. & G. 255.

Held, also (*Lord Justice Knight Bruce* abstaining from giving any opinion), that the Court had no authority (notwithstanding the 50th section of the statute 15 & 16 Vict. c. 86, the Chancery Amendment Act) to declare future rights, and, therefore, could not decide between the daughter of the eldest daughter of Earl Edward and the tenant in tail male in remainder, whether the codicil affected the copyhold and leasehold estates. *Ibid.*

A testator bequeathed to his sister E A V an annuity, with a clause of revocation in case she should do any act or take any proceedings to alter, frustrate or dispute the devises and bequests in the will of their deceased father. E A V, in pursuance

of a power in the father's will, did take proceedings for altering the devises and bequests therein, and the testator afterwards joined in an agreement, which was expressed to be, for the purpose of preventing and terminating all doubts and controversies, to refer such devises and bequests to a valuer. The valuer awarded a sum of money to E A V for equality of partition, and all the parties interested under the father's will, including the testator, executed a deed of mutual confirmation and discharge, which recited that they were respectively satisfied with the valuation, and was expressed to be made in order to carry into effect what they believed to be the wishes of the father. The testator afterwards, by codicil, confirmed his will. Whether the steps taken by E A V were within the proviso in the testator's will—*quære*. *Violet v. Brookman*, 26 Law J. Rep. (n.s.) Chanc. 308.

But,—Held, that, if so, the testator had by his subsequent acts dispensed with the prohibition. *Ibid.*

The words "heirs of the body," though words of limitation, may, by explanatory context, be reduced to words of purchase, but the inference to be drawn from such context must be clear. *Gummoe v. Howes*, 26 Law J. Rep. (n.s.) Chanc. 323; 23 Beav. 184.

Ambiguous words will not controul the legal effect of words of limitation. *Ibid.*

A testatrix bequeathed unto each of the present nieces of P E 2,000*l.*, "and in case any of them shall die in my lifetime, leaving a child or children who shall survive me, then the legacy intended for her so dying shall go to her child or children in equal shares." There were originally seven nieces of P E in the first degree, but at the date of the will there was but one living, a widow, seventy-five years old, who had had two children, both of whom were dead; but there were several great-nieces and great-great-nieces, descendants of nephews and nieces of P E:—Held, affirming the decision of one of the Vice Chancellors, that the word "nieces" must be taken in its ordinary signification, meaning nieces in the first degree; and that the children of nieces who were dead at the date of the will could not take by substitution. *Crook v. Whitley*, 26 Law J. Rep. (n.s.) Chanc. 350; 7 De Gex, M. & G. 490; 26 Law J. Rep. (n.s.) Chanc. 657.

A testator, in certain events, directed the conversion of his real and personal estate, and he gave one moiety of the proceeds "unto and equally amongst my legal personal representatives in such and the like manner as if the same had been to be paid under the Statute of Distributions," and he gave the other moiety unto the legal personal representatives of his wife in like manner:—Held, that the moiety given to his legal personal representatives must be distributed according to the Statute of Distributions among the next-of-kin living at the death of the testator, and that the widow was entitled to one-third of such moiety notwithstanding the gift of one moiety of the residuary estate to her legal personal representatives and the direction to divide equally. Held, also, that the real estate was converted by the testator, and that his son's share could not be taken as real estate. *Holloway v. Radcliffe*, 26 Law J. Rep. (n.s.) Chanc. 401; 23 Beav. 163.

A testator devised estates S and H to trustees on certain trusts, "and subject to the trusts aforesaid,

all the said premises hereinbefore devised shall be in trust for my grandson Robert Watson and the heirs of his body; but in case he shall die under the age of twenty-one years and without issue, my said message at H and my said messuages or cottages at S aforesaid (subject to the trusts hereinbefore respectively declared) shall be in trust for my granddaughter Ann Watson and the heirs of her body; but in case she shall die under the age of twenty-one and without issue, the said last-mentioned premises shall be upon such and the same trusts as are hereinafter declared concerning my said message or dwelling-house and farm at S aforesaid. And I declare that if my said grandson Robert Watson shall die under the age of twenty-one years and without issue, "the trustees should be seised of the messuages and dwelling-house at S in trust to pay the rents to two other persons for life, "and subject to the trusts hereinbefore declared, the message and farm at S shall be in trust for D." The grandson attained twenty-one, and afterwards died without issue; the granddaughter likewise attained twenty-one, and afterwards died without issue:—Held (*Lord St. Leonards dissentiente*), affirming the decree of the Court below, that the words of the will must be read as they stood, that in the events which had happened the ultimate limitation as to the H estate had failed, and that estate had descended on the heir-at-law of the testator, but that the ultimate limitation of the S estate continued in force.—The cases of *Brownwood v. Edwards* and *Doe d. Usher v. Jessop* commented on. *Grey v. Pearson*, 26 Law J. Rep. (n.s.) Chanc. 473; 6 H.L. Cas. 61.

A testator gave to his daughter an annuity of 100*l.* while she was unmarried; but on her marriage, and on some adequate provision made by some settlements made for her for life, and to the use of her issue, which provision the testator directed might be made, he bequeathed to and for her use 2,500*l.*; in default of such issue, the testator bequeathed that sum for the benefit of the children of F, with benefit of survivorship, except issue left, who should then share the parent's part. The testator died in 1825; the daughter married in 1827, and had one child, who died in infancy. No settlement was made; but the 2,500*l.* was set apart, and the interest paid to the daughter during her life. Upon her death, in 1856, having survived her husband, it was held, that her personal representative, who was also personal representative of her child, was entitled to the 2,500*l.*, to the exclusion of the children of F. *Findon v. Findon*, 26 Law J. Rep. (n.s.) Chanc. 561; 1 De Gex & J. 380; 24 Beav. 83.

A testator gave freehold and leasehold property to his wife for life, and after her decease, to A, to B, to C, to D, to E, to F, to G, and to H: this to be paid to them by his executors, free from every husband or wife that then was or ever should be; and after their decease, to their children, share and share alike, for his (the testator's) term and interest. There was a residuary gift in the will. H survived the testator and the tenant for life, and then died intestate and without issue:—Held, that his share in the above-mentioned gift thereupon fell into the residue of the testator's estate. *Waters v. Waters*, 26 Law J. Rep. (n.s.) Chanc. 624.

A testator gave all his real and personal estate to trustees upon trust, after payment of his just debts,

&c. to pay and apply the whole, or any part of the rents, issues and profits of his real and personal estate and effects for and towards the maintenance, attendance and comfort of J S during his life, giving him the use and enjoyment of his household goods and furniture; and from and after his decease, upon trust to sell the same real and personal estate, and treat the produce as personal estate; and his will was that the rents and profits of the real estate until sale should be deemed to be part of the annual income of his personal estate, and subject to the disposition therein made thereof; and he then proceeded to dispose of the personal estate. Part of the income of the real and personal estate was applied during the life of J S (who was incapable of managing his own affairs) for his maintenance, attendance and comfort, and at his death there was a considerable fund arising from the surplus income:—Held, first, that the will did not give to J S a life interest in the whole income independently of his maintenance, attendance and comfort; secondly, that the representatives of J S would be entitled to be reimbursed out of the surplus fund if any monies had been expended out of the private resources of J S in his maintenance, attendance and comfort; thirdly, that if J S had been inadequately maintained, &c., this would give his representatives no right to compensation out of the savings; fourthly, that so much of the savings as arose from rents and profits during the life of J S were not by the will converted into personalty, but must go as real estate to the heir-at-law of the testator. *In re Sanderson's Will*, 26 Law J. Rep. (n.s.) Chanc. 804; 3 Kay & J. 497.

T W, by his will, made in 1805, gave the residue of his real estate and all his personal estate to a trustee in trust for conversion and for accumulation, for the benefit of "such child or children" as his nephews and niece, Walter, Thomas and Dorothy, should leave at the time of their respective deceases, in equal third parts; and in case either of his said nephews and niece should die without leaving any children or a child, then such third share should be paid to the children or child of the other or others leaving children or a child, in equal proportions. And in case all his said nephews and niece should die without "leaving any issue," then he directed that the whole should go to the children of P G, in equal shares. Walter, Thomas and Dorothy all died without leaving any child, but Dorothy left grandchildren. The Master of the Rolls decided that the word "children" should be interpreted so as to include grandchildren and remoter issue, and that the property was divisible among the eight grandchildren of Dorothy *per capita*, so that the gift over did not take effect, nor was there an intestacy:—Held, reversing that decision, that the words "child or children" must be read in their strictly proper sense, and did not include grandchildren or remoter issue; that "any issue" could not be read "any such issue," so that the gift over to the children of P G did not take effect, but that there was an intestacy. *Pride v. Fooks*, 28 Law J. Rep. (n.s.) Chanc. 81; 3 De Gex & J. 252.

A testator, by his will, directed his trustees to accumulate the income of his residuary personal estate, "until the principal and accumulations should amount to the sum of 3,000*l.*, or there-

abouts," and then to pay the income of the fund to A, B, C, D, E, F and G during their lives and the life of the survivor; and after the death of the survivor to pay the principal sum unto and equally among the issue of the said A, B, C, D, E, F and G who should be then living. At the end of twenty-one years from the death of the testator (the period allowed by the Thellusson Act) the residue and the amount of accumulations of the income thereof, fell far short of the sum of 3,000*l.*:—Held, per *Stuart, V.C.*, that the whole fund thus produced belonged to those who were next-of-kin of the testator at the time of his death: but, upon appeal, it was held, that the gift was not void for remoteness; but that the income of the fund, between the termination of twenty-one years from the testator's death and the time when the fund became divisible, belonged to the next-of-kin; *Lord Justice Knight Bruce*, however, dissenting from such construction of the will. *Oddie v. Brown*, 28 Law J. Rep. (N.S.) Chanc. 542; 4 De Gex & J. 179.

A testator directed that, when the youngest of his two daughters had attained twenty-one, his real and personal estate and effects should be divided into three equal parts: one part to be for his wife, and one of the remaining two for each daughter; at his wife's decease her share to be equally divided between his two daughters; and, provided either of his two daughters should die before a division of the property should have been made, and having no surviving issue, then the part of the deceased to be given to her surviving sister. By a codicil, the testator provided that "should both his children die in their minority, and leave no issue, then in such case, and in such case only," the property should go to his widow for life, and then over. One daughter attained twenty-one, and died without having been married, and afterwards the other daughter died under age and without having been married:—Held (affirming the decision of one of the Vice Chancellors), that the gift by the codicil to the widow for life, and then over, had failed. *Maddison v. Chapman*, 28 Law J. Rep. (N.S.) Chanc. 450; 3 De Gex & J. 536; 4 Kay & J. 709.

A testator bequeathed his residuary estate upon trust as to one moiety for his daughter M for life, and in default of issue of M upon trust as to one half part thereof as M should appoint, and in default of appointment over, and as to the other half part of such moiety, upon the same trusts as were thereinafter declared concerning the other moiety of his residuary estate; and he proceeded to declare precisely similar trusts of the other moiety, substituting the name of his daughter E for that of M. Both M and E exercised their powers of appointment, and died without issue:—Held, that each appointment effectually disposed of one moiety of the testator's residuary estate. *Atkinson v. Jones*, 28 Law J. Rep. (N.S.) Chanc. 753; Johns. 246.

A testator gave a legacy to each of his brothers and sisters (naming them), or to their "legal representatives," to be paid to them two years after his death, and legacies to his nephews, the whole amounting together to 6,100*l.* He then gave the residue of his property to his widow absolutely, except 4,100*l.*, which she was only to take for life, and after her death it was to be divided among his relations before mentioned, "in proportion to the legacies left above,

which will just make their legacy double the first bequest." One of the sisters of the testator and two of his nephews died after the date of the will, but in his lifetime, and after his death the widow died. One of the Vice Chancellors decided that there was not sufficient evidence before the Court to justify it in departing from the words of the will respecting the apparent miscalculation of the amount excepted out of the residue; and with regard to the postponed legacies, that notwithstanding the words "or to their legal representatives," the shares of the pre-deceased legatees in the amounts postponed to the widow's life interest lapsed, and that as the 4,100*l.* was not given as part of the residue, but as an exception out of the residue, those shares which lapsed fell into the residue, and did not go to the testator's next-of-kin; and on appeal the same was affirmed. *Thompson v. Whitlock*, 28 Law J. Rep. (N.S.) Chanc. 793; 4 De Gex & J. 490.

A testator, after making a provision for an unmarried daughter, said—"Should my daughter L marry, I give to her and to the person who may be her husband a similar power and control over her marriage portion as is given by the marriage articles of my daughter E. And I do also direct, that if my daughter L should marry and die without issue, the several sums given to her after my decease shall, after her decease and that of her husband, revert to my surviving children, or in case of their death to their nearest relatives." By E's marriage settlement successive powers of appointment were given to her and her husband, and in default to the children of the marriage equally. It then provided that if there should be no children E should have power to appoint to any such person as she pleased:—Held, that the power of appointment in the settlement in the event of there being no children was negated by the direction in the will, that on the death of his daughter L without issue the trust fund should "revert to his surviving children, or in case of their death to their nearest relatives." *Crossman v. Bevan*, 29 Law J. Rep. (N.S.) Chanc. 77; 27 Beav. 502.

A testator, a native of Great Britain but domiciled in Russia, possessed of real and personal estate in that country, and also of a large sum of consols in the English funds, made a will in Russian form, declaring an intention to dispose of all his property, both moveable and immovable; he then directed his real estate to be sold, and said, "The money proceeds of all the above, as also the whole of my capital which shall remain with me after my death in ready money and in bank billets belonging to me, shall be divided into ten equal parts,"—which he then disposed of. The testator died unmarried. One of the Vice Chancellors decided that there was an intestacy as to the consols:—Held (affirming his Honour's decision), that neither under the clause (within inverted commas) nor under the whole instrument, did the consols pass; that the words of the clause were not ambiguous; that the words used did not operate as a defective enumeration; that the latter part of the will did not amount to a gift by recital; and that the appeal must be dismissed, with costs. *Wylie v. Wylie, Wylie v. Enokhin*, 29 Law J. Rep. (N.S.) 341; 1 De Gex, F. & J. 410.

A testator gave the residue of his real and personal estate to trustees, upon trust to pay the income

to A L for her life, and after her decease, upon trust, for all her children who should be living at her death, and the issue of such of them as should be then dead, leaving issue, as tenants in common; but the issue, if more than one, of any deceased child should take as a class, as if by representation, and not as individuals. A child of A L died in her lifetime, leaving only a son and a daughter, both of whom survived the testator, but the daughter died in the lifetime of A L, an infant. The brother assigned all his interest to the trustees of his marriage settlement, to whom his original share was paid over, and they filed a bill against the executors for payment of the sister's share. The father of the son and daughter was also made a defendant as administrator of the daughter, and he filed a demurrer to the bill for want of equity. One of the Vice Chancellors was of opinion that the interest of the "issue" of the deceased child of A L was not contingent on their surviving her, and that the administrator of the daughter was entitled, and he allowed the demurrer, whereupon the plaintiff appealed:—Held, reversing his Honour's decision, that the demurrer must be overruled; for although the daughter, not having survived A L, did not take a vested interest, yet that the words "who should be living," applied as well to the "issue" as to the children of A L, and that although the "children" and the "issue," as between classes, took as tenants in common, yet the "issue" *inter se* took as joint-tenants. *Penny v. Clarke*, 29 Law J. Rep. (n.s.) Chanc. 370; 1 De Gex, F. & J. 425; Johns. 619.

A testator gave a fund to trustees, upon trust, in case he left no child, to pay the whole income to his wife during her life or widowhood; but if she married again, to pay one-half of the income, and after her death the whole thereof, to A and B for their joint lives equally; and after the decease of either of them, A and B, to pay the same wholly to the survivor during his life; and after the decease of every of them, his said wife and A and B, the testator directed the fund to be held in trust for the children of A. The testator left no child; the widow married again, and survived both A and B:—Held, that the moiety of the income between the death of the survivor of A and B and the death of the widow, passed to the child of A. *Brown v. Jarvis*, 29 Law J. Rep. (n.s.) Chanc. 695; 2 Gex, F. & J. 168.

A testator, by his will, dated in 1850, gave all his property, real and personal, whether land at H in New South Wales, or in the island of Ceylon, or funds in the hands of A & Co. of Calcutta, or of G in England or elsewhere, to the members of the firm of A & Co., in trust for the benefit, in equal portions, to the extent of the annual income of his property, of his brothers E and C, or the heirs of their bodies lawfully begotten; and the meaning of his will was, that if either brother should die leaving lawfully-begotten heirs of his body, then should the share or portion of such brother descend to such lawfully-begotten heirs; but if one brother should die without lawful issue, then should the whole annual income be paid to the surviving brother, or, in case of his death also, to his lawfully-begotten heirs; but in case both brothers should demise without issue lawfully begotten, then should the whole property be divided among his nearest of kin. The testator then appointed executors, with power to appoint other

executors; also with full power to get in all monies, and to sell, dispose of, and convert into money all his real and personal estate, either by public auction or private contract, as to his executors should seem meet. One of the Vice Chancellors held, that the testator's personality was subject to an executory gift over, on the death of his two brothers without leaving issue living at their death; he also declared that the real estates should be sold, and the proceeds, with the personality, should form a common fund. On appeal, it was held, that the decision as to the personality was correct, but that there was no conversion of the realty, and that the brothers took an estate tail as tenants in common, with cross-remainders between them, of such lands as were subject to English law; and an inquiry was directed as to the effect to be given to the will regarding the lands in Ceylon by the law prevailing there. *Greenway v. Greenway*, 29 Law J. Rep. (n.s.) Chanc. 601; 2 De Gex, F. & J. 128; 1 Giff. 131.

A testator devised estates to trustees, on trust to pay certain annuities, and then the residue to his son for life; and after the decease of his son he gave the estates to the children of his son; he then added a proviso, "that he devise to my said son are upon this express condition, that he shall continue to profess the Protestant religion according to the rites of the Church of England, during his life, and that he shall not reside abroad more than three calendar months in one year." As to the son's children, there was this proviso:—"That the devise hereinbefore contained to the children of my son are made upon this express condition, that the children be educated in England, and in the Protestant religion according to the rites of the Church of England; and in case any one or more of such children shall be educated abroad, or not in the Protestant religion according to the rites of the Church of England, then I do hereby revoke all and every devise to such child or children so educated as aforesaid"; and then followed a gift over. In 1802 the son, who was married to a Roman Catholic French lady, went to France, taking with him four of his six children. He took a house in Paris. In May 1803 the decree of Napoleon was issued, by which he was detained a prisoner in France; but that decree allowed females and all male children under eighteen to return to England. The wife and all the children remained till the Peace of 1814, when all returned to England. All the children were brought up as Protestants, though those who were in France were partly taught at Roman Catholic schools; but these schools were attended by a Protestant master, and the children were not compelled to attend the Roman Catholic services:—Held, that the children took vested interests under the will; that the provisos were conditions subsequent; that they must be strictly construed; and, being so construed, it could not be said that the children had been educated abroad, or not educated in the Protestant religion according to the rites of the Church of England; and, consequently, that no forfeiture of the vested estates had accrued. *Clavering v. Ellison*, 29 Law J. Rep. (n.s.) Chanc. 761; 7 H.L. Cas. 707; affirming 25 Law J. Rep. (n.s.) Chanc. 274; 26 Ibid. 835; 3 Drew. 451.

A testator gave certain property to his wife absolutely. He then gave the residue of his personal property to trustees, to pay the income to his daughter

ter Ann for life, and after her death the capital to be divided equally between his next-of-kin, but exclusive of his nephew Leonard and his two nieces, Mary and Emma (to whom he had previously given legacies):—Held, that the widow was not entitled to a share of the residue as one of the next-of-kin of the testator, but that his daughter Ann was entitled as next-of-kin. *Lee v. Lee*, 29 Law J. Rep. (N.S.) Chanc. 788; 1 Dr. & Sm. 85.

The will of J A contained the following passage: "I forgive to my said nephew Jacob Appleyard, the debt of 2,000*l.* which I advanced to him on loan"; the testator had, on occasion of his nephew going into partnership, advanced to him 2,000*l.* for his own use, and had also at the same time lent to the partnership different sums, the nephew's proportion of which would have amounted to about 2,000*l.*:—Held, that whether the 2,000*l.* was to be treated as having been a gift to the nephew or not, the testator intended in the above passage to refer to it, and not to the proportion of the partnership debt due from the nephew. *Smith v. Armstrong*, 6 De Gex, M. & G. 150.

On an inquiry directed at the hearing the chief clerk certified that the advance of the 2,000*l.* was a gift and not a loan:—Held, that whatever effect this certificate might have on the hearing, on further consideration, it could not be disputed by a party who had neither taken out a summons nor moved to have it varied. *Ibid.*

A testator, by his will, gave certain portions of his property to one of his daughters and her children, and the residue, which was the greater portion, to another daughter and her children. By a codicil, he said, "I cancel that part of my will settling on my daughters and their children my property, and my sons-in-law H and A may dispose of the property I leave for the good of their families:—Held, that the sons-in-law took absolute interests in the portions given by the will to their respective wives. *Alexander v. Alexander*, 6 De Gex, M. & G. 593.

A testator having in the commencement of his will appointed his daughter to act in concert with his son to be guardian and executrix, added, "I also appoint and desire in this my last will and testament that my son to be my executor and residuary legatee do jointly with my daughter, my executrix, who is to act independent of her husband, and be guardian to the children":—Held, that the son alone was entitled to the residue. *Langley v. Thomas*, 6 De Gex, M. & G. 646.

A testator having three sons and three daughters gave, by his will, his residuary estate in trust to be divided into six shares ("being as many shares as" he had children), one share to be for the benefit of each child in manner following, viz., the shares of sons to be paid to them as soon as convenient after testator's death, and the shares of daughters to be vested in trustees for their respective benefit as thereinafter mentioned. Provided that if any son died without having issue living at his death, the share intended for such son, and any share accruing under that proviso, should accrue to the survivors of the testator's children, their executors or administrators. And he directed his daughters' shares to be invested upon trusts therein mentioned for them and their children. By a codicil, reciting that he desired to settle more distinctly the share of one of the daughters,

he revoked the will as to her share, and gave it in trust for her for life, and after her death for such of her children as should attain twenty-one, or being daughters, marry; and in case she should have no child living at her decease who should attain a vested interest, in trust for the testator's children who should be living at her decease, and the representatives of such as should be dead. One of the testator's sons died in his lifetime a bachelor, and the above-mentioned daughter died after the testator's death a spinster:—Held, first, that the surviving sons' shares, both original and accruing, vested absolutely on the testator's death, the clause of substitution as to sons' shares operating only in case of death in the lifetime of the testator; secondly, that the daughters' accruing shares vested in them absolutely. *Ware v. Watson*, 7 De Gex, M. & G. 248.

A testator by his will, gave the dividends of specific sums of stock of different amounts to his sons and daughters by name respectively, for their respective lives, and on the death of any son or daughter he gave the capital sum of which he had given the dividends to such son or daughter, to his or her children at twenty-one, and if no such child attained twenty-one, the said capital sum was to fall into the residue, the interest of which he bequeathed to his widow for life, and after her death to the sons and daughters, "during their several and respective lives to be divided between them," in proportion to the specific sums of stock of which the dividends were bequeathed to them respectively. After "the decease" of the testator's "said children," the capital of the residue was to be divided amongst the children's children at twenty-one, and if any grandchild died under twenty-one, its share was to be divided among the survivors at twenty-one or their issue, and after the death of the widow and all the testator's "children and grandchildren without issue as aforesaid," over. By codicils, the testator revoked the bequests to two of his sons and a daughter, and gave them for their lives the dividends of smaller specific sums of stock than those so given by the will:—Held, first, that under the will the income of the residue was divisible among the children and the survivor and survivors of them, till the death of the last survivor; secondly, that the codicils only revoked the gifts of the dividends; thirdly, that the dividends, the gifts of which were revoked, were not undisposed of, but passed by the residuary bequest as income to those tenants for life of it whose interests were not revoked. *Alv. v. Gregory*, 8 De Gex, M. & G. 221.

An hotel-keeper, by his will, bequeathed his property to trustees, upon trust to permit his widow to carry on the business so long as it could be carried on with advantage to his estate, and to permit her to receive the profits so that she might maintain herself and her family and educate the testator's children. He also directed that if the profits were insufficient for this purpose, the deficiency should be supplied out of the income of the general estate, which, subject to this direction, was to be accumulated and with the principal to be divided among the testator's children on their attaining twenty-one. There was a proviso that, if from any cause it should be advisable to discontinue the business (which the trustees were to have power to do), the stock in trade should be sold and the proceeds form part of the general estate, and that the income of the whole or so much of the

income as should be required, should be applied in the maintenance of the testator's wife and family and the education of the children:—Held, that, on the widow by misconduct becoming unfit to maintain and educate the children, she was not entitled to the surplus profits after setting apart sufficient for their maintenance and education, but could only claim maintenance for herself. *Castle v. Castle*, 1 De Gex & J. 352.

A testator gave an estate to his daughter E for life, and after her death to his executors, in trust to sell and to divide the proceeds equally between her children, their shares to be vested in them at twenty-one, with clauses of survivorship and accruer, and a direction for maintenance out of the "interest and proceeds" of their shares after E's decease till their shares vested. He made similar dispositions of other estates in favour of his children, A, J and W respectively, and their respective children. He then gave the residue of his property to E and A, and if any of the four children should die under twenty-one, he gave the part or parts intended for them respectively to the survivors or survivor of them for life, and after the decease of such survivors or survivor, he gave such part or parts to his executors, in trust to sell and to pay the proceeds to their, his or her child or children. E and W attained twenty-one, and died without having had any child:—Held, that the trusts for sale of estates devised to E and W respectively for life were absolute, and did not depend on E and W having children, and that the interests which E and A took in those estates under the residuary gift were personal estate. *Wall v. Colshead*, 2 De Gex & J. 683: and see *Re Colshead's Will*, *Ibid.* 690.

A testator gave realty and personalty to his son when he should have attained twenty-one, subject to an annuity to the testator's widow, and then proceeded thus:—"Should the hand of death fall on my widow and son, and my having no children or my son any issue, my will is that should he leave a widow, she shall receive the annual sum of 50*l.* during her widowhood out of my real estates, the residue then to be equally divided, after paying such legacies as I may hereafter name, the division of property to be between my late brother's surviving children, and my sister J W's children, my sister R S's children, and my nieces G B and S S, they paying all my son's just debts, funeral expenses and demands, or my wife's, should she be the longest liver":—Held, that the executory gift was not too uncertain to cut down the absolute gift to the son, but that on his death without having had any issue, such of the children of the testator's specified brothers and sisters as were living at the testator's death, together with his specified nieces, were entitled. *Randfield v. Randfield*, 2 De Gex & J. 57; 4 Drew. 147.

Semble—that the condition as to payment of the son's or widow's debts would be inoperative. *Ibid.*

A testator bequeathed his residuary estate in trust for all and every his children and child then born and thereafter to be born, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry under that age, in equal shares as tenants in common; and if there should be but one such child then the whole in trust for that one child. And the testator declared that the share to which each of his

daughters on her attaining the age of twenty-one years, or, marrying under that age, should become entitled under the trusts aforesaid, should be held by the trustees in trust for such daughter for her life, and afterwards for her children:—Held, (affirming the judgment of Vice Chancellor Wood), that the children of a daughter who died in the lifetime of the testator did not take any interest. *Stewart v. Jones*, 3 De Gex & J. 532.

An absolute gift in clear language in a will is not taken away unless by language equally clear. Where, therefore, a testator having made a provision in his will for his eldest grandson, by a bequest of leasehold property, directed that his residuary real and personal estate should be equally divided between his four other grandchildren in common, and declared that the share of each should remain vested in the trustees of the will upon trust to permit him and her to receive the income for life, and after the decease of each his or her share to be in trust for his or her children, provided that if the share of any one or more of the four grandchildren should not vest in any children or child of his or her body, or in case the term in the leasehold given to the eldest grandson should expire in his lifetime, then and in either of such cases the oldest grandson should be let into and take an equal share in the residuary estate intended for the other four grandchildren and their issue equally with such other children or their respective issue:—Held, that on the death of one of the four grandchildren without issue the residue remained divided into four, and was not redistributable into five parts. *Kiver v. Oldfield*, 4 De Gex & J. 30.

A testator, by his will, gave a moiety of his residuary estate as well real as personal, upon trust to pay the income equally amongst all his children who should be living when his youngest child attained twenty-one years, for their respective lives, and after the death of any of them upon trust as to an equal portion of the moiety proportionate to the number of his children then living for the use of the issue of such child or children so dying absolutely for ever:—Held, first, that the word "issue" included only children of the testator's children, to the exclusion of their more remote descendants; and, secondly, that pursuant to the interest of the gift and by analogy to dispositions operating under the Statute of Uses or of dispositions operating under wills, as distinguished from conveyances operating at common law, the children of a child who died after the youngest child of the testator attained twenty-one took as joint tenants the proportionate share of the deceased child, although their respective interests in the proportionate part vested in them at different times as they respectively came into *esse*. *McGregor v. McGregor*, 1 De Gex, F. & J. 63.

A testator gave all his real and personal property to his wife for life, and he gave a sum of stock to his five cousins by name, or the survivors of them, to be equally divided between them, and to be paid as soon as possible after the death of his wife:—Held, that following the rule in *Cripps v. Wolcott* (4 Madd. 11), the survivorship must be referred to the death of the testator's wife, so that one of the cousins who survived the testator and died in the lifetime of his widow, took nothing. *Hearn v. Baker*, 2 Kay & J. 383.

Held, also, that "survivors" must be construed to include a sole survivor, so that where only one of the legatees survived the widow, such survivor took all the stock. *Ibid.*

A bequest of residue "to all the children of my brother R and my sister M, to be equally divided between them, share and share alike." R and M having equal legacies in a former part of the will, and there being nothing in the context from which an intention could be inferred that M was personally to take an equal share in the residue with the children of R, this construction was rejected and the gift was held to pass the residue to the children of R and the children of M in equal shares. *Mason v. Baker*, 2 Kay & J. 567.

Power by sale or mortgage to raise money for maintenance implied from an unfinished clause in a will, purporting to provide for the event of a deficiency of funds for that purpose. *Wheeler v. Howell*, 3 Kay & J. 198.

The Court may supply words in a will, when the context shews by necessary implication what are the words omitted; and unless they are supplied there would be an intestacy. *Hope v. Potter*, 3 Kay & J. 206.

So where there is a gift by will, and then a gift over not commensurate with the original gift, the Court will curtail the general words of the gift over by supplying words of reference; as where the first gift is to A's children, and the gift over is in default of issue of A, the Court will read the gift over as though it were in default of "such" issue. *Ibid.*

But where there was a devise of a particular property to the testator's daughter A, her heirs and assigns, if she should die under the age of twenty-five years, "without having left any child or children," over, and subsequently a devise of other real estate to trustees in fee, in trust for A for her separate use, and after her death in trust to convey the same "unto and equally amongst such children of A as tenants in common, the rents and profits in the mean time to be applied for their maintenance, and in case A should die without leaving any child or children, or leaving such child or children should die under twenty-one," over.—Held, that the Court could not, after "such children of A," supply the words "as should attain twenty-one," but was at liberty, as against the testator's heir, to construe the word "such" as relating to all the children of A, as they had been mentioned in the previous limitation. *Ibid.*

Where there is an absolute devise or bequest of real or personal property, followed by a gift over in the event of the donee dying intestate, the gift over is repugnant and void. *Barton v. Barton*, 3 Kay & J. 512.

Direction in a will, that "all and every such sums of money which I have already advanced or may hereafter advance to my children as will appear in a statement in my handwriting," should be brought into hotchpot.—Held, that a subsequent unattested statement in testator's handwriting was admissible in evidence of advances, the Court construing "which" as meaning "as," and the clause "as will appear," &c., as mere words of reference, forming no part of the identification of the subject. *Whateley v. Spooner*, 3 Kay & J. 542.

But such unattested document cannot be looked

upon as proving that an advance was made which was not actually made nor conversely, and direction therein, that shares so advanced and which had become depreciated in value should be estimated at their selling price at the time when the estate should be divided, is inadmissible. *Ibid.*

"Sums of money" in a will held to comprise personal estate generally. *Ibid.*

Testator, by his will, declared it should be in trustees' discretion to advance all or any part of the principal of a fund to his son, or to his children if he should be dead, in or towards his or their maintenance or advancement in the world, it being his wish that his son (if living) should have the whole benefit of such monies if he should conduct himself steadily and to the satisfaction of his trustees, with gifts over in the event of the whole of such monies not having been advanced by the trustees. The son having assigned his interest under the will, the trustees after the widow's death paid the fund into court under the Trustees' Relief Act, but did not suggest that the son had conducted himself otherwise than steadily and to their satisfaction.—Held, first, upon the construction of the will, that this was in effect a trust for the son, with a power for the trustees to deprive him of the fund if he should not conduct himself steadily and to their satisfaction. Secondly, that the trustees having declined to exercise that power, it was not competent to this Court to exercise it, and the fund was ordered to be transferred to the assignee. *In re Coe's Trust*, 4 Kay & J. 199.

Bequest to executors of a sum of money "to be chargeable and paid as thereinafter mentioned," upon trust for testator's wife for life, remainder for his children; then a gift of certain freehold and leasehold property to his nephew, "subject to the payment" of the said sum and to testator's debts, with a residuary devise and bequest to the wife absolutely.—Held, as between testator's widow and his nephew, that the same was a charge on the gift to the nephew, and not an exception out of that gift, and testator never having had any child, the sum subject to the widow's life interest belonged to the nephew, the principle being that where there is a gift by will of any property, whether real or personal, subject to a particular charge, if any of the purposes of the charge fail before all are satisfied, the donee takes the property relieved from the residue of the burthen which, in the events that have happened, the testator no longer intended him to bear. *Tucker v. Kayess*, 4 Kay & J. 339.

Test in all such cases: Is the thing in question excepted out of the devised property? or in other words, did testator mean to give that property, *minus* the thing in question, or is it a charge on that property? If the former, then, the purpose failing, it goes to the residuary devisee; if the latter, to the devisee of the property charged. *Ibid.*

Whether a sum of money to be paid out of an estate has ever been held to be an exception—*quære*. *Ibid.*

Testator bequeathed a mixed residue upon trust as to one moiety for his daughter Mary for life, with remainder for her children; and as to the other moiety for his daughter Sarah for life, with remainder for her children, with cross-remainders, and proceeded thus: "And in case both my said daughters should die without issue, or leaving such all should

die under twenty-one without leaving issue, then I direct my trustees to pay one moiety unto the person or persons that shall then be considered as my next-of-kin and personal representative or representatives, agreeable to the order of the Statutes of Distribution, and the other moiety unto the person or persons that shall then be considered the next-of-kin and personal representative or representatives of my late wife Sarah, agreeable to the order of the Statutes of Distribution." At the date of his will, his daughter Sarah was the only child and sole next-of-kin of his late wife Sarah; the daughter survived the testator and died without issue.—Held, that the persons entitled to the second moiety were those who at the death of the surviving daughter were the next-of-kin according to the statute of testator's deceased wife; and having regard to the juxtaposition of the bequests, that the persons entitled to the first moiety were those who at the same period were the next-of-kin according to the statute of the testator. *Wharton v. Barker*, 4 Kay & J. 483.

Review of the authorities as to the time when the persons taking under bequests of this description are to be ascertained. *Ibid*.

Where in a will "heir" is used in a popular sense as a word of description, so as that the capacity to inherit is not of the essence of the description, the want of capacity to inherit is immaterial if the person meant is otherwise ascertained. *Ritson v. Stordy*, 3 Sm. & G. 230.

A clause of forfeiture of income given to the separate use of a married woman, which was to take effect on her becoming entitled to or in the receipt of a permanent income of 1,000*l.* a year.—Held, not brought into operation by the accruing to her of an income exceeding that amount which, by the trusts of her marriage settlement, made prior to the will, passed to her husband for life, remainder to the wife for life, remainder to the children of the marriage. *Curson v. Curson*, 1 Giff. 248.

Where a testator in his will calls the son of his own illegitimate son his grandson, having no legitimate son, after giving his property to be divided between his son and daughter's children, and if there should be no grandchildren, then a gift to his nephew,—the Court held, that a legitimate daughter of the testator's illegitimate son was within the description of grandchildren. *Allen v. Webster*, 2 Giff. 177.

Question of construction decided on demurrer. *Ibid*.

The 33rd section of the Wills Act, 7 Will. 4. & 1 Vict. c. 26, does not apply where the devise or bequest is to the testator's children as a class. *Browne v. Hammond*, Johns. 210.

A devise or bequest over in terms made dependent on the marriage of the donee of the preceding estate, will be extended by implication so as to take effect on the determination of that estate by death. *Ibid*.

Observations on *Sheffield v. Lord Orrery*, 3 Atk. 282, and *Pile v. Salter*, 5 Sim. 411. *Ibid*.

A testator devised and bequeathed all his real and personal estate upon trust to convert and invest, and out of the income to pay various annuities, and to apply the residue which should be more than sufficient to provide for the annuities, and also such sums as should become available by the determination of the said annuities, in such manner as testator should

appoint, and failing such appointment, "to pay the same to my own next-of-kin for the time being equally among them, share and share alike, declaring hereby that my said trustees shall be the sole judges as to whether the whole and what parts of my said means, estates and effects is and shall be necessary for the purposes aforesaid, or any of them".—Held, that the next-of-kin at testator's death were entitled to the residue, including both the original surplus and the sums set free by the dropping of annuities. *Moss v. Dunlop*, Johns. 490.

Testator gave to his son for life, and if his son should die without leaving lawful issue living at his death, then for "all and every his brothers and sisters, and the issue of such of them as should be then dead, such issue taking only the share their parents would have been entitled to if living".—Held, first, that the gift to the issue was original; and the children of a sister deceased before the date of the will took. Secondly, that a brother surviving the testator but predeceasing the tenant for life, took a vested interest, and his representatives were entitled. Thirdly, as to a sister who survived the testator, but died before the tenant for life, leaving a child, who also died before the tenant for life, the representatives of that child were entitled. *Becher v. Becher*, 3 Drew. 447.

A testator gave leasehold estate to trustees, on trust for his son Benjamin to take the rents until the son of Benjamin should attain twenty-one; remainder on trust to support contingent remainders, and subject thereto on trust for such son for life; remainder for the heirs male of such son; remainder to the second and other sons of Benjamin and the heirs male of their bodies, with remainder over of a like nature in favour of other children of the testator and their sons.—Held, that this would have been an estate tail in the son of Benjamin, and being personalty he would have taken an absolute estate. *Lewis v. Hopkins*, 3 Drew. 668.

A will contained a bequest of 1,000*l.* on trusts, and of 5,000*l.* on trusts, and another bequest on trusts in which no sum was mentioned; but the language was continuous, and no actual blank was left. In another part of the will there was power to invest the said sum of 5,000*l.* and the said two sums of 1,000*l.* —Held, that the latter clause was evidence that the testator intended a bequest of 1,000*l.* in the bequest in which no sum was named. *Edmunds v. Waugh*, 4 Drew. 275.

A trustee devised "all his real estates whatsoever and wheresoever" charged with a legacy.—Held, that the trust estates did not pass. *Hope v. Liddell*, *Liddell v. Norton*, 21 Beav. 183; 25 Law J. Rep. (N.S.) Chanc. 90.

Under his marriage settlement, A B had power to appoint the reversion in fee of the settled estates, and the trustees had a power of sale with his consent. A B, by his will, appointed it to trustees to sell and stand possessed of the produce in trust for a class; and he gave all his real and personal estate "not thereinbefore specifically disposed of" to his widow. Subsequently the trustees, with A B's consent, sold the estate, but at his death the conveyance had not been executed by one of the trustees, and the purchase-money had not been received.—Held (notwithstanding the 1 Vict. c. 26. ss. 19, 23), that the gift to the class was inoperative, and that the purchase-

money passed, under the residuary gift, to the widow. *Gale v. Gale*, 21 Beav. 349.

A testatrix, by her will, gave to A B and C distinct legacies, and she appointed A and B executors, and gave "to her executors A and B" her residuary estate. By a codicil, she appointed C executor and trustee of her will, "as if his name had been inserted therein as a trustee and executor," and a legacy for his trouble, "in addition to the benefit he derived under her will"; and she declared that her trust estate should vest in A, B and C, and confirmed her will in all other respects. C claimed one third of the residue, but the Court held that it was divisible between A and B. *Hillerdon v. Grove*, 21 Beav. 518.

In a will the word "or" was read "and" to give effect to the manifest intention. The testator bequeathed 4,000*l.* to his four sons, B, C, D and E, in trust for A for life, with remainder to his issue, and in default to the four sons, "or" to such other of his sons as should be trustees in succession. He provided that on the death of either of the four sons, his next surviving son should become a trustee in his place. A survived the four trustees and died without issue, leaving two of the substituted trustees surviving:—Held, that they were not exclusively entitled to the legacy, but that it was divisible equally between them and the representatives of the deceased trustees. *Maude v. Maude*, 22 Beav. 290.

Gift of residue in trust for testator's wife during widowhood and on her death or marriage to pay it amongst his five children, or the "survivor or survivors" of them, at such ages as his wife should appoint, or in default at twenty-one. But in case of the death of any, before his share should become "payable," leaving issue, then to pay his share to such issue. A child attained twenty-one and died in the life of the wife, leaving issue, no appointment having been made:—Held, that the survivorship had reference to the ceasing of the wife's estate, and that the issue and not the representatives of the child took the share. *Hind v. Selby*, 22 Beav. 378.

A testator gave his residue to his wife, and on her death or marriage to his children. But in case she should die or marry again without leaving any child, or should any such child die before twenty-one, he directed the trustees to pay it to "such person or persons as might be legally entitled to the same under the Statute of Distributions." There was one child only, who was born after the testator's death, and who died three years old. The widow married again:—Held, that the class to whom the residue was given over was to be ascertained at the testator's death and not at the death of the child, and that the widow was not excluded. *Starr v. Newberry*, 23 Beav. 436.

After certain bequests for life, the general residue was bequeathed to the surviving children of A, who was living:—Held, that the survivorship had reference to the death of the testator. *Lill v. Lill*, 23 Beav. 446.

After gifts to A, B and C, there was a gift, "after their decease," of that property, together with the residue:—Held, that "after their decease" meant "subject to the interests of A, B and C," and that these words did not postpone the immediate enjoyment of the general residue. *Ibid.*

A testator empowered his trustees to purchase

freeholds "to the amount of 1,500*l.* of his personal estate for the use of A during life, and then divided among his issue, if any":—Held, that this was executory, and that A took for life, with remainder to his children as tenants in common in tail, with cross-remainders between them in tail, with an ultimate reversion in fee to A. *Hadwen v. Hadwen*, 23 Beav. 551.

A testator after the death of his daughter gave real and personal estate to her "legal personal representative or representatives," to hold to them, their "heirs," executors, &c., according to the nature of the property. She left a husband, who took out administration, and an only child:—Held, that the husband took both the real and personal estate. *Dixon v. Dixon*, 24 Beav. 129.

A testator made a voluntary settlement of some real estates. He afterwards, by his will, devised other real estates to nearly the same uses:—Held, that the deed could not be referred to for the purpose of construing the will. *Randall v. Daniel*, 24 Beav. 193.

The testator gave his residuary real and personal estate to his widow "to and for her own sole use and benefit, feeling assured and having every confidence that she will hereafter dispose of the same fairly, justly and equitably amongst my two daughters and their children," and he appointed her sole executrix and residuary legatee:—Held, that the widow took beneficially for life, with remainder to the two daughters and their children as she should appoint; but the Court refrained from declaring how the property would devolve in default of appointment. *Gully v. Oregoe*, 24 Beav. 185.

A testator devised his real and personal estate in trust for his wife for life, and after her decease he devised a real estate to his brother for life, with remainder to his children. He proceeded thus: and as to the residue of my estate and effects "not hereinbefore disposed of, or which may remain after satisfying the trusts of this my will," I give the same to my brother (if then living), his heirs, &c. "But in case my brother shall then be dead, then and in such case" I give the residue of my estate and effects to his children. The brother died in the life of the widow:—Held, that the residue vested in him at the testator's death. *Birds v. Askey* (No. 1), 24 Beav. 615.

Gift of a share "in addition" held, under the circumstances, not liable to same contingency as the original share. *King v. Toole*, 25 Beav. 28.

A testator devised an estate to A and B successively for life, and after their deaths to sell and divide the produce between his grandchildren who should be living at the decease of the survivor of A and B, except his grandsons Edward and John, neither of whom was to receive anything; and he directed that the shares which would be otherwise payable to them should be paid to his grand-daughter Susannah, "in addition to her own share." Edward and John survived the tenants for life, but Susannah predeceased them:—Held, that the two shares passed to the representatives of Susannah. *Ibid.*

A testator "gave, devised and bequeathed" his household goods, &c. "and everything he should die possessed of" to A for life, and after her death he "gave, devised and bequeathed the whole of his effects which might be then remaining unto and to

the use of" the plaintiff:—Held, that the real estate passed. *Phillips v. Beal*, 25 Beav. 25.

In construing a will plain and distinct words are only to be controlled by words equally plain and distinct. *Goodwin v. Finlayson*, 25 Beav. 65.

A testator gave and devised to his executors his freehold house, and all his other property he might die possessed of, "in trust for the purposes of his will":—Held, that he had not created a mixed fund. *Ellis v. Bartrum* (No. 3), 25 Beav. 110.

Trusts for sale on failure of a series of prior limitations:—Held, on the context, to be too remote. *Hale v. Pew*, 25 Beav. 335.

A testator bequeathed his residue equally to his five cousins who should be living at the time of his decease, and to the "issue" of such of them as should be then dead leaving issue, share and share alike, "such issue, respectively, nevertheless, taking between them a parent's share":—Held, that the word "issue" was to be construed "children," and that grandchildren were excluded. *Smith v. Horsfall*, 25 Beav. 628.

By his will the testator divided his property between his son and two married daughters, and he declared that the debts due to him from his son and his two sons-in-law should be "paid or accounted for to his executors" before his children should receive any part of his estate. By a codicil, he cut down his son's interest to a life estate, and gave interests in his share to his wife and children:—Held, that the son was not bound to pay his debts for the benefit of his wife and children, but only to bring the amount into hotchpot as regarded his two sisters. *White v. Turner*, 25 Beav. 505.

A testator devised real and personal estate to A for life, with a direction to the executors after A's death, to divide it amongst all her children "and their lawful issue, share and share alike." There was a gift over of the leaseholds to other persons on a total failure of issue of the children:—Held, that the children took estates tail in the realty and absolute interests in the personality, and that cross-remainders were not to be implied in regard to the leaseholds. *Beaver v. Nowell*, 25 Beav. 551.

The word "issue" restricted to "children" by force of the correlative expression "parent." The word "and" construed "or" in order to give effect to the obvious meaning. *Maynard v. Wright*, 26 Beav. 285.

Gift to "my grandchildren and their issue as shall stand in respect to me in equal degree of consanguinity":—Held, not void for uncertainty, the sentence being read in the alternative. *Ibid.*

A testator devised a freehold in trust to accumulate the rents for periods of not less than ten years successively at a time, at the expiration of which the accumulations to be paid to the testator's "sons and daughters, or such of them as should be living at the respective periods of division, and the issue of such of them as shall have died leaving lawful issue, such issue taking their deceased parent's share to be vested interests in the same respectively at the age of twenty-one years, and so on from time to time until the expiration of twenty-one years after the decease of the survivor of her children. And from and after the expiration of the term of twenty-one years he devised the same premises unto such of his grandchildren and their issue as should then stand

in respect to him in equal degree of consanguinity, and their heirs as tenants in common:—Held, that "issue" was to be read "children," and the word "and" to be read "or," and that the devise was neither void for remoteness nor uncertainty. *Ibid.*

The word "son" in connexion with the words "heir" and "issue" held by force of the context to mean issue male. *Jenkins v. Lord Clinton*, 26 Beav. 108; s.c. on appeal, *nom. Jenkins v. Hughes*, 30 Law J. Rep. (n.s.) Chanc. 870.

The word "son" is quite as flexible as the word "heir," and can as easily be read "issue male" as the word "heir" can be turned into "son." *Ibid.*

A testator appointed A B "his universal heir":—Held, that these words were sufficient, if uncontrolled, to give the fee simple. *Ibid.*

A testator gave and bequeathed the "residue of his estate, after taking out 1,000*l.*," to his uncle:—Held, that the residuary real and personal estate passed, the testator having previously made pecuniary gifts out of "his freehold and personal estate." *Hawkeworth v. Hawkeworth*, 27 Beav. 1.

A testator directed his trustees to make a settlement of his real estate, containing a power to the tenant for life to charge the estate with a sum for portions for his younger children:—Held, that in determining the rights of the younger children, the portions could not be treated as legacies under the will, but that such rights must depend upon the terms of the instrument executing the power. *Remnant v. Hood*, 27 Beav. 74.

A testator devised and bequeathed his real and personal estate to his widow "to and for her own use and benefit absolutely, having full confidence in her sufficient and judicious provision for my dear children":—Held, that there was no trust in favour of the children. *Fox v. Fox*, 27 Beav. 301.

A testator bequeathed his personal estate to his wife absolutely, and he devised two real estates to her for life, and after her death, in trust for sale and division amongst other parties. Having sold one of the estates, he made a codicil, changing his trustee and authorizing the sale of the remaining estate at any time, and he gave the produce thereof to his wife for life, and then "upon the trusts and for the intents and purposes in his will expressed and declared as concerning all his real and personal estate"; and in all other respects he confirmed his will:—Held, that the produce of the estate was not divisible amongst all the devisees and legatees rateably, but was subject to the trusts declared by the will. *Baker v. Richards*, 27 Beav. 320.

A testatrix gave her real estate in trust for her grandchildren (by name) and their issue, as M F should appoint, and in default of such appointment upon trust for "my aforesaid nephews and nieces and their respective lawful issue, and also the issue (if any) of M F and their several and respective heirs and assigns for ever," as tenants in common. No nephews or nieces were mentioned in the will. M F died without appointing:—Held, that there was no gift by implication to the grandchildren and their issue. Secondly, that the words "my aforesaid nephews and nieces" could not be read "my aforesaid grandsons and granddaughters." Thirdly, that the gifts to the nephews and nieces were not void for uncertainty, and, lastly, that they took in tail. *Campbell v. Bonskell*, 27 Beav. 325.

Copyholds held to pass under a will by the words "monies, property and effects," aided by the context. *Streetfield v. Cooper*, 27 Beav. 338.

A will commenced with a statement that it was a disposition of the testatrix's "estates, property and effects." The testatrix then gave and "bequeathed" her "monies, property and effects," to her daughter, with an ultimate limitation to her own next-of-kin. The disposition pointed to personal estate; there was a direction to invest; the words "devise" and "heirs" were not used, and the expressions "legacy," "capital and principal," were applied to the gift. There being a trust for conversion,—Held, that copyhold passed under the gift to the children. *Ibid*.

A testator said, "I leave my wife 200*l.* to dispose of as she may think proper, and the interest of the residue of my property, viz., the sum of 454*l.* 9*s.* 9*d.*, for life." He subsequently stated that he had 200*l.* in the savings-bank, and 454*l.* 9*s.* 9*d.* and 30*l.* in addition in another bank. His property consisted of 454*l.* 9*s.* 9*d.* and 30*l.* and some furniture, and there was in the savings-bank a sum of 200*l.* in his wife's name, being part of her separate estate:—Held, that this latter sum was the 200*l.* referred to in the will. *Heaketh v. Magennis*, 27 Beav. 395.

A testator gave some property to his wife for life, and proceeded thus:—"At the decease of my wife, I leave the last-named sum to be equally divided between the families of my two brothers, viz., one-half to the widow and children of my deceased brother John Bennett, the widow, if surviving, to have an equal share with the children:—Held, that the survivorship had relation to the death of the tenant for life, and not of the testator; and, secondly, that the children took in joint tenancy. *Ibid*.

It is a canon of construction that where a testator has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all other parts of it, unless it violates the same. The word "issue" was used in a will on several occasions as equivalent to "children," and the issue were in some instances spoken of in reference to their "parent":—Held, that "issue" must receive the same construction throughout the will. *Rhodes v. Rhodes*, 27 Beav. 418.

The words "next lawful heirs," in an ultimate gift of real and personal estate, construed in their strict sense as to the personalty; and the heir-at-law, and not the next-of-kin, held entitled. *Hazlewood v. Green*, 28 Beav. 1.

The words "if A die without having any child or children," construed "without having had any child," and the words "should A die without, any child or children," construed "any child surviving him." *Jeffreys v. Conner*, 28 Beav. 328.

A testator gave one-sixth of his personal estate to A for life, and afterwards to a charity. He gave four separate sixths to B, C, D and E for life, with remainder to the same charity; he gave the remaining sixth to F for life, and after the death of the survivor of A, B, C, D, E and F, he gave the whole monies and all interest thereafter to become due thereon to the same charity. F died:—Held, that the charity was not entitled to F's sixth until the death of the survivor of the six legatees, and that there was an intestacy as to the intermediate interest. *Stevens v. Pyle*, 28 Beav. 388.

Gift over in case A B should die "before marriage and leave no issue":—Held, to take effect only on the happening of both events. *Secombe v. Edwards*, 28 Beav. 440.

On the construction of a will, held that the word "and" could not be read disjunctively as "or." *Ibid*.

(b) *Misdescription and Ambiguity.*

Parol evidence will not be admitted to shew that a bequest in a former will had been inadvertently allowed to remain in a second will. A testator, in the lifetime of his niece E, made a will containing bequests in her favour. She afterwards died, leaving a granddaughter, E J, who was a great-great-niece of the testator. With a knowledge of these facts, the testator made a second will, which contained bequests to E, identical with those contained in his former will:—Held, that the testator's great-great-niece was within the description, and that she was entitled to the legacies. *Stringer v. Gardiner*, 28 Law J. Rep. (N.S.) Chanc. 758; 4 De Gex & J. 468; 27 Beav. 35.

A testator devised a house to "my sister Mary Frances Tyrwhitt Drake." He afterwards gave the residue of his real and personal property to three other persons and "my niece Mary Frances Tyrwhitt Drake," equally to be divided between them. He had no sister, but only a sister-in-law, and no niece bearing exactly these names:—Held, that extrinsic evidence was admissible to explain the ambiguity; that the evidence of the solicitor as to what had been his instructions to prepare the will was properly rejected; and that the will was, as to this fourth share of the residue, void for uncertainty. *Mary Frances Tyrwhitt Drake v. Frederick William Tyrwhitt Drake*, 29 Law J. Rep. (N.S.) Chanc. 850; 8 H.L. Cas. 172.

Devise "to William Marshall, my second cousin." Testator had no second cousin so named; but he had two first cousins, once removed, one named William Marshall, the other named William John Robert Blandford Marshall:—Held, a latent ambiguity, and parol evidence admitted to disclose it. *Bennett v. Marshall*, 2 Kay & J. 740.

(B) VALIDITY.

(a) *In general.*

E H died in February 1857, leaving a will made in January 1857. The deceased's husband had left New York for Albany on the 9th of April 1850, since which time, though inquiries had been made for him there and elsewhere, nothing had been heard of him. On motion for probate of the will of E H as having died a widow,—Held, that the husband of E H, not having been heard of for more than seven years, might, under the circumstances, be presumed to have died before his wife, as there was no legal presumption that his death took place at the end of the seven years, and that, consequently the will of E H was valid. *In the goods of How*, 27 Law J. Rep. (N.S.) Prob. & M. 37; 1 Sw. & Tr. 53.

A, a mariner, by a will duly executed in January 1857, bequeathed to B a share in the residue of his property, and appointed S and R his executors. In November 1857, being then with his ship at Port Adelaide, he wrote a letter to S relating to business, which contained the following passage:—"Mem. I desire, if it should please God to take me before I

see you again, that you and E will prevent B or his children from ever having a fraction of my property." On the death of A,—Held, that, under 1 & 2 Vict. c. 26. s. 11, this letter was entitled to probate as a codicil, though it did not relate exclusively to matters of a testamentary nature. *In the goods of Parker*, 28 Law J. Rep. (N.S.) Prob. & M. 91.

By a settlement made in contemplation of a marriage between A, the intended wife, and B, certain property of A was vested in trustees in trust for A till the marriage, and afterwards (subject to certain limitations), in case A should survive B, in trust for such persons as A should by will appoint. In July 1842 the marriage was solemnised, but was void in consequence of A being the sister of B's deceased wife. In October 1842 A made her will, whereby, after reciting the power conferred by the settlement, she confirmed it, and "in exercise of the power thereby reserved, and all other powers enabling her in that behalf," directed that the trustees of the settlement for the time being should hold the property comprised therein after the death of B on certain trusts. Among others, she gave certain legacies to such of several persons as should be living at the death of B, to be paid within six months after B's death; and one moiety of the residue for such persons as B should appoint, &c. B died in the lifetime of A, and on the death of A letters of administration of her effects were obtained. A suit being afterwards instituted for the purpose of revoking the grant of administration, and obtaining probate of the will,—Held, first, that the will was not a contingent will intended by A to take effect as such only in the event of B surviving her, though she did not intend by it to dispose of her property until after B's death. Secondly, that though A might have supposed her right to make the will depended on the power conferred by the settlement, yet as she intended to give it in whatever way her right to do so was acquired, and had such a right, the will was entitled to probate. *Southall v. Jones*, 28 Law J. Rep. (N.S.) Prob. & M. 112; 1 Sw. & Tr. 298.

A man can have only one domicile for the purpose of succession. His domicile of origin prevails until he has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and taking another as his sole domicile. Where issue is joined on the question of domicile the burden of proof is on the party setting up the abandonment of the domicile of origin. *Crookenden v. Fuller*, 29 Law J. Rep. (N.S.) Prob. M. & A. 1; 1 Sw. & Tr. 441.

The circumstance that a will is made in execution of a power does not exempt it from the general rule that probate cannot be granted of an instrument unless it is duly executed as a will in conformity with the law of the domicile of the testator. *Ibid.*

Semble—that a will made in a foreign country in conformity with its laws by a Frenchman or foreigner domiciled in France is valid by the law of France. *Ibid.*

The will of a person who dies domiciled abroad, disposing of personal estate situate in this country, if made in pursuance of a power of appointment, and executed in compliance with the requisites of the power, is entitled to probate, though not executed according to the testamentary law of the domicile of the testator. The opinion to the contrary, expressed

in the judgment in *Crookenden v. Fuller*, is incorrect. *In the goods of Alexander*, 29 Law J. Rep. (N.S.) Prob. M. & A. 98.

Where a testamentary paper is alleged to have been made in execution of a power, and proof of a power enabling the deceased to dispose of property by will is given, the Court is bound to decree probate, and has no authority to inquire whether the will is in the form required by law for the due execution of a power, or whether it has been executed with the formalities required by the power.—It is for a Court of construction to decide whether the will is operative. *De Chatelain v. De Pontigny*, 29 Law J. Rep. (N.S.) Prob. M. & A. 147; 1 Sw. & Tr. 411.

The plaintiffs, in a testamentary suit, propounded the will of A. The defendants pleaded that at the time it was made A was a married woman, and that it was not made by assent of her husband, or in pursuance of a power. The plaintiffs replied that it was made in pursuance of a power. At the hearing, it appeared that under A's marriage settlement certain property was settled in trust for such persons as she, notwithstanding her coverture, by will to be signed and published by her in the presence of, and attested by three credible witnesses, should appoint, and that the testamentary paper propounded neither referred to the power, nor was executed with the formalities required by it:—Held, in accordance with the decision of the Privy Council in *Barres v. Vincent*, that the Court was bound to decree probate. *Ibid.*

A testatrix, by her will, bequeathed personally to certain legatees, "in the confidence that they will distribute it as I may by memorandum or deed, or otherwise, direct." She afterwards executed a codicil revoking some legacies, but confirming her will in all other respects. After her death, the will and codicil and several unattested memoranda, in her handwriting, containing directions for the distribution of the personality, bearing dates later than the will and earlier than the codicil, were found tied up together:—Held, that the memoranda could not be admitted to probate. *In the goods of Lancaster*, 29 Law J. Rep. (N.S.) Prob. M. & A. 155.

When several sheets of paper, constituting a connected but not in all points a consistent disposal of the property, are found together, the last sheet being duly executed, the presumption, in the absence of direct proof, is, that they all formed the will of the deceased at the time of the execution. A general revocatory clause of "all former wills" leads to the inference that the deceased at that time intended to leave a subsisting will. The physical annexation (by a piece of tape, &c. g.) of a duly-executed codicil of a later date to testamentary papers, duly executed but revoked, is no ground for inferring the "intention to revive," required by 1 Vict. c. 26. s. 22. *Semble*—such intention can only be shewn by the contents of the codicil itself. *Marrā v. Marrā*, 1 Sw. & Tr. 528.

(b) Incompetency.

A party propounding a will is bound to shew that it was executed by the testator, and that he was of a sound and disposing mind. If a will, not irrational on the face of it, is produced before a jury, and the execution of it is proved and no other evidence is offered, the jury should be told to

find for the will: and even if some evidence of incompetency be given, yet if it does not shake the jury's belief in the competency, they may find for the will, but not as on a mere presumption of law. But when there is evidence before the jury on both sides, they ought not to affirm the will unless they believe the testator was competent; and a Judge was held to have misdirected the jury in telling them, in an action of ejectment by the heir-at-law against the devisee, where evidence had been given on both sides as to the competency of the testator, that, the execution of the will being proved, the law presumed sanity, and that the heir-at-law must prove the incompetency, and that if upon conflicting evidence the jury were left in doubt, they ought to find for the will. *Sutton v. Sadler*, 26 Law J. Rep. (N.S.) C.P. 284; 3 Com. B. Rep. N.S. 87.

To an allegation propounding a will, dated the 7th of July 1857, by which a feme covert had exercised, in favour of her husband, a general power of appointment, a responsive allegation was given in which in the earlier articles pleaded the personal history of the deceased, her dislike to her husband in consequence of his ill-treatment, her wish to leave her property to her father, and that by the coercion of her husband she had been induced to execute previous wills in his favour. The 21st article alleged the testamentary incapacity of the deceased at the date of the will, and stated facts from which that inference might be drawn. The admission of this allegation being opposed,—Held, that as the 21st article pleaded facts bearing directly on the question of incompetency at the time the will was made, the former part of the allegation, which by itself would be inadmissible as irrelevant, was no longer immaterial, but that the facts stated in it might properly be taken into consideration in combination with those stated in the 21st article. *Latham v. Woolbert*, 27 Law J. Rep. (N.S.) Prob. & M. 10; 1 Sw. & Tr. 1.

If a will, rational on the face of it, is shewn to have been executed and attested in the manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding. But if there are circumstances in evidence which counterbalance that presumption, the decree of the Court of Probate must be against its validity, unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it. *Symes v. Green*, 28 Law J. Rep. (N.S.) Prob. & M. 83; 1 Sw. & Tr. 401.

W P, who for many years had been afflicted with habitual insanity, accompanied with intermissions, executed a will when confined in a lunatic asylum. The instructions for it were designed and written by himself without assistance, and the will made a natural and equitable distribution of his property. Probate of the will was opposed by the next-of-kin on the ground of the testator being of unsound mind at the time of its execution. The executors contended that it was executed by him in a lucid interval. The jury having found a verdict for the executors, probate of the will was decreed:—Held, that where a person afflicted with habitual insanity, with intermissions, makes a will, the fact that the will is a rational one and made in a rational manner, though not conclusive, is strong evidence of its having been made

in a lucid interval; that where a person is labouring under an insane delusion, his sanity is to be tested by directing his attention to the subject-matter of such delusion; but that where a person is afflicted with habitual insanity unaccompanied with delusions, his sanity is to be tested by his answers to questions, his apparent recollection of past transactions, and his reasoning justly with regard to them, and with regard to the conduct of individuals; that the will in question was made under remarkable circumstances, and such as would have justified the next-of-kin in calling upon the executors to prove it in solemn form; that the next-of-kin having put the executors to a very expensive trial, although she had previously received from them full and complete information respecting its execution, was not entitled to have her costs out of the estate. The Court declined to make any order as to costs. *Nicholls v. Binns*, 1 Sw. & Tr. 239.

(c) Execution.

A will, purporting in the commencement and testimonium clause to be that of S C, was executed by a mark, against which was written the name S B, and was handed by S C, as her will, to one of her executors, shortly before her death. B had been the maiden name of S C:—Held, that, as there was sufficient evidence that the mark was that of S C, the execution of the will by her was not vitiated by another name having been written against her mark. *In the goods of Clarke*, 27 Law J. Rep. (N.S.) Prob. & M. 18; 1 Sw. & Tr. 22.

The testimonium clause of a will was as follows: "In witness whereof I, Martin Hall Mann, have hereunto set my hand," &c. The whole of this was in the handwriting of the testator, and his name written as he usually signed it, but the will was not otherwise signed by him:—Held, that the will was duly executed, the signature being placed "among the words of the testimonium clause," within the meaning of Lord St. Leonards' Act, 15 & 16 Vict. c. 24. s. 1. *In the goods of Mann*, 28 Law J. Rep. (N.S.) Prob. & M. 19.

To the will of T, dated in 1842, there was no clause of attestation, but there were subscribed the names of three attesting witnesses. The only one of the witnesses who survived T deposed, that he witnessed the testatrix execute the will, but that no one else was present, and that he then told her that the presence of another witness was requisite:—Held, in the absence of evidence as to the circumstances under which the other two witnesses signed, that it might be presumed that the testatrix had acknowledged her signature in their joint presence. *In the goods of Thomas*, 28 Law J. Rep. (N.S.) Prob. & M. 33; 1 Sw. & Tr. 255.

Probate of a will made by a soldier in actual military service, signed but not attested, will not be granted unless the signature be proved to be in the handwriting of the deceased, by the affidavits of two disinterested persons. It is not sufficient that the affidavits state that the whole paper writing is in the handwriting of the deceased, but they should in terms state that the signature is in his handwriting. The form of affidavit of handwriting in the rules should be strictly followed. *In the goods of Neville*, 28 Law J. Rep. (N.S.) Prob. & M. 52.

Where a will appears on the face of it to have

been duly executed, and the attesting witnesses are unable to say whether or not the testator had signed it when they subscribed their names, the Court is at liberty to infer from the circumstances of the case whether or not the testator had previously signed. *Groillim v. Groillim*, 29 Law J. Rep. (n.s.) Prob. M. & A. 31.

After the death of A a paper writing of a testamentary nature, signed by the deceased, but not attested in conformity with the Wills Act, was found sealed up in an envelope, on the outside of which was written, "I confirm the contents written in the inclosed document, in the presence of R S and S P, this 29th day of December 1858." This memorandum was signed by the deceased, and duly attested by two witnesses:—Held, that parol evidence was admissible to shew that the paper writing found within the envelope was the "document" referred to in the indorsement on it, and that the evidence adduced being satisfactory, the paper writing and the envelope were entitled to probate. *In the goods of Almonino*, 29 Law J. Rep. (n.s.) Prob. M. & A. 46; 1 Sw. & Tr. 508.

The name of the testator formed the concluding words of a holograph will, made in 1832, which was not otherwise signed. When found after the death of the deceased, beneath the last line were the words—"Witness, J S. Witness, H E. April 11, 1838." The will was propounded as executed on the 11th of April 1838. It was proved that the witnesses J S and H E were dead, and that their signatures were genuine:—Held, that from the construction of the last sentence the testator intended his name at the end of the will to represent his signature, and that due execution and attestation must be presumed, in the absence of any evidence to the contrary. *Trott v. Trott*, 29 Law J. Rep. (n.s.) Prob. M. & A. 166.

The attesting witnesses to a will, which upon the face of it appeared to have been duly executed, were unable to state whether it was signed by the testator in their presence or before he brought it to them to sign, and whether he had stated that the paper they signed was his will; but, the position of their signatures being such that if previously signed by the testator, his signature must have been seen by them, the Court granted probate. *In the goods of Holgate*, 29 Law J. Rep. (n.s.) Prob. M. & A. 161; 1 Sw. & Tr. 261.

A executed his will in February, and a codicil on the same paper in December; below the signature to the will, and before the commencement of the codicil, appeared a memorandum, which, from the evidence of the solicitor who prepared the will, had been written on the paper before the execution of the will:—Held, that the memorandum, being no part of the will as originally executed, was not entitled to probate by reason of the duly-executed codicil of subsequent date, such codicil referring merely to the will. *In the goods of Willmott*, 1 Sw. & Tr. 36.

A being resident in India, sent in 1850 to England, in a letter to his solicitor, a copy of a will which he stated he had made there. In February 1857 he transmitted in the same way a copy of a codicil stated by him to have been made at Delhi. A lost his life in May 1857 in the mutiny at Delhi, and the will and codicil were not forthcoming. On

motion for probate of the will and codicil as contained in the copies sent to England,—Held, that there being no proof of the execution of the original will and codicil, except the statement of the deceased himself, made after their execution, the copies were not entitled to probate. *In the goods of Ripley*, 1 Sw. & Tr. 68.

A produced to B a sheet of paper, having on the first side a formal heading of a codicil, and asked B to write a codicil for her. B, not having finished the dispositive part when he reached the formal ending, turned over the page and continued the sentence and other dispositive clauses on the second side. The signatures of A and of the attesting witnesses following the formal ending were on the first page. On motion for probate, counsel suggesting that the writing on the second side might be considered as an interlineation, the Court refused to decide such a question on motion, but left the parties to propound the paper, if they thought fit. *In the goods of Peach*, 1 Sw. & Tr. 138.

A when blind made his will, having no property of his own, but being surviving trustee of a fund consisting of 1,105*l.* 5*s.* stock, solely for the purpose of enabling B, to whom the reversion in the said trust fund had been assigned, to receive the same. By the will he appointed B, his executors, administrators and assigns, his sole executor. B died in A's lifetime, having made a will whereof C, one of his executors, had taken probate. The Court being satisfied that A knew and approved of the contents of his will when he executed it, granted probate of it to C, limited to the said trust fund. *Re Asford*, 1 Sw. & Tr. 540.

(d) Attestation.

The hand of L, one of the attesting witnesses to a will, who was unable to write, was, at his request, held and guided by the other witness, and so L's name was subscribed:—Held, that the will was duly attested and subscribed by L under section 9. of the Wills Act. *In the goods of Frith*, 27 Law J. Rep. (n.s.) Prob. & M. 6; 1 Sw. & Tr. 8.

To constitute a subscription by the attesting witness to a will, under 1 Vict. c. 26. s. 9, the witness, if he does not sign his name, must make some mark on the will, with the intention that that mark shall represent his signature, as attesting the execution. *Charlton v. Hindmarsh*, 28 Law J. Rep. (n.s.) Prob. & M. 132; 1 Sw. & Tr. 433.

A acknowledged his signature to his will in the presence of two witnesses, B and C. B then duly attested and subscribed it. C, who had on a previous occasion signed his name on the will, with the omission of a cross to the letter "F" in it, simply crossed the "F" and added the date. According to his evidence, C crossed the "F" for the purpose of supplying the omission and perfecting his signature, not intending that the mark so made should stand for his signature, but supposing that the addition of the date was equivalent to the repetition of his signature:—Held, that by crossing the "F" C did not subscribe the will. *Ibid.*

One of the attesting witnesses to a will, by the desire of the testator, subscribed her husband's name instead of her own to the attestation clause. The will appeared on the face of it to be duly executed. The Court held, that as the attesting witness did not

intend the subscription to the will to represent her own signature, the attestation was invalid, and the will could not be admitted to probate. *Pryor v. Pryor*, 29 Law J. Rep. (n.s.) Prob. M. & A. 114.

A will attested by two witnesses (both since dead) with their respective marks, no one being present except the drawer, admitted to probate with consent of next-of-kin. *In the goods of Edwards*, 1 Sw. & Tr. 10.

(e) *Alteration and Interlineation.*

Unattested alterations in the handwriting of the testator, in a will made before the Wills Act came into operation, will, in the absence of any evidence as to their date, be presumed to have been made before the act came into operation. *In the goods of Streaker*, 28 Law J. Rep. (n.s.) Prob. M. & A. 50.

The names of two of the executors of a duly executed will were erased by the direction of the testator, and two other names having been substituted, the testator signed his name in the margin by the side of the alterations, in the presence of one witness, who attested them. The Court granted probate with the names of the original executors. *In the goods of Parr*, 29 Law J. Rep. (n.s.) Prob. M. & A. 70.

Some alterations having been made in a will subsequent to execution, the testator and the attesting witnesses traced the former signatures with a dry pen, and the attesting witnesses wrote their initials in the margin, opposite each alteration. The Court held, that these initials were no evidence of a due execution of the alterations, and refused to admit them to probate. *In the goods of Cunningham*, 29 Law J. Rep. (n.s.) Prob. M. & A. 71.

In a will made subsequently to 1 Vict. c. 26, the testator, after its execution, erased the name and description of the executor, and substituted those of another person. The alterations not having been duly attested, the Court ordered the words erased to be restored in the engrossment of the will. *In the goods of Harris*, 29 Law J. Rep. (n.s.) Prob. M. & A. 79; 1 Sw. & Tr. 536.

The testatrix after the execution of her will erased certain parts thereof, substituting in their places other words. Probate granted of the will with those parts erased in blank, the original words not being discernible on the face of the paper, and there being no evidence to shew what they were. *In the goods of James*, 1 Sw. & Tr. 238.

Where there are alterations on the face of a will there is no presumption of law that they were made at any particular time, but the rule applicable to such cases is, that those who propound a doubtful instrument must make the doubt clear. *Williams v. Ashton*, 1 Jo. & H. 115.

Therefore, where a testatrix told the witnesses to her will at the time of attestation that she had made alterations in her will, but did not allow them to see what the alterations were:—Held, that in the absence of any means to determine what alterations were made before execution, the Court would not give effect to any of them. *Ibid.*

Under a devise of land "to my nearest of kin by way of heirship":—Held, that the heir was entitled. *Ibid.*

(C) ESTABLISHING.

The old rule that the Court would not admit a
Digest, 1855—60.

bill of discovery in aid of the jurisdiction of the Ecclesiastical Court is not applicable to the case of a bill for discovery in aid of proceedings in the Probate Court, that Court not having the same power of compelling discovery as the Ecclesiastical Court had. *Fuller v. Ingram*, 28 Law J. Rep. (n.s.) Chanc. 432.

An heir-at-law having been cited to see proceedings commenced in the Probate Court for the purpose of proving the testator's will in solemn form, filed several pleas denying the validity of the will, and filed a bill of discovery in aid of his pleas, and moved for an injunction to stay proceedings until answer. Interrogatories not having been filed, the motion was refused, with costs, but leave was given to move on a future day, after the interrogatories should have been filed. *Ibid.*

This Court can entertain a suit to establish a will against parties claiming under a prior will and disputing the plaintiff's claim; a devisee being entitled to have the will established and his title quieted not only against the heir, but against all persons setting up adverse rights. *Lovett v. Lovett*, 3 Kay & J. 1.

But whether the Court can establish a will against a devisee claiming under another instrument, without directing an issue (except where an issue would be merely frivolous and vexatious)—*quære*. *Ibid.*

Observations on the impropriety in such cases of detailed evidence on the part of the defence. *Ibid.*

Parties in remainder held not bound by the proceedings in a suit to which the prior tenant in tail was a party, he having no interest to protect, and not having protected the interest of such remaindermen. *Alsop v. Bell*, 24 Beav. 451.

A testator made two wills, one in 1815 and the other in 1818. Under both A B (an infant) was first tenant in tail; but the first tenant in remainder was Thomas under the first, and William under the second will. In a suit against the tenant in tail, the heir and William, the second will was established. A B died an infant and without issue:—Held, that though the inheritance was represented in the suit, Thomas was not bound by the decree, the suit expressly negating his right, and he not being a party thereto. *Ibid.*

Where a decree to establish a will against the heir and for administration of the real and personal estate under it had been made in 1835 and actively prosecuted down to 1845, and the further prosecution of it had then been interrupted by the institution of an ejectment suit by a person claiming as tenant in tail under a prior will, who afterwards compromised such claim in 1851 by giving 25,000*l.* for the estate:—Held, that an original bill, in the nature of a supplemental bill filed against him in May 1855 for the purpose of reviving and carrying on the prior suit, for administration of the estate, was not barred by lapse of time. Held, also, that notwithstanding the ejectment suit had been abandoned as against the plaintiff in the bill of revivor, who was a defendant to it, the Court would not revive the decree in the administration suit, so far as it established and sought to carry out the trusts of the later will, without directing an issue to try the validity of that will. But that upon the plaintiff in the bill of revivor consenting to admit, for the purposes of that suit, that the prior will was the last will, the Court would revive the administration decree so far as it sought

administration, simply without reference to either will. *Ibid.*

(D) REPUBLICATION AND REVIVAL.

A codicil appointing a new executor:—Held, a republication of the will, and to give to the latter the effect of passing after-acquired lands. *In re Earl's Trust*, 4 Kay & J. 673.

The cases on this subject reconciled. *Ibid.*

James T made a will, giving a life-interest in his property to his wife Sarah. She died, and he subsequently married Martha B. On the day before his death he told an attendant that he wished the name of his former wife Sarah to be erased in his will, and the name of Martha (his present wife) to be substituted for it, and requested her to write a memorandum on his will to carry out his wishes. The attendant thereupon wrote a memorandum upon the will, which was executed according to the provisions of the Wills Act. The memorandum did not in direct terms refer to the will:—Held, that the memorandum operated as a codicil to the will, so as to revive the will. *In the goods of Terrible*, 1 Sw. & Tr. 140.

(E) REVOCATION AND CANCELLATION.

Where a will is last seen in the testator's own possession, and at his death, after due search, is not forthcoming, the presumption is, that the testator destroyed it himself *animus revocandi*; and the onus lies on the party seeking to set up the will to displace this presumption. *Brown v. Brown*, 27 Law J. Rep. (n.s.) Q.B. 173; 8 E. & B. 876.

On the trial of an ejectment by heir-at-law against devisee, it appeared that the testator, in November 1846 (being then on bad terms with the plaintiff, his eldest son, which continued to the spring of 1855), executed a will, by which he devised his property, real and personal, which was considerable, in trust for the defendant, his wife, during widowhood, remainder equally to his children, excluding the plaintiff, to whom he left a smaller specific bequest. In July 1855 the testator gave instructions to B, his solicitor, to prepare another will. B reduced them to writing, and submitted according to the testator a draft will, and afterwards himself engrossed the will, which was duly executed by testator at B's office; the testator then destroyed the instructions and draft will, and took the will away with him, saying he should probably leave it at his bankers'. At the end of 1855 testator's eyesight became defective: and from October 1856 up to his death he was unable to read. In January 1856 the plaintiff, having been reconciled to the testator, came to live with him; and in October 1856 they left home and came to London, to have an operation performed on testator's eyes, where he died suddenly, in February 1857. After his death, the will of 1846 was found open, together with letters and papers of no value, in the pocket of a coat he wore daily. The will of 1855 could not be found, after due search at testator's house, his bankers', and elsewhere. Secondary evidence was admitted: and B stated that the testator, by the will, gave his dwelling-house, the subject of the action, to the defendant, and devised all his other property, in trust, to different trustees from those of the first will, to sell and pay the defendant an annuity of 300*l.*, and the residue equally among all his six children; and that the will also contained a clause revoking

all former wills:—Held, first, that secondary evidence of the will of 1855 was admissible; and that B's evidence satisfactorily shewed that the will of 1846 was revoked by it. Secondly, that the fact of the second will having been last seen in the testator's possession and the ineffectual search raised the presumption that it had been destroyed by him *animus revocandi*; that there were no facts sufficient to rebut that presumption; and that the deceased had therefore died intestate. *Brown v. Brown*, 27 Law J. Rep. (n.s.) Q.B. 173; 8 E. & B. 876.

Under the Statute of Wills, 1 Vict. c. 26. s. 20, it is sufficient to cancel a will that its entirety is destroyed; and this may be by tearing off the seal with some portion, however small, of the writing; provided it appears that this has been done *animus revocandi*. *Price v. Price*, 27 Law J. Rep. (n.s.) Exch. 409; *nom. Price v. Powell*, 3 Hurl. & N. 341.

G, in 1855, wrote his will on six or seven unattached sheets of paper. At the foot of each sheet he signed his name in the presence of two witnesses, who also subscribed their names in his presence. After G's death two only of these sheets, viz., the third and fourth, could be found, but they contained a disposition of part of G's property. On motion for a grant of administration, with these two papers annexed, as being the will of G:—Held, first, that it must be presumed that G destroyed the lost sheets intentionally; secondly, that as the last sheet contained the only signatures which were in compliance with the Wills Act, the whole will must be presumed to have been revoked. *In the goods of Gullan*, 27 Law J. Rep. (n.s.) Prob. & M. 15; 1 Sw. & Tr. 23.

B, in 1846, made a will, which he revoked by another will made in 1855. On his death the former will was found, but not the latter:—Held, first, that it must be presumed the deceased destroyed the missing will *animus revocandi*. Secondly, that parol evidence of the contents of the missing will was admissible. Thirdly, that the earlier will was not revived by the destruction of the will which had revoked it. *In the goods of Brown*, 27 Law J. Rep. (n.s.) Prob. & M. 20; 1 Sw. & Tr. 32.

On the 15th of December A, being very ill, made his will, and gave it to his mother to take care of. On the 21st of December, at his request, she gave it back to him. On the 22nd of December he died, when the will was found under the bolster of the bed on which he died, the attestation clause and signatures of the attesting witnesses having been torn off:—Held, that the will was revoked. *In the goods of Lewis*, 27 Law J. Rep. (n.s.) Prob. & M. 81; 1 Sw. & Tr. 31.

C, in 1828, made his will, in contemplation of marriage, whereby he appointed E S, his intended wife, executrix, and made provision for her and the issue of the marriage. C shortly afterwards married E S, and had children by her. In 1857 K died:—Held, that the will was revoked by the marriage and birth of a child. *In the goods of Cadypool*, 27 Law J. Rep. (n.s.) Prob. & M. 36; 1 Sw. & Tr. 34.

The presumption that a will left in the keeping of the testator, if it cannot be found at his death, has been destroyed by him *animus revocandi* is a presumption of fact which prevails only in the absence of circumstances to rebut it. Among such circum-

stances are declarations by the testator of goodwill towards the persons benefited by it, adherence to the will as made, and the contents of the will itself. *Patten v. Poulton*, 27 Law J. Rep. (N.S.) Prob. & M. 41; 1 Sw. & Tr. 55.

C, in 1837, made a will in favour of her three children, who were illegitimate, retaining possession of it. She had no place for the deposit of papers of importance, and afterwards changed her residence twice, and died in 1846. Search was then made unsuccessfully for a will by her brother, who, when doing so, destroyed some papers which he supposed unimportant. C always shewed the greatest affection for her children, and at the time of making the will and shortly before her death expressed her satisfaction that her property was secured to them in the event of her death, and never expressed a desire to benefit by her will any other person. A draft of the will, propounded by the executor, being opposed by the next-of-kin,—the Court decreed probate of the draft, holding that under the circumstances the *primâ facie* presumption that C destroyed the will *animò revocandi* was rebutted, inasmuch as it was possible that the will might have been accidentally lost in C's lifetime or destroyed after her death, and highly improbable that she wilfully destroyed it. *Ibid*.

In order that a will may be revoked by tearing, it must be shewn that the testator intended that which he actually did of itself to have had the effect of revoking it without more. If he commences tearing it with the intention of revoking it, and being about to tear further stops *in mediò*, the act not being complete, the will remains valid. *Elms v. Elms*, 27 Law J. Rep. (N.S.) Prob. & M. 96; 1 Sw. & Tr. 155.

A having commenced tearing his will, which was admitted to have been duly executed, with the intention of revoking it, had nearly torn it in two pieces when he stopped. There was some evidence to lead to the conclusion that he was about to tear further, and that he stopped at the entreaty of a bystander. The Court, being satisfied that the will had been duly executed, and not satisfied on the evidence that it had been revoked, granted probate. *Ibid*.

When a duly executed will is propounded in a mutilated state there is a *primâ facie* presumption that it was put in that state by the testator *animò revocandi*; but when evidence is given for the purpose of shewing that such is not the case, the matter is at large, and the presumption must be disregarded, and a Court or jury should decide on the evidence alone, and should not, if they are in doubt on the evidence, find against the will by calling in aid the presumption. *Ibid*.

An alien, domiciled and naturalized in this country, is subject to the same disabilities as is a natural-born subject. He is incapable of contracting a marriage, which would have been void if contracted by a natural-born subject, although valid by the law of his domicil of origin, and by the *lex loci contractûs*. *Mette v. Mette*; and *In the goods of Mette*, 28 Law J. Rep. (N.S.) Prob. & M. 116; 1 Sw. & Tr. 416.

A, a native of Marburg, in the Electorate of Hesse Cassel, domiciled in England, married in 1836, and in 1836 was naturalized by act of parliament. In 1841 he made his will. His wife having died, he went to Frankfort in 1846, and there married a sister, by the half-blood, of his deceased wife, with a view

to subsequent residence in England, such marriage being valid by the law of Frankfort and by that of Hesse Cassel. Soon after his second marriage he returned to England, where he died in 1856, never having since its acquisition abandoned his English domicil. Letters of administration of the estate and effects of A having been granted by the Prerogative Court of Canterbury,—Held, in a suit instituted for the purpose of recalling those letters of administration, and obtaining probate of the will, that A's second marriage was rendered void by the 5 & 6 Will. 4. c. 54. s. 2, and consequently did not revoke his will. *Ibid*.

After a testator's death a duly executed will was found, but the testator had written the word "cancelled" and his initials across his signature, and at the end he had written a memorandum, in which he said, "I hereby revoke this will, and it is altogether cancelled," and "I intend to make another will, whereupon I will destroy this." The Court granted probate to the executor, as the will had not been revoked in any of the modes prescribed in the 20th section of the Wills Act. *In the goods of Brewster*, 29 Law J. Rep. (N.S.) Prob. M. & A. 69.

A married woman exercised two powers of appointment in separate wills, executed at different times. The later will contained a clause revoking all former wills. Evidence being adduced that the deceased did not thereby intend to revoke the appointment in the first will, the Court granted probate of both wills. *In the goods of Meredith*, 29 Law J. Rep. (N.S.) Prob. M. & A. 155.

A testator, by his will, dated the 9th of December 1857, made several dispositions of his property, and appointed executors. He subsequently executed a codicil, by which he altered two bequests in his will; and gave directions that his executors should not require the payment of a debt of 50l. The codicil commenced, "This is a codicil to my last will, dated the 9th of December 1857," and concluded, "and in all other respects I revoke my said will." The word "revoke" was inadvertently written by the solicitor who prepared the codicil instead of "confirm," and was inconsistent with the expressed intentions of the deceased. On application by the executors named in the will for probate of the will and codicil, the Court declined to act on the assumption that the testator intended to "confirm" his will, but granted probate on the ground that the direction in the codicil, that the executors should not require payment of the debt, implied that their office was to continue. *In the goods of Davy*, 29 Law J. Rep. (N.S.) Prob. & M. 161; 1 Sw. & Tr. 262.

A made her will in March 1854, and a codicil in June 1854, one of the legatees under the will having died since its execution. In May 1856, she executed another codicil, among other things appointing one of the parties benefited under the codicil of 1854, to be executor, in the room of one appointed in the will. At her death, in December 1857, the will and second codicil were found in a tin box at the Bank of England, in which she kept her papers; but the first codicil, of which the testatrix took possession immediately after its execution, was nowhere to be found. On motion for probate of the draft of the first codicil, with the consent of the residuary legatees,—Held, that the *primâ facie* presumption of revocation was strengthened rather than rebutted by

the circumstances. Probate of the draft refused. *In the goods of Shaw*, 1 Sw. & Tr. 62.

E H, a married woman, in 1846 duly made a will in execution of a general power of appointment, disposing of certain stock and appointing executors thereof. In 1855 she made another will, without the consent of her husband, disposing of certain other property under her marriage settlement, and of other articles; it did not refer to the general power, under which the will of 1846 was made, nor to the stock thereby appointed; but it contained a general revocatory clause, and named a different executor:—Held, that the 27th section of the Wills Act was intended to enlarge the dispositive power of testators, and has no bearing on questions of revocation; that the revocatory clause in the will of 1855, being in general terms, and containing no reference to the general power in execution of which the will of 1846 was made, or to the property thereby appointed, did not operate to revoke that will. *In the goods of Elizabeth Merritt*, 1 Sw. & Tr. 112.

A under his marriage settlement had, in the event of his surviving B (his wife), a power of appointing by deed or will amongst his children certain trust monies, and in default of such appointment the monies were to be equally divided amongst them. A survived B, and by a will executed in 1847 he, being then a widower, (amongst other things) directed the the unappointed portion of such monies to be equally divided amongst his sons (a portion of such monies having been previously assigned to his only daughter on her marriage). A, in 1855, contracted a second marriage and died in 1858 without having executed any other will, or any further appointment of the trust monies:—Held, that the will of 1847, so far as it was an execution of the power of appointment, was not revoked by A's second marriage, though the same persons would take under the settlement in default of appointment as would have taken in case of an intestacy under the Statute of Distributions. *In the goods of Fitzroy*, 1 Sw. & Tr. 133.

A, having duly executed her will, subsequently became insane. Shortly before her death it was discovered that the will had been mutilated by her; but it was proved to have been in her custody for a short time subsequent as well as prior to her insanity:—Held, that there being satisfactory evidence of the due execution of the will, the onus of shewing that it had been mutilated by the testatrix when of sound mind was upon the party alleging its revocation. *Harria v. Berrall*, 1 Sw. & Tr. 153.

A will was destroyed by the testator, on the supposition that he had substituted another for it, but which was not duly executed. Probate of a copy of the first will granted. *Scott v. Scott*, 1 Sw. & Tr. 258.

Testatrix by her will bequeathed a sum of money to trustees upon trust to accumulate for a period exceeding what the law allows, and to pay and divide the principal sum, interest and accumulations with and amongst a certain class, with a power of advancement in favour of sons. By a codicil, after reciting that she had by her will bequeathed this sum upon trust to accumulate and to pay and divide the same sum and all accumulations thereof in manner therein mentioned, she directed that in lieu of the accumulations and dispositions made thereof by her will the trustees should accumulate for twenty-

one years after her decease and should stand possessed of the principal money, interest and accumulations upon trust for such of the class as should be then living. The codicil did not repeat the power of advancement, but concluded by confirming the will in every particular in which the same was not thereby altered:—Held, that the power of advancement was a valid and subsisting power and was not revoked by the codicil. *Hill v. Walker*, 4 Kay & J. 166.

By the usual statement in the witnessing clause at the end of his will that he has set his hand to the preceding pages, a testator makes the signatures on those pages a part of his will; and if, having so recited, he afterwards, *animo revocandi*, tears off the signatures from the preceding pages, it is a good revocation of the whole will under the 20th section of the Act, 7 Will. 4. & 1 Vict. c. 26. *Williams v. Tyley*, Johns. 530.

(F) ELECTION UNDER.

Sir R C was seized in fee simple in possession of the manor of Clifton and lands at Wilford, and of advowsons and other estates. The mansion-house and demesnes of Clifton and the manor of Wilford were settled to the use of Sir R C for life, with remainder to J C for life, with remainder to the first and other sons of J C in tail, with remainder to the use of Sir R C in fee. Being so entitled, Sir R C by his will devised the manors of Clifton and Wilford, and the mansion-house of Clifton and the advowsons, and all his lands in Clifton and Wilford, "usually called the Clifton estate," to the use of J C for life, with remainder to the eldest son of J C for life, with remainder to the first and other sons of such eldest son in tail, with divers remainders over:—Held, (affirming a decision of the Master of the Rolls) that Sir R C intended to pass both the estates of which he was owner in fee, and the settled estates, and that J C and the eldest son of J C were put to their election either to take the benefit devised to them respectively under the will, or to take in opposition to it under the settlement. *Wistour v. Clifton*, 26 Law J. Rep. (n.s.) Chanc. 218; 21 Beav. 447.

An estate, called H F, stood limited, along with some other property of small amount, to W S for life, with remainder to his children in tail, remainder to J S for life, remainder to trustees for a term, in trust to raise 10,000*l.* for the younger children of J S and the younger children of C S, and, subject thereto, to the first and other sons of J S successively in tail, with divers remainders over. J S died in the lifetime of W S, leaving a will, by which, though not in possession of the H F estate, and having no devisable interest in it, he purported to devise it to the plaintiff, who was his eldest son, in fee, and gave various benefits to his own younger children. W S afterwards died without issue, upon which the plaintiff became entitled to the H F estate as tenant in tail, subject to the 10,000*l.* charge:—Held, that the younger children of J S were not put to their election between their shares of the 10,000*l.* and the benefits given them by their father's will; for that a devise of an estate does not *per se* impart an intention to devise it free from incumbrances so as to put incumbrancers to their election; and, moreover, that an absence of intention to

devise the estate free from incumbrances was to be inferred from the fact that nothing had been given by the will to the children of C S, so that they were clearly not put to their election as to their shares of the 10,000*l.* *Stephens v. Stephens*, 1 De Gex & J. 62.

Devise of residuary real estate in lieu and discharge of all debts due from testator to devisee. Devisee dies intestate three days after testator:—Held, as between the heir and personal representative of the devisee, that it not being manifestly for the disadvantage of the devisee to retain the devised estate, the Court could not presume a disclaimer by her; consequently, her heir was entitled to the estate, and debts claimed by her administrator, as due to her from the testator, were discharged. *Harris v. Watkins*, 2 Kay & J. 473.

But, *semble*, had it been manifestly for the disadvantage of the devisee to retain the estate upon the terms proposed by the testator, the Court might have presumed a disclaimer. *Ibid*.

Devise of Black Acre to defendant for life made conditional upon his confirming the disposition in the will of such of the hereditaments thereafter devised as were the property of testator's late brother, S U, deceased, followed by a residuary devise of "all and every the manors and hereditaments, being freehold of inheritance, of or to which testator was then or at his death should be seised or entitled, at law or in equity, for any devisable estate or interest, or which testator then had, or at the time of his decease should have power to dispose by will, including lands known as Duchy lands," as to White Acre and two other estates, to uses for securing an annuity to an annuitant for life, and as to all and singular the same manors and hereditaments (subject, as to the three last-mentioned estates, to the uses thereinbefore limited) to use of plaintiff for life:—Held (following *Wintour v. Clifton*, 3 Jur. N.S. 74), that defendant was bound to elect between Black Acre and certain Duchy lands, of which White Acre was one, and stood limited to S U for life, with remainder to testator for life, with remainder to defendant for life, with remainder over for life and in tail, with ultimate remainder to testator in fee, testator having no other Duchy lands. *Ustick v. Peters*, 4 Kay & J. 437.

Whether, if White Acre had not been mentioned, a case of election would have been prevented from arising, upon the ground that the testator contemplated the possibility of acquiring other Duchy lands in the interval of the date of his will and his death—*quære*. *Ibid*.

Testator devised Hood's Farm to his *eldest son* in fee. Hood's Farm was, under another will, charged with portions for the *younger children* of the testator and of his brother; and, subject thereto, it was under that other will devised to the testator's *eldest son* in tail. The testator gave his other real estate to his children other than the eldest son, and his personal estate to his children generally:—Held, that the younger children were not put to their election. *Stephens v. Stephens*, 3 Drew. 697.

A testator, whose only funded property consisted of a sum of long annuities, which had been purchased by him in the joint names of himself and wife, bequeathed to his brothers an interest in "his present funded stock or Government securities." He also

made a provision for his wife:—Held, that the wife was put to her election in regard to the long annuities. *Grosvenor v. Durston*, 25 Beav. 97.

A testator had an exclusive power of appointment over an estate to his children and grandchildren, and an exclusive power to appoint a fund amongst his children only. He appointed the estate to some of his children, and the fund to his children and to a grandchild (who was not an object):—Held, that this was not a case of election, and that the children were not compellable to elect, either to give effect to the appointment of the fund to the grandchild, or reject the benefits appointed under the first power. *In re Fowler's Trust*, 27 Beav. 362.

A testator was the owner in fee of a moiety of the *Goose Green* property; the other moiety belonged to his wife. By his will, he devised "all that his messuage, tenement," &c. situate at *Goose Green*, and all other his real estate, to his widow for life, and he gave her other benefits:—Held, that this raised a case of election as against the widow. *Fitzsimons v. Fitzsimons*, 28 Beav. 417.

Under his marriage settlement A B had a power of appointing property amongst the children or remoter issue of the marriage. By his will he appointed the settled property to his son and daughter in equal shares, to vest in them in the manner thereafter expressed concerning his residuary estate. He afterwards gave his residuary estate in trust as to one half to his son absolutely to vest at twenty-five, but subject to the settlement thereafter directed, which was to be made upon him and his children, with gifts over to persons not objects of the power. The son insisted that he took the settled property absolutely, discharged from the void restrictions; but the Court held that he must elect whether he would take under or against the will. *Tomkyns v. Blane*, 28 Beav. 422.

(G) PROOF OF.

(a) *In Solemn Form.*

To prove a will in the Court of Probate, it is not necessary that both the attesting witnesses should be examined. *Belbin v. Skelton*, 27 Law J. Rep. (N.S.) Prob. & M. 56; 1 Sw. & Tr. 143.

Where an executor propounds a will in solemn form, and there are several defendants whose case on the pleadings is substantially the same, the Court will hear counsel only for one defendant. *Palmer v. Maclear*, 1 Sw. & Tr. 149.

The opposite counsel cannot inspect letters which a witness has with him during examination, though they relate to the cause, without putting them, if required by the other side, in evidence. *Ibid*.

In a cause of proving a will and codicil in solemn form, promoted by the executor against the legal personal representative of the sole next-of-kin of the deceased, a compromise having been agreed to, by which a verdict establishing the will and codicil was to be taken by consent for the plaintiff, and the defendant was to receive 2,000*l.* out of the estate, —Held, that the Judge of the Court of Probate had jurisdiction to make the terms of the compromise a rule of Court, and to enforce it as such. Probate of the will and codicil was decreed to the plaintiff, as executor, the terms of the compromise being embodied in the decree. *Harvey v. Allen*, 1 Sw. & Tr. 151.

(b) *Missing Will.*

G made his will in 1855, appointing his wife sole executrix. In May 1857 he fled from Delhi when the mutiny broke out, leaving there a desk containing the will. After the recapture of Delhi, an attempt was made to recover it, but without success. G died in June 1857. On proof of the due execution of the will and of its contents, the Court granted probate to the executrix. *In the goods of Gardner*, 27 Law J. Rep. (N.S.) Prob. & M. 55; 1 Sw. & Tr. 109.

(c) *Double Probate.*

A died, leaving a will, appointing B, C, D and E her executors, and directing that, in case B should die, F should be an executor in his place. All the executors proved the will. B died, and F applied that a double probate should be granted to him:—Held, on the authority of *In the goods of Lighton*, that he was entitled to the grant, without the consent of the surviving executors, the will shewing a clear intention that he should, on B's death, succeed him as an executor. *In the goods of Johnson*, 27 Law J. Rep. (N.S.) Prob. & M. 9; 1 Sw. & Tr. 17.

(d) *Executor according to the Tenor.*

H D died in 1857, having by his will directed his debts and funeral and testamentary expenses to be paid, and devised and bequeathed all his realty and personalty to W D, his executors, &c., upon certain trusts, and empowered W D to appoint by deed or will any other person or persons to be a joint trustee with him or a succeeding trustee for the purposes of his will, and appointed W D sole executor. W D died without having proved the will, leaving a will whereby he gave all his real and personal estate, to which he should be beneficially entitled, or over which he had any power of appointment or disposition to H and B, upon certain trusts, and appointed them trustees and executors of his will. The will recited that, by the will of H D, he was empowered to appoint any other person or persons to be a joint or succeeding trustee. H having renounced probate of the will of W D was granted to B. On a motion by a creditor of the estate of H D, for an order to compel B to accept probate of the will of H D, or in default calling on him to accept or refuse letters of administration,—Held, that B could not be compelled to take probate of the will of H D, as he was not appointed executor of that will, and did not, by accepting the trusts of the will of H D, become executor of the will of H D according to the tenor. *Moss v. Bardwell*, 29 Law J. Rep. (N.S.) Prob. M. & A. 117.

(e) *Citations.*

In a cause of proving in solemn form the will of a spinster, a bastard, which affected real estate, the Court authorized the executor, under rule 34. of the Rules in respect of Contentious Business, to cite the Queen's Proctor to see proceedings. *Wyman v. Ashwell*, 29 Law J. Rep. (N.S.) Prob. M. & A. 94.

Where a party to a suit is before the Court as next-of-kin or legatee, being also heir-at-law or devisee under the same will, it is unnecessary to cite him to see proceedings under section 61. of the

20 & 21 Vict. c. 97. as heir-at-law or devisee. *Emberley v. Trevanion*, 29 Law J. Rep. (N.S.) Prob. M. & A. 142.

(f) *Confirmation and Probate Act.*

The note or memorandum on a probate, that the deceased died domiciled in England, mentioned in section 14. of the "Confirmation and Probate Act, 1858," 21 & 22 Vict. c. 56, must be written before the probate issues. *In the goods of Muir*, 28 Law J. Rep. (N.S.) Prob. & M. 49; 1 Sw. & Tr. 294.

The Court will not revoke a probate rightly granted, and not issued under a mistake. Therefore, when A died domiciled in England possessed of personalty in Scotland, and probate of his will was issued without a note that the deceased died domiciled in England written on it, the Court refused to allow such a note to be made on it, and also refused to revoke the probate, that a new one might be obtained, stating such fact. *Ibid.*

The executors of a Scotch will, having sent the original confirmation granted by the Commissary Court to the colony of Victoria, obtained a duplicate confirmation from that Court, and applied, under the 12th section of the 21 & 22 Vict. c. 56, to have the seal of the Probate Court affixed to it. The Court ordered the seal to be affixed, on the ground that it was bound to give faith to the Commissary's certificate, and could not take into consideration the fact that the confirmation was a duplicate. *In the goods of Webster*, 29 Law J. Rep. (N.S.) Prob. M. & A. 66.

The executors of a Scotch testator obtained a confirmation, including the whole personal estate in Scotland, before the 12th of November 1858, when the Confirmation and Probate Act came into operation. After that date they obtained an additional confirmation, including personal estate in England. Upon application by the executors to have the seal of the Probate Court affixed to the additional confirmation, under the 12th section of the act, the Court held, that it was bound to exercise its own judgment, whether the 12th section was applicable to such additional confirmation, notwithstanding its having been granted by the Commissary, and being of opinion that it was not applicable, rejected the motion. *In the goods of Gordon*, 29 Law J. Rep. (N.S.) Prob. M. & A. 67.

(g) *General Points.*

R S died on the 19th of January 1858, two days after her husband's death, leaving a will, made during her coverture, which had not been republished after her husband's death. R S had no power under any instrument to make a will during coverture. At the time of the death of her husband and herself there was invested in the husband's name in the 3l. per cent. annuities, with monies of his, a sum of money which had always been treated by the husband and wife as her separate property, the same being the savings of the wife of presents made to her by her husband. By his will the husband declared that the said sum was the sole property of his wife:—Held, that the said monies were the separate estate of the wife, her husband being, as to them, a trustee for her, and, consequently, might be disposed of by a will made during her coverture; but that, as she survived her husband, probate should be granted, limited to such property as she had power to dispose

of. *In the goods of Smith*, 27 Law J. Rep. (N.S.) Prob. & M. 89; 1 Sw. & Tr. 125.

Rule 59. of the Rules for the Principal Registry in Non-Contentious Business, which directs that the Registrars are not to allow probate of the will, or administration with the will annexed, of any obviously illiterate person to issue, unless they have previously satisfied themselves that the said will was read over to the deceased before the execution, or that the deceased had at such time knowledge of its contents, applies to a will made by a soldier in actual military service and executed by mark. *In the goods of Hackett*, 28 Law J. Rep. (N.S.) Prob. & M. 42.

The Prerogative Court, putting a construction on a will, made a grant of letters of administration to K. The Court of Chancery held that construction to be wrong, and that W was entitled. K appealed to the House of Lords. W applied for the grant to be to him in accordance with the decree of the Court of Chancery:—Held, that the proceeding in Chancery was in the nature of an appeal from the Prerogative Court, and that its decision must prevail. Grant decreed to W. *Warren v. Kelson*, 28 Law J. Rep. (N.S.) Prob. & M. 122.

The executors named in a will which disposes only of realty are generally entitled to probate. If, however, such a will be made in execution of a power, they are not entitled to probate, as, in that case, their authority is only co-extensive with the power given by the will, and they take nothing *jure representationis*. *O'Dwyer v. Geare* and *In the goods of Parkin*, 29 Law J. Rep. (N.S.) Prob. & M. 47; 1 Sw. & Tr. 465.

A clause in a will revoking all prior wills is equivalent to a bequest to the persons who would be entitled to the personal estate of the testator in case he had died intestate; and, therefore, though the will in terms disposes only of property held by the testator in trust, the grant of probate to the executor should be general, and not limited to the trust property. *In the goods of Lancaster*, 29 Law J. Rep. (N.S.) Prob. & M. 19; 1 Sw. & Tr. 464.

The executors of a will affecting realty cannot be prevented from obtaining probate in common form by a caveat entered by the heir-at-law if he has not been cited. If the heir-at-law enters such caveat, it is not necessary for the executors to deliver a declaration; and if they do so, and the heir-at-law does not plead to it, he will not be condemned in the costs incurred in delivering it. *Young v. Ferris*, 29 Law J. Rep. (N.S.) Prob. M. & A. 69.

An executor having propounded a will, a party who appeared to dispute it, as the natural son of the deceased, was put upon proof of his interest. In his declaration he alleged (*inter alia*) that the deceased was a domiciled Portuguese; that he was his natural son; that by the law of Portugal he was entitled to the whole of the deceased's property; and that he had instituted a suit in Portugal against the executor, in which he obtained a decree that he should be put into possession of the property. The declaration did not state the nature of the suit, nor the questions involved in it; nor did the judgment shew that the plaintiff was in the same position as a legitimate son. The executor traversed all these allegations, except that of the foreign suit and judgment. The Court held, on demurrer to the executor's plea, that the foreign judgment alone did not shew such an interest

in the party in whose favour it was made as to entitle him to dispute the will. *Crispin v. Dogliani*, 29 Law J. Rep. (N.S.) Prob. M. & A. 130.

A limited probate taken out of the will of a *feme covert* will not continue the chain of representation under the general probate of the will of the original testator, but the Court will make a supplemental grant limited to the property which the *feme covert* had as executrix. *In the goods of Bayne*, 1 Sw. & Tr. 132.

Application on behalf of the plaintiffs to direct a cause to be tried at the coming assizes at Derby, refused. There is no similarity between the position of a plaintiff here and his common law right to lay the venue where he pleases. A testamentary suit is at large, and ought to be tried before the Judge in the Court of Probate, though he has a discretionary power to send an issue to be tried before a Judge of Assize. *Cooper v. Moss*, 1 Sw. & Tr. 143.

B died in May 1850, leaving a will, dated May 1849, and two codicils dated May 1850. Probate of these papers was taken in common form in July 1850. In April 1858, two legatees under the will intimated their intention of disputing the two codicils; whereupon the surviving executors commenced a suit and filed their declaration on the 25th of June. On the 21st of July the defendants filed pleas: first, alleging that the codicils were unduly executed; and secondly, that the testator was of unsound mind at the time of their execution. On the 18th of November the plaintiffs set the case down for hearing, but it had not come on for trial. The defendants now, on the affidavit of their solicitor, applied for leave to amend their pleas by inserting similar pleas as against the will, on the ground that since the pleas were filed, their solicitor had received information impeaching the validity of the will. The Court, *hesitant*, allowed such amendment, on condition of a portion of a legacy already received by one of the defendants being brought into Court, the costs of the motion being paid, and the pleadings amended within a week. *Ware v. Claxton*, 1 Sw. & Tr. 251.

The inclination of the Court is to allow the record to be amended at the trial by the addition of a new plea, rather than to shut out any defence which might be raised. The defendants were allowed to put on the record at the trial a plea, that the will in dispute had been obtained by the undue influence of one of the plaintiffs, subject to the postponement and rehearing of the cause, if required by the plaintiffs, and to the payment by the defendants of all expenses incurred by such postponement. *Todd v. Sumpson*, 1 Sw. & Tr. 269.

Where, in a probate cause, the county court has jurisdiction, the Court may, though application be made in behalf of all the parties to the cause for it to be tried at the assizes, still, in its discretion, direct it to be tried in the county court. *Dunn v. Dunn*, 1 Sw. & Tr. 521.

(h) Costs.

Next-of-kin has generally a right to call upon the executor to prove a will *per testes*, and to cross-examine the witnesses produced in support of it, without being subject to costs. If, however, he gives in a plea, and fails to prove it, he will be liable to costs from the date of the plea. Where pleadings contain

irrelevant matter, application should be made at chambers to have it struck out. *Farlar v. Farlar*, 27 Law J. Rep. (N.S.) Prob. & M. 103; 1 Sw. & Tr. 124.

An executor of a former will has the same right as a next-of-kin to put an executor of a subsequent will upon proof in solemn form, and to interrogate his witnesses without being liable for costs. *Boston v. Fox*, 29 Law J. Rep. (N.S.) Prob. M. & A. 68.

An application for a certificate for the costs of a special jury was not made until three months after trial. The Court held that it was bound to exercise the powers conferred on it by the 36th section of the Probate Act (20 & 21 Vict. c. 77), with regard to trials by jury, subject to the same rules as the common law Courts, and, therefore, under the 34th section of the Jury Act (6 Geo. 4. c. 50), refused the application as being too late. *Skipper v. Skipper*, 29 Law J. Rep. (N.S.) Prob. M. & A. 133.

Issues of undue execution, incapacity and undue influence raised by the next-of-kin in opposition to a will were found against him. The Court, however, refused to condemn him in costs, because it was of opinion that the parties propounding the will, and in whose favour it was made, had acted so as to excite the suspicion of the next-of-kin; but refused to allow his costs out of the estate, because he had not sufficient grounds for the pleas he had filed. *Broadbent v. Hughes*, 29 Law J. Rep. (N.S.) Prob. M. & A. 134.

A testamentary suit having been instituted against a married woman without making her husband a party to it, she propounded a will knowing that it had not been duly executed. The Court pronounced against the will, and condemned her in costs. *Clarkson v. Waterhouse*, 29 Law J. Rep. (N.S.) Prob. M. & A. 136.

An attorney propounded, as executor, a will, which purported to be attested by two of his clerks. The next-of-kin pleaded in opposition to the will; issue was joined, and the case came on for trial before a jury. On the morning of the trial the counsel for the executor stated that the executor would consent to a verdict for the defendant. In the absence of a satisfactory explanation by the plaintiff of the circumstances under which the will had been propounded and withdrawn, the Court condemned him in the costs of the suit. *Richards v. Humphreys*, 29 Law J. Rep. (N.S.) Prob. M. & A. 137.

The will of a married woman being propounded by her executors, it was opposed by her husband, and a question of domicile was raised upon the pleadings. That question was decided in favour of the executors, and the decision was affirmed, upon appeal, by the House of Lords, without costs. The costs of the litigation in this court were allowed out of the estate, on the ground that the question raised by the party opposing was so doubtful that he was entitled to have it decided by a competent tribunal. *Robins v. Dolphin*, 29 Law J. Rep. (N.S.) Prob. M. & A. 138; 1 Sw. & Tr. 518.

A will and two codicils having been propounded by executors, W, who was also an executor under the will, disputed the validity of the second codicil: pleading, first, fraud; secondly, undue influence; thirdly, that the testator was ignorant of its contents. The heiress-at-law, being cited to see proceedings,

entered a caveat against the will and first codicil; and, on this being warned, pleaded in opposition to the will and both codicils: first, incapacity; secondly, undue influence. All these issues being found by a jury in favour of the executors, the Court pronounced for the will and codicils, and, in general terms, condemned the defendants in costs. On motion on behalf of the heiress-at-law to vary this decree as to costs,—Held, first, that an heir-at-law cited to see proceedings, if he plead, but does not prove such pleas, in opposition to a will, is, with respect to his liability for costs, in a position analogous to that of the next-of-kin in the Prerogative Court, who, not content with putting the executors on proof of the will, had brought in an allegation, and had failed to prove it; and, therefore, that the heiress-at-law was liable for the costs incurred since the entry of the caveat by her. Secondly, that the costs ought to be distributed by taxing, against the heiress-at-law such portions of the costs of the briefs and witnesses as belonged to the issues raised by her as to the will and first codicil from the date of her caveat, and against W the costs of such part as related to the second codicil; and that when costs had been incurred in any matter equally applicable to both parties, so that they could not be assigned to one more than to the other, they should be taxed equally between them. *Fyson v. Westrope*, 29 Law J. Rep. (N.S.) Prob. M. & A. 139; 1 Sw. & Tr. 279.

Nine years after a testator's death his executor produced and propounded a will. It was opposed by the next-of-kin. The executor accounted for the delay by saying that the testator had desired that it should not be produced until after his mother's death. The will being admitted to probate, the Court held, that, as the conduct of the testator in desiring its concealment had given the next-of-kin a reasonable ground for suspicion, she ought not to be condemned in the costs of her opposition. *Emberley v. Trevelion*, 29 Law J. Rep. (N.S.) Prob. M. & A. 143.

In taxing the costs of a trial, the registrar has a discretion as to the number of witnesses and the number of counsel whose expenses and fees should be allowed. The expenses of only one consultation are usually allowed. In a testamentary suit, a will of 1858 was propounded by the plaintiffs. The defendants, executors under a former will, pleaded incapacity. A verdict being found for the defendants, the plaintiff was condemned in costs. The registrar, in taxing the costs, disallowed the expenses of two witnesses called by the defendants to prove the execution of the former will. The Court directed the registrar to review his taxation, on the ground that, though the execution of the former will was not in issue, it was a piece of evidence tending to establish the issue raised, and therefore the expenses of one witness, but of one only, as the factum of the will was not in issue, should be allowed. *Edwards v. Payne*, 29 Law J. Rep. (N.S.) Prob. M. & A. 144; 1 Sw. & Tr. 276.

In taxing the costs of a trial in a testamentary suit, the Registrar is not bound by the practice of the Prerogative Court, which was to allow the fees of only two counsel at the hearing, but may exercise his discretion as to the number of counsel to be allowed. *Braine v. Braine*, 29 Law J. Rep. (N.S.) Prob. M. & A. 151; 1 Sw. & Tr. 271.

A person entitled in distribution who merely puts the executors to strict proof of a will in solemn form, if he has reasonable ground for doing so, will generally be allowed his costs out of the estate. But if it appears that his object in calling for such proof was not simply to obtain the judgment of the Court of Probate as to the validity of the will, but to elicit evidence, which might be used by him in a suit instituted in another court, he will not be allowed his costs out of the estate. *Swinfen v. Swinfen*, 29 Law J. Rep. (N.S.) Prob. M. & A. 153; 1 Sw. & Tr. 283.

Probate of a will was opposed by the next-of-kin, who was also the executor of a previous will. He made no inquiry into the circumstances under which the later will was executed, though he was aware of its execution, and knew the name of the attorney who had prepared it. He pleaded undue execution, incapacity, and that the will was not the last will of the deceased; but gave notice, before the hearing, that he did not intend to produce evidence. On cross-examination of a witness, called in support of the will, certain facts were elicited which, in the opinion of the Court, would have justified the next-of-kin in calling for proof of the will, in solemn form, if they had been known to him. But as they were not known to him, until stated by the witness in court, and he had made no previous inquiry as to the circumstances attending the execution, the Court refused to allow his costs out of the estate, although it did not condemn him in costs. *Seaton v. Sturch*, 29 Law J. Rep. (N.S.) Prob. M. & A. 195.

W T obtained probate in common form of a paper professing to be the will of A L. Such probate, at the suit of the next-of-kin of the deceased, was revoked, the Court holding that the paper in question was not the will of the deceased, and that W T had been guilty of fraud in obtaining probate of it, and in contesting the suit. *Carless v. Thompson*, 1 Sw. & Tr. 21.

W T, though suing *in forma pauperis*, was condemned in the costs of the suit. *Ibid*.

A, B and C, three legatees named in a codicil, sought probate of it in solemn form against the executors named in the will. Subsequently to their having propounded the codicil, D, another legatee, intervened. The executors, by their replication, which was given in after D had intervened, admitted part of the alleged codicil, including the legacy to D:—Held, that D was not entitled to have his costs out of the estate. *Shave v. Marshall*, 1 Sw. & Tr. 129.

(H) IN THE REGISTRY.

A, by her will, devised to B certain land in Australia. A suit was commenced by B in the Supreme Court in Australia to recover possession of such land. An application on behalf of B that the original will, which was deposited in the Principal Registry of the Court of Probate, should be delivered out of it for the purpose of being sent to Australia to be used as evidence in the suit, was refused. *In the goods of Holl*, 28 Law J. Rep. (N.S.) Prob. & M. 38; 1 Sw. & Tr. 138*.

Where the executor is in this country, the Court will allow a will, which has been brought into the Registry for the purpose of obtaining probate, to be delivered out to the executor, in order that he may

be sworn thereto before a Commissioner, on an exemplified copy of it being left in the Registry. *In the goods of Gibbs*, 27 Law J. Rep. (N.S.) Prob. & M. 90.

The Court will not allow a will in its custody to be taken out of its jurisdiction on any alleged necessity for the furtherance of justice. It must presume that other Courts, when satisfied that the original document is withheld by a competent authority, will admit secondary evidence. *In the goods of Manfredi*, 1 Sw. & Tr. 135.

(I) PROBATE DUTY.

Probate duty held not payable in respect of the purchase-money of real estate, paid to the executor after the death of the testator. *Attorney General v. Brunning*, 28 Law J. Rep. (N.S.) Exch. 125; 4 Hurl. & N. 94.

Shares in railway companies are assets in the country in which the holders must be registered; and, therefore, it is in that country the probate duty must be paid thereon by the executors or administrators of deceased proprietors. And this is not affected, in regard to Scotch shares, by the Companies Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 16. s. 20), so that such shares must be inventoried and duty paid thereon in Scotland, even although the probate duty actually paid within another jurisdiction would afford a margin sufficient to cover the duty payable in respect of such shares. *Attorney General v. Higgins*, 26 Law J. Rep. (N.S.) Exch. 403; 2 Hurl. & N. 339.

Shares in a banking company purchased by executors with the assets of their testator in the name of a party who was entitled to the dividends for life, are included in the probate stamp, and do not require to be covered by the stamp upon the letters of administration granted to the estate and effects of the party in whose name the purchase was made. *Hennell v. Strong*, 25 Law J. Rep. (N.S.) Chanc. 407.

If the bankers refuse to transfer the shares after an affidavit made by the executor of the testator, in conformity with the 48 Geo. 3. c. 149, they do so at the peril of costs. *Ibid*.

Where a testator died domiciled in Scotland, and entitled to property in Scotland, and also to a fund standing in this court, and his executor, after the passing of the statute 21 & 22 Vict. c. 56, obtained a grant of confirmation of the testator's will in Scotland, which he afterwards got sealed under the statute in England,—Held, that this Court had no jurisdiction to question the scale at which the probate duty upon the fund in court had been assessed by the Scotch Commissary Court. *In the matter of the Trustees' Relief Act, and of the Trusts of Booth's Will*, 28 Law J. Rep. (N.S.) Chanc. 800; 1 Giff. 46.

WITNESS.

- (A) COMPETENCY.
- (B) PRIVILEGE.
- (C) COMMISSION TO EXAMINE.
- (D) SUBPOENA.
- (E) EXPENSES.

A) COMPETENCY.

At the hearing, before Justices, of an information, under the 1 & 2 Will. 4. c. 32. s. 23, for unlawfully using engines for the purpose of taking game, without being authorized to do so for want of a game certificate, the defendant is not competent to give evidence. *Castell v. Ireson*, 27 Law J. Rep. (N.S.) M.C. 167; E. B. & E. 91.

(B) PRIVILEGE.

A company, formed in 1837, and issuing scrip certificates transferable from party to party by delivery, is not an illegal company. A scrip company was established previous to the 7 & 8 Vict. c. 110. The transfer of the scrip certificates to new purchasers does not create new members or vary the company, or bring the holders within the provisions of the statute, or render parties dealing in the scrip certificates of the company liable to penalties:—Held, therefore, at the Rolls, that a stockbroker, who had as a matter of business bought and sold shares in the company, is liable to answer questions respecting his dealings; which decision, on appeal, was affirmed. *In re the Mexican and South American Company, ex parte Aston*, 28 Law J. Rep. (N.S.) Chanc. 632; 4 De Gex & J. 320; 27 Beav. 474.

(C) COMMISSION TO EXAMINE.

A commission, obtained by the defendant under the 1 Will. 4. c. 22, to examine witnesses, addressed to the Judges of a court at Pesth, as individuals, was returned unexecuted, the defendant's attorney being informed at the Austrian Embassy that it ought to have been addressed to the Court and not to the individual Judges. This Court thereupon allowed a commission to issue addressed to the Court itself, the usual clause prescribing the form of oath being omitted. The costs of the abortive commission to be plaintiff's costs in the cause in all events. *Fischer v. Sataray*, 27 Law J. Rep. (N.S.) Q.B. 239; E. B. & E. 321.

It is no answer to an application for a commission to examine witnesses abroad (supported by the ordinary affidavit), that the opposite party deposes that there are persons in this country, and documents accessible to the applicant, which would supply him with any information he could obtain from the witnesses he proposes to examine. And after a Judge has exercised his discretion on such an application, the Court will not disturb his decision, unless it is manifestly wrong. *Adams v. Gorfheld*, 28 Law J. Rep. (N.S.) Exch. 81.

A commission having issued, to be examined at New York, returnable in a month, with leave to the defendant to cross-examine, &c., there was, some weeks afterwards, a consent by the defendant "that no objection to the admissibility of the evidence taken should be made by reason of the time of taking or returning such evidence, saving all just exceptions to the evidence." It was returned executed two or three days after such consent, having been executed without any notice to the defendant of the time at which he might attend its execution:—Held, that nevertheless the evidence taken under it was admissible at the trial; and, *semble*, that there was no irregularity. *Whyte v. Hallett*, 28 Law J. Rep. (N.S.) Exch. 208.

(D) SUBPENA.

The plaintiff, resident in Ireland, may be compelled by a *subpœna ad testificandum*, under the statute 17 & 18 Vict. c. 34, issued on the part of the defendant, to attend at the trial of a cause in this country. *Harris v. Barber*, 25 Law J. Rep. (N.S.) Q.B. 98.

Upon a motion for an attachment against a witness for not attending pursuant to a subpoena, it appearing from the affidavits in answer that the witness's wife had neglected to deliver to her husband a notice which had been left with her, requiring his attendance in court on the following morning, and the witness swearing that he did not receive the notice, and did not wilfully disobey the process of the Court,—the rule was discharged, but without costs. *Netherwood v. Wilkinson*, 17 Com. B. Rep. 226.

(E) EXPENSES.

The plaintiff was *subpœnaed* as a witness by both parties in a cause of B v. E. In consequence of B's *subpœna* he remained in attendance for eleven days. E obtained the verdict at the trial, and the plaintiff called upon B to pay his expenses, which B refused to do. The attorney for E then paid the demand, upon an understanding that the plaintiff should return to him any part which the Master might strike off, upon taxation. At the taxation the attorney swore that he had paid the plaintiff the whole sum demanded, but, at the instance of B, the Master struck off a certain portion, which the plaintiff accordingly returned, and then brought an action against B to recover that amount:—Held, that he was not prevented from recovering in the action, by reason of his repayment of the sum which he had first received from the attorney for E. *Hale v. Bates*, 28 Law J. Rep. (N.S.) Q.B. 14; E. B. & E. 575.

An insufficient tender to a witness on account of his travelling and other expenses, will excuse his attendance before the examiner, and an attachment which had been issued against him was discharged with costs. *Brocas v. Lloyd*, 26 Law J. Rep. (N.S.) Chanc. 758; 23 Beav. 129.

WORK AND LABOUR.

By statute 5 & 6 Will. 4. c. lxi. a company was incorporated for supplying the town of A with water. The act fixed the share capital of the company at 15,000*l.*, and defined the area from which the water was to be taken, and to which it was to be supplied. Some years after the works were completed the committee of management of the company, in consequence of complaints of the defective supply, resolved, with the sanction of the shareholders, to apply to parliament for power to make fresh works, so as to include a largely extended area, both in respect of the sources and the supply of water, with a large additional capital, and having power to enter into contracts on behalf of the company, employed the plaintiff, an engineer, to prepare the necessary parliamentary plans:—Held (*Bramwell, B. dissentiente*), that the employment of the plaintiff for the above purpose was not *ultra vires*, and (the contract being in other respects valid) that he was entitled to

recover as for work and labour from the defendants, who had (by another act, 18 Vict. c. lxx.) become liable to pay the debts and perform the agreements of the company. *Bateman v. the Mayor, Aldermen and Burgesses of the Borough of Ashton-under-Lyne*, 27 Law J. Rep. (N.S.) Exch. 458; 3 Hurl. & N. 328.

WRIT OF INQUIRY.

Upon the execution of a writ of inquiry, in an action for dilapidations, two surveyors were called on each side: those called for the plaintiff estimated the dilapidations, the one at 119*l.*, the other at 124*l.*; those called for the defendant estimated them, the one at 63*l.* 15*s.*, the other at 68*l.*; the jury returned a verdict for 36*l.* 10*s.*—The Court ordered that the inquisition be set aside without costs, unless the defendant would consent to the verdict being entered for 63*l.* 15*s.* *Weeding v. Mason*, 2 Com. B. Rep. N.S. 382.

WRIT OF TRIAL.

Where a writ of trial issues to a sheriff, under the 3 & 4 Will. 4. c. 42, he has the same power as a Judge at Nisi Prius to adjourn the trial, or the plain-

tiff may withdraw the writ. *Show v. Owen*, 25 Law J. Rep. (N.S.) C.P. 103; 17 Com. B. Rep. 524.

WRIT NE EXEAT REGNO.

A writ of *ne exeat regno* was obtained against a defendant upon an undertaking by the plaintiff to be answerable for damages. The defendant became insolvent, and obtained his protection under the act:—Held, that the writ must be discharged upon payment of costs by the defendant and the plaintiff being released from his undertaking. *James v. North*, 28 Law J. Rep. (N.S.) Chanc. 374.

A fund was left by a testator to his daughter for life, and then to her children, with a gift over in case of any of them dying under twenty-one. The daughter, as administratrix of the testator, and her husband, obtained possession of the fund and applied it to their own purposes. They then went to reside abroad; but the husband being found in England and being upon the point of returning to France, the children, who were under twenty-one, applied, by their next friend, for a writ *ne exeat regno*:—Held, that the interest of the children being vested was, though liable to be divested upon dying under twenty-one, sufficient to entitle them to the writ. *Howkins v. Howkins*, 29 Law J. Rep. (N.S.) Chanc. 662; 1 Dr. & Sm. 75.

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